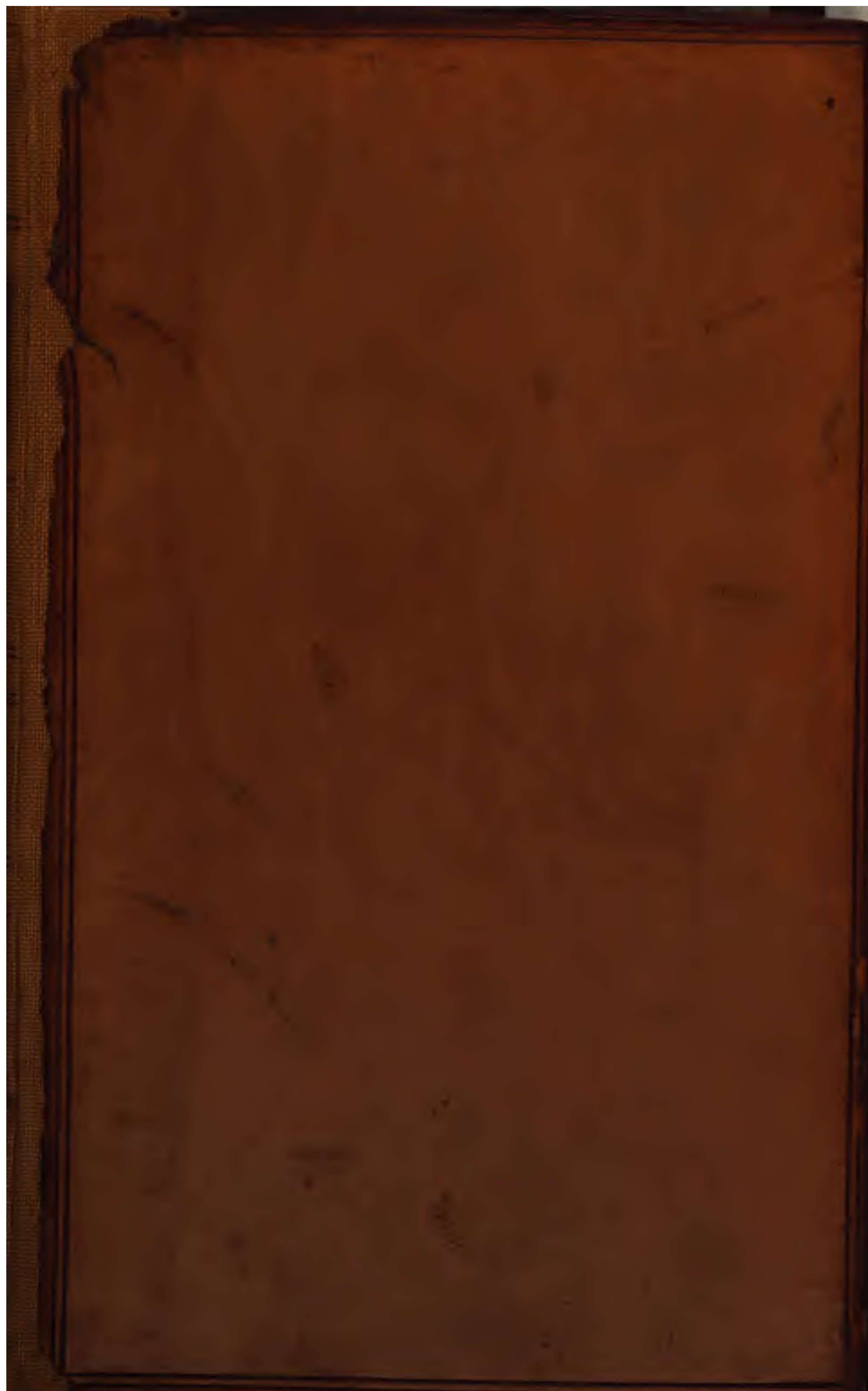




CASES

DECIDED IN

THE COURT OF SESSION,

TEIND COURT,

COURT OF EXCHEQUER,

AND

HOUSE OF LORDS.

SCOTCH COURTS, FROM NOV. 12, 1856, TO JULY 18, 1857.
HOUSE OF LORDS, FROM JULY 10, 1856, TO JUNE 12, 1857.

REPORTED BY

JAMES S. MILNE, NORMAN MACPHERSON,
AND CHARLES J. SHIRREFF, ESQUIRES, ADVOCATES.

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JUDGES

OF THE

COURT OF SESSION

DURING THE PERIOD OF THESE REPORTS.

FIRST DIVISION.

Lord President M'Neill.
Lord Ivory.
Lord Curriehill.
Lord Deas.

SECOND DIVISION.

Lord Justice-Clerk Hope.
Lord Murray.
Lord Wood.
Lord Cowan.

PERMANENT LORDS ORDINARY.

Lord Handyside.
Lord Benholme.
Lord Neaves.
Lord Ardmillan.
Lord Mackenzie.

James Moncreiff, Esquire, Lord-Advocate.
John Inglis, Esquire, Dean of Faculty.
Edward F. Maitland, Esquire, Solicitor-General.

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IN

VOLUME XIX.

I.—SCOTCH COURTS.

II.—HOUSE OF LORDS.

ERRATA.

P. 64, fifth line from bottom, *for* " sequestration," *read* " registration."

P. 187, last paragraph of rubric, *for* " *held*," *read* " *observed*."

P. 194, sixteenth line, *for* " , and, therefore, we", *read* " . We"; and in seventeenth line, *for* " highest legal rate," *read* " rate of four per cent."

P. 195, at bottom of the page, *for* " motion granted," *read* " motion refused."

P. 201, fifth line from bottom, *for* " paupers," *read* " parishes."

P. 203, middle of page, *delete* " as a defence."

P. 235, second paragraph, under heading iii., *for* " H." *read* " *Ibid*."

P. 434, twenty-first line from bottom, *for* " asserted," *read* " arrested."

P. 477, eighth line, *for* " when," *read* " for a debt contracted when he was only."

P. 716, last line of rubric, *for* " *incompetent*," *read* " *competent*."

CASES

DECIDED IN

THE COURT OF SESSION, &c.

1856-57.

WINTER SESSION.

LORD GRAY AND OTHERS, Petitioners. No. 1.
MESSRS DUNDAS AND WILSON, Compearers.—*D. F. Inglis—Gordon.*
CHRISTOPHER DOUGLAS, W.S., Petitioner.—*Penney—Baillie.* Nov.12, 1856.* Lord Gray and Others.
ANN BAILLIE AND OTHERS, Petitioners.
THOMAS MACKENZIE, W.S., Compearer.—*Patton.*
THE ACCOUNTANT OF COURT.—*Sol.-Gen. Maitland.* Whole Court.

Agent and client—Trust.—A private Act of Parliament, in reference to an entailed estate, was obtained by trustees, one of whom was a partner of a law firm which conducted the proceedings, both prior and subsequent to the passing of the Act. The account for professional business done by the law firm was approved of by the trustees, and also by the heir in possession;—*Held* (by a majority of the whole Court), that a trustee is not entitled to transact in reference to the trust-estate under his charge, or to employ a firm, of which he is a partner, to do so; and that the right to payment of a business account so acquired is null, and not merely voidable at the instance of some person having an interest to state the objection and to void the right: Therefore, the business charges disallowed, except to the extent of costs out of pocket.

Judicial factor—A factor may not act as agent for the estate.—A factor, *loco tutoris*, who was the partner of a law firm, employed his own firm to conduct certain professional business, which they did beneficially for the estate under his charge, and at less expense than if he had employed a separate agent, and not his own firm to transact it;—*Held* (by a majority of the whole Court), that the factor was not entitled to his business charges, except to the extent of the costs out of pocket.

Curator bonis.—Opinions expressed to the same effect in regard to a *curator bonis.*

LORD GRAY, Captain Paterson, and John Dundas, C.S., the surviving trust-disponees of the late George Paterson of Castle Huntly (the elder), obtained a private Act of Parliament, for certain purposes connected with the entailed estates, and to give them power to purchase, and add to the entailed lands, the estate of Pilmores, belonging to George Paterson (the younger)—to borrow money for the price, and for the expense of obtaining and carrying the Act into execution,—all which were to be done under the Dundas.

* Decided 21st June 1856.

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authority of the Court of Session. They now applied to the Court for various powers in connection with this Act; but the only point of interest had reference to the expenses, with regard to which, Mr W. R. Baillie, W.S., to whom the Lord Ordinary remitted, reported as follows:—

"The account of expenses which was lodged with him by the agents, together with an additional account, which he has more recently been supplied with, have been carefully audited by him, and he has ascertained the expenses of applying for, obtaining, and passing the Act, and carrying the same into execution, to amount to the sum of L.2227, 12s. 4d.

"It is right, however, that the reporter should notice that, to a very considerable extent, these accounts are composed of charges for business incurred eight years ago to Messrs Dundas and Wilson, W.S., a firm of which one of the partners is Mr John Dundas, a trustee under the trust-deed of George Paterson the elder, and who, in that capacity, was one of the petitioners who applied for and obtained the Act in question, and who was also a trustee of George Paterson the younger,—a trust which was concerned in none of the proceedings under the Act.

"The Reporter is aware that, in certain cases, it has been held that, where a trustee is agent for a trust, he is not entitled to make charges for professional trouble. In this case, however, as the Reporter is informed and believes to be the fact, the statute was got very much for the benefit of, and at the instigation of the heir of entail, into whose hands the trust-estate ultimately falls. Messrs Dundas and Wilson have been for many years the agents for the family, and are, and were when the Act was passed, the agents for the heir, the beneficiary under the trust. That gentleman is desirous that the present objection should not be raised or given effect to.

"If the Court shall be of opinion that the firm cannot make any charges for business performed for the trust in consequence of one of the partners being a trustee, the sums which will fall to be struck off amount to L.850, 12s. 2d."

Messrs Dundas and Wilson sisted themselves as parties, by a minute stating—"The professional charges referred to have been incurred to the compearers as a firm composed of several partners,—a separate person by the law of Scotland,—and the individual members of which may incur liability for professional business done by the firm on account of any of them; while one only of the partners is a trustee under the Act.

"The general objection, that a trustee, or other such administrator, is not entitled to transact in reference to the trust-estate under his charge, is one which requires to be pleaded by some party having an interest. A right acquired by a trustee under such circumstances is not null, but merely voidable at the instance of some person having an interest to state the objection, and to void the right. In the present case, no party appears to urge such objection. On the contrary, the trustees apply for a warrant to enable them to pay the amount due to the compearers, while the party having an interest to object to the charges, the heir of entail in possession, has intimated that he approves of a warrant being granted for the full amount of the compearers' account as reported on by Mr Baillie."

Mackenzie.

II. The circumstances of the case of Mackenzie are thus stated by the Accountant of Court:—"The Accountant now reports to your Lordship a case where a factor has taken credit for a business account incurred to Messrs Mackenzies and Fraser, W.S., of which firm the factor is a partner. The circumstances are briefly these:—

"Mr Thomas Mackenzie, W.S., is *curator bonis* to Mr William Baillie of Dunain. The rental of the estate for the year under audit (31st December 1853 to 31st December 1854) was L.819, 13s. 11d., and the revenue from other sources L.590, 19s. 2d. The Accountant has fixed the factor's com-

mission at L.75, 17s. 3d., being five per cent on the revenue realised by him. No. 1.

" In addition to this allowance, the factor seeks credit for an account of L.14, 8s. 2d. paid to the firm of Mackenzies and Fraser, W.S., which has been incurred in proceedings adopted by him to obtain special powers from the Court to let a portion of the lands of Dunain. The Accountant herewith produces the business account referred to, which he has analyzed, and he finds it to be composed of— Nov. 12, 1856. Lord Gray and Others.

" 1. Professional charges, - - - - -	L.10	19	0
" 2. Cash outlay, - - - - - -	3	9	2
Together, -	L.14	8	2

" The Accountant has only to remark in regard to the business performed, that it humbly appears to him to be of a beneficial character for the estate, and such as a law-agent must have been employed to perform."

III. Christopher Douglas, W.S., was in February 1853 appointed factor *loco tutoris* to Sylvester Reid. At the first audit of his accounts, the Accountant of Court allowed him credit for a business account incurred to the firm of Douglas and Monilaws, W.S., of which he was a partner, reserving for future discussion, when the amount of commission to be allowed came to be fixed, the propriety of its being sustained as a charge against the estate. Douglas.

In rendering his account for the year ending 31st March 1853, he again took credit for business done by the firm; and, as at March 1856, there was a farther charge.

The Accountant disallowed these sums till the Court should have disposed of the case of Mackenzie, *supra.*

The charges in these accounts consisted partly of fees to counsel and clerk's charges for writing, and partly of professional charges by Messrs Douglas and Monilaws for business which had arisen out of the position of the pupil's estate.

The factor gave in a report, in which he still claimed to have the charges allowed, on the following special grounds :—

" II. Special considerations.

" Apart from the above specialty applicable to the first account, the factor urges in his objections the following specialties with regard to both accounts, viz. :—

" 1. That the factor in this case was not the nominee of any of the parties interested, nor connected with them or the pupil in any way; but he accepted office on the special nomination of the Court, the person suggested for the office by the petitioners having been objected to by the respondents.

" 2. That the factor understood at the time of his appointment that he was selected because he was a professional person, and with a special view to his fitness to deal with the legal questions which it was known would arise, owing to the complicated and involved position and nature of the pupil's rights and estate.

" 3. That the interposition of a professional agent was absolutely indispensable in this case, and great additional expense would have been entailed upon the pupil's estate if the factor had employed a separate agent, and not his own firm, to transact the legal business of the estate.

" 4. That the accounts in question are confined in the strictest manner to the purely legal business which must necessarily have been done in this case, and which would be alone performed by a law-agent; and they contain no charges whatever for anything that can be considered in any sense as the ordinary business of a factor.

" [illegible] accounts are entirely composed of three branches, viz. :— 1st, [illegible] counsel as to the question of legal difficulty arising out of

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the pupil's rights; 2d, Thereafter presenting an application to the Court for special powers to sanction and carry out a conditional settlement of these questions, which the factor had effected very favourably for the pupil; and, 3d, Carrying into effect the special powers which were granted by the Court under said application, and completing titles to the property thereby acquired; and that these proceedings having been all conducted by the firm of which the factor is a partner, and also sanctioned and approved of by the Court, the necessary expenses of such procedure ought not to be disallowed.

"The Accountant has no hesitation in reporting that these specialties all occur in the present case; and that, had there been no doubt about the rule of law, he would have sustained the business accounts as incurred beneficially for the estate. In consequence of the naked direction of the Court, however, and the subsequent decision in the case of Flowerdew, the Accountant feels debarred from allowing weight to equitable considerations; and his only course, therefore, appears to be, to bring the whole circumstances under the consideration of your Lordships."

The Accountant, in reporting to the Court, said, "That had there been no doubt about the rule of law, he would have sustained the business accounts as incurred beneficially for the estate," and he suggested to the Court that, after disposing of this point, they should remit to him to determine the amount of commission, as it would be different in the event of the business account being sustained, from what it would be otherwise. The Court, "in respect of the general importance of the questions raised as to the charges competent to be made for agency and outlay by men of business acting as factors or curators appointed by the Court, and of the views expressed by some of the Judges as reported in the case of Flowerdew and others, 22d December 1854," appointed the cases to be argued before the whole Court.

At the argument before the whole Court, it was contended,—

I. For Lord Gray and others;—That, although there was a general rule of law that a party in a fiduciary position had no right to perform and charge for business connected with the trust, there were exceptions to that rule, as when the employment was acquiesced in by the beneficiaries, as here. Where a body of trustees determined that one of their number should be so employed, and the beneficiary consented, it was impossible to prevent remuneration, and his right to it was not void, though it could be challenged by any one having an interest, but here there was no contradictor. The case was different from that of a judicial factor, who was an officer of Court, and directly under its control.[1]

II. For Mackenzie;—That the fact that he was an officer of Court was a specialty in favour of allowing the charges in question. As everything connected with his office was done under the superintendence of the Court, there was that perfect check against abuse, to supply which was the object of the rule of law laid down as applicable to ordinary cases of trust. The main part of the charges made were for an act specially authorised by the Pupils Protection Act—an application to the Court for special powers necessary to improve the estate, and the proceedings themselves had been approved of by the Court already. Such an application could be more easily, efficiently, and cheaply made by the curator or the firm of which he was a member than by any one else.

III. For Douglas;—As in the case of the *curator bonis*, the control of the Court was a specialty in favour of the charges being allowed to a *factor loco tutoris*, an office to which, unlike an ordinary trust, claim for remuneration

[1] Ommanney v. Smith, 3d March 1854, ante, vol. xvi. p. 721; Sugden on Ven. and Pur. p. 900; Fraser v. Hankey, 13th Jan. 1847, ante, vol. ix. p. 415; Craddock v. Piper, M'N. and G., Chancery Rep. vol. i. p. 664.

in the shape of commission necessarily attached. The account here was for business of a very delicate nature, performed to save the estate committed to the factor, and which had been successfully carried through. To disallow these charges would be to establish an inflexible rule contrary to the spirit of the Pupils Protection Act, which in section 13 left it to the Accountant to audit accounts " on the general principles of good management."

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For the Accountant of Court, it was replied,—That though the characters of all the agents stood high, and the business had in each case been necessary, the rule that a party holding a fiduciary office could not be *auctor in rem suam* could not be evaded. In England, even costs out of pocket were not granted as a matter of course.[1]

The consulted Judges returned the following opinions :—

LORD JUSTICE-CLERK.—It is best at once to fix the principle applicable to this case.

I.—Ld. Gray.

In New v. Jones, 1 Hall and Twells, p. 632, on the then equity side of the Exchequer, Lord Lyndhurst said, when the argument began, " that it was the duty of a trustee to watch over the solicitor in all proceedings connected with the trust, and to take care that he did only that which was proper, and that his charges were not unreasonable ; he was also bound to tax the costs of the solicitor, if necessary. The trustee being appointed for this duty, the question was, whether a court of equity would allow a trustee, acting as a solicitor to the trust-estate, his charges for work and labour in that capacity."

At the close of the argument Lord Lyndhurst gave this weighty declaration of his opinion :—" The sole question to be decided is, whether or not a solicitor who was an executor or trustee is entitled to be paid his bill of costs for business done by him as a solicitor in the execution of his trust. There is no point more clearly established as a general rule by the case of Robinson v. Pett (3 P. Wms. p. 249), and other decisions, than that an executor or trustee is not entitled to be paid for his trouble. If the accounts of the deceased are complicated, and the executor takes upon himself to settle and arrange those accounts, although it may take up much of his time and attention, the principle of equity is, that he is not entitled to compensation for his time and trouble ; if he chooses to employ an accountant to settle these accounts, and for the expenses so occasioned, he is entitled to be remunerated out of the estate. The principle is this :—It is the duty of an executor and a trustee to be the guardian of an estate, and to watch over the interests of the estate committed to his charge. If he be allowed to perform the duties connected with the estate, and to claim compensation for his services, his interest would then be opposed to his duty, and, as a matter of prudence, the Court does not allow the executor or trustee to place himself in that situation. If he chooses to perform those duties or services on that estate, he is not entitled to receive compensation. The case applies as strongly to an attorney as to that of any other person ; for if an attorney, who is an executor, performs business that was necessary to be transacted,—if this attorney, being an executor, performs those duties himself, he, in my opinion, is not entitled to be paid for the performance of those duties ; it would be placing his interests at variance with the duties he has to discharge. It was said that the bill might be taxed, and that this would be a sufficient check. I am of opinion that it would not ; the estate has a right not only to the protection of the taxing-officer, but also the vigilance and guardianship of the executor, in addition to the check of the taxing-officer. There might be cases (I do not speak with reference to the present case) where a trustee, placed in the situation of a solicitor, might, if he was allowed to perform the duties of a solicitor, and to be paid for them, be so placed that he might find it very often proper to institute and carry on legal proceedings which he would not do were he to derive no emoluments from them, and were to employ another person. In point of prudence, pro-

[1] Craddock v. Piper, M'N. and G., Chan. Rep. vol. i. p. 664 ; Morison v. Rennie, 14th July 1847, H. of L., 20th April 1849 ; New v. Jones, Hall and Twells, vol. i. p. 632.

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priety, and as a guard over the estate, I am of opinion, that it would not be proper that a solicitor, who is a trustee, should be distinguished from an ordinary trustee. If a trustee, who is a solicitor, acts as a solicitor, he is not entitled to charge for his labour; he is entitled only to be paid his costs out of pocket. This rule applies to the present case."

An attempt has been made to limit this general principle, and to restrain its application by the case of Craddock v. Piper, decided by Lord Cottenham. The facts here present no such case as that which Lord Cottenham seems to sanction as an exception. But the authority of that case (itself not very clear) cannot be relied upon at all, for, in the number of the House of Lords' Reports (distributed since this case was argued), the present Lord Chancellor, Lord Cranworth, said, in Manson v. Sir William Baillie and others (2 Macqueen, p. 82),—"I am inclined to think that the true principle was considerably trenched upon by Lord Cottenham, when he said, that a solicitor might act as a solicitor for his co-trustee, and be allowed professional charges. I apprehend that the true principle is, that each trustee shall be a check and control on each and all of the co-trustees, a principle which is placed in danger by the allowance of pecuniary profit."

Lord Brougham, concurring in that opinion on appeal, seems to have added a few words for the sake of alluding to Craddock v. Piper, and said,—"My Lords, a case has been referred to, more than once, in the course of the argument, especially on the part of the appellant, I mean that of Craddock v. Piper, before Lord Cottenham, I think. If that case had been at all adopted in any of the decisions of your Lordships' House, I should be very slow to express any doubt which I might have upon it; but if it has never been so adopted, or countenanced in decisions here, then I may be permitted to state that I have great doubts respecting the soundness of that decision to the length to which it goes."

This opinion is conclusive against the claim of the trustee for agency business. That a partner may share in the profit can make no difference. I refer, on that point, to my remarks in my opinion on the cases of C. Douglas and T. Mackenzie (*infra*).

That the trustee is a Parliamentary trustee under a private Act of Parliament to carry it into effect militates greatly against the claim for profit. The Act contemplates that he is to act gratuitously. By promoting the Act, he represented himself to be on the same footing as Lord Gray and Captain J[s]. Paterson. The Act having passed on that footing, it is quite incompetent to go back upon the matter, or introduce the competency of doing anything which does not fall within the special duties and obligations of the Parliamentary trustees.

I lay aside, as immaterial, in my opinion, on what footing and risk these parties acted in obtaining the Act of Parliament, or whether they could throw the expense, if unsuccessful in the attempt to obtain the Act of Parliament, on either or both private trusts, or must have borne the expenses themselves. We can only deal with them as parliamentary trustees.

If they had wished to obtain any particular accounts to be expressly sanctioned by the statute as part of the arrangement proposed, as has been done in some of these statutes (Dugaldston and Others), they might have tried that.

One of the intended trustees acts as agent, first in the business of preparing and carrying through the Act. Whether chargeable against any other parties, is not a question now before us. This is an application solely (as the minute of compearance states) in the petition of the Parliamentary trustees to carry the Act into execution, and the expenses claimed must be legally brought under the statute. And they apply to us to fix the expenses in terms of the Act of Parliament.

That there is no contradictor can in no degree relieve the Court from the faithful and strict discharge of their duty, under (in particular) the 15th section of the statute. On the contrary, the fact that there is no one opposing the claim, only increases the *onus* laid on the Court. The parties interested in the estate, or the private trustees, do not propose to pay the accounts. Their non-opposition or assent, even if directly given (which is not proved), would be of no avail. I say even if directly given, for I see no evidence that Lord Gray or Captain Paterson, in the full knowledge that there is a claim for professional profit by one of their number, and in the knowledge further of the legal objection to a claim for such profit, have sanctioned that claim. But I repeat, no assent by them would avail

the other trustees, or relieve us of the duty of examining the accounts on the legal principles applicable to trustees.

The trustees, under one of the private trusts, are empowered to sell a property to the other set of private trustees, and the latter to borrow money for the price of such estate, and for the expenses of applying for, obtaining, and passing this Act, and carrying the same into execution.

Then the trustees may apply to the Court, who are directed to "inquire into, ascertain, and fix, by interlocutor or judgment, the amount of the expenses of applying for, obtaining and passing of the Act, and carrying the same into execution." Various other powers are then introduced for the benefit of the estate, and the trustees are specially described as acting in "the trusts hereby created." And the Court has power to appoint one or more trustees in room of trustees dead, discharged, or incapable. And further, the existing trustees, or others so named, may apply from time to time to this Court, "for a discharge and exoneration of their actings and proceedings, by virtue of this Act, prior to the date of any such application; and the said Court is hereby authorised and required to order evidence to be laid before them of such actings and proceedings, and after consideration thereof, and if the same shall be found to be correct, to exonerate and discharge the said trustees of such actings and proceedings, and to declare them acquitted and discharged thereof for ever."

Then, in February 1852, the trustees of the two private trusts, and in virtue of, and as acting under the Act of Parliament, present the petition before the Court, in which they drop the title of Parliamentary trustees, or as trustees under the Act of Parliament, more correctly given to them in the minute of compearance.

But it is only as the Parliamentary trustees that they apply to the Court. And the prayer of their petition is, in terms of the Act, "to inquire into and ascertain and fix, by interlocutor or judgment, the amount of the expenses of applying for, obtaining, and passing the said Act, and carrying the same into execution; and to order payment of the same to the petitioners, to be applied by them in defraying the expenses of applying for, obtaining, and passing the said Act, and carrying the same into execution, and to issue an order for payment accordingly."

This petition will, at the close of the transactions, be followed up, I presume, by another petition for exoneration and discharge, in terms of the clause of the statute already quoted.

Thus we have the case of proper Parliamentary trustees coming before us to account for part of the actings, and praying for inquiry into the expenses they have incurred, and for payment of the same. And (independently of L.839 of what is termed outlay, but no way explained) there is claimed as profit to one of the trustees L.230.

This I hold to be perfectly incompetent in the case of a Parliamentary trustee.

That this trustee was well acquainted with the position, burdens, and value, of the estate, and was more easily able to carry on the proceedings under the Act of Parliament, may be very true. But having accepted the office, and had its acceptance in view from the first, he was to give his aid gratuitously, and as agent he could not act with a view to profit.

Besides, it is not alleged, that on account of his previous knowledge of the affairs of the family, any abatement is made from the full rates of professional charges for the whole business done, and it is not shown how, in any way, expense was saved by his acting as agent. In truth, the execution of the Act of Parliament, both as to the sale contemplated, and as to the borrowing of money, were matters which any agent might have caused them; and, at all events, Mr Wilson might easily have done so, he deriving the full profit. It is the trustee making profit which raises the objection.

There may be some specialty as to part of the very large sum stated for outlay. For instance, if this trustee went to London at the time of obtaining the Act of Parliament, his expenses may, I think, be fairly charged. But as the Parliamentary solicitors would pay, I presume, the fees in London to counsel, or officers of Parliament, out of the L.620 paid to them, the sum stated for outlay under this branch, L.[illegible], seems to be a very great sum.

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On the charges for outlay I think there should be a detailed report by the Auditor of Court.

This case does not fall under the functions of the Accountant of Court; and that being the case, I apprehend that, in ascertaining and fixing the amount of the expenses to be settled by our judgment, we ought to have an examination and audit by the proper officer of this Court, the Auditor.

The ground for remitting accounts to another Writer to the Signet I do not understand. We have not yet had the aid and assistance which the Court ought to have in such cases. This was a proper matter for the Auditor of Court, as much as any ordinary account of expenses. And I can never, on the report of another agent, when there is no special ground for such remit, concur in sustaining, in the discharge of our statutory duty, Scotch accounts of expenses, without examination by our Auditor. In principle I think the course adopted, of the remit to Mr Baillie (well known to us as very high in his profession, was yet) objectionable. Accordingly, he went wrong to the extent of L.620. But as to what he assumes, by his approval of the abstract prepared by the parties, to be outlay, L.839, I cannot take his opinion as satisfactory or conclusive. I have looked over the accounts which were sent to me, and I am not prepared to hold any such sum to be outlay, in the proper sense of the term used by Lord Lyndhurst, viz. "costs out of pocket." I object entirely to a remit to another agent, when we have an officer appointed for the purpose of strict examination of these matters. And therefore, after the principle is fixed, I think these accounts should be sent to the Auditor in the usual form, but with the direction to distinguish specially what are costs out of pocket. I am very jealous of that duty being done by any one who is not in the independent but most responsible office of Auditor.

Lord Benholme.—I concur in the opinion of the Lord Justice-Clerk.

Lord Wood.—By the private Act obtained in 1847, on the application of the trustees under the trust-deed of George Paterson the elder, the trustees under the trust-deed of George Paterson the younger were empowered to sell the estate of Pilmore, part of the trust-property, to the trustees of George Paterson the elder, who, on the one hand, were empowered to purchase the same:—And it is provided that the trustees may apply to the Court, who are directed to inquire into, ascertain, and fix, "by interlocutor or judgment, the amount of the expenses of applying for, obtaining, and passing of the Act, and carrying the same into execution." The Act contains various provisions for carrying the objects in view into effect by the parties who were trustees under the trust-deed of George Paterson the elder, and they are specially described as trustees acting "in the trusts hereby created." Then there is a clause (sect. 14) providing for their exoneration and discharge by the Court.

Mr Dundas—one of the trustees under both private trust-deeds, and one of the intended Parliamentary trustees, and who is a Parliamentary trustee—or, as it is said, the firm of Dundas and Wilson, of which he is a partner—acted as agent or agents in the business of preparing for and procuring the Act, and subsequently in carrying its purposes into execution; and it is for the expenses of performing the business so done that the present claim is made.

Now, although the petition is titled as a petition for the trustees in the two trust-deeds, it is in reality an application, in the petition of the Parliamentary trustees, to carry the Act into execution; and the expenses claimed are expenses which must be shown to be chargeable in virtue of its provisions. Accordingly, the Court is applied to to fix the amount to be allowed, in terms of the provisions already cited. The question is, to what extent the claim for expenses is well founded—that is, well founded against the fund allowed to be provided by the Act, and as such, can be sanctioned by the Court. Whether or not there is any other quarter from which the expenses may be recoverable is not the matter at issue.

Now, the principle applicable to the case of a trustee acting as agent in the business of the trust may be held to be completely fixed by the authorities mentioned in the opinion of the Lord Justice-Clerk; and were it necessary, others might be cited both in England and from our own books. A trustee so acting is not entitled to charge for his labour. He is entitled only to be paid his costs out of pocket. The rule, and the grounds of it, are fully explained by Lord Lyndhurst in the case of New v. Jones:—And that it is not subject to the limitation which

was supposed to have been sanctioned by Lord Cottenham in the case of Craddock v. Piper is shown by the opinions of Lord Cranworth and Lord Brougham in Manson v. Sir William Baillie and Others. But in addition to these cases, I am anxious to refer to that of Broughton v. Broughton, cited in the number of the Law Review for the month of February 1856, which contains a valuable and instructive judgment of the present Lord Chancellor upon the point under consideration, which I shall take the liberty of quoting.

"*Trustee acting as Solicitor not entitled to his costs.*—An executrix and trustee under a will employed her co-trustee, who was a solicitor, to transact the necessary business of the trust. It was held by Lord Chancellor Cranworth, that the solicitor was only entitled to costs out of pocket. 'The rule,' said his Lordship, 'applicable to the subject has been treated at the bar as if it were sufficiently enunciated by saying, that a trustee shall not be able to make a profit of his trust, but that is not stating it so widely as it ought to be stated. The rule really is that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty, and a case for the application of the rule is, that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them. As the trustee might make the payment to others, this Court says he shall not make it to himself; and it says the same in the case of agents where they may employ others under them. The good sense of the rule is obvious, because it is one of the duties of a trustee to take care that no improper charges are made by persons employed for the estate. It has been often argued, that a sufficient check is afforded by the power of taxing the charges, and the answer to this is, that the check is not enough, and the creator of the trust has a right to have that, and also the check of the trustee; the result therefore is, that no person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust, namely, that of seeing that no improper charges are made. The general rule applies to a solicitor acting as a trustee; and the only question is how far the circumstances of the present case take it out of the rule.

It is, in the first place, sought to take this case out of the rule on the authority of Craddock v. Piper; and here I must own, speaking with all deference, and not meaning to decide anything upon the point, that I cannot see any distinction between costs incurred in administering an estate without a suit; the danger may probably be less in the former case than in the latter, but the principle is the same. As every trustee is bound to protect the estate against improper charges, there must also exist the same difficulty in principle in acting for himself and others, as in acting for himself alone.'"

If, then, the business, the expenses of which are claimed, had been transacted by Mr Dundas as agent, I am not aware of any ground on which it could—as respects that portion of the claim consisting of his proper accounts, as distinguished from those of the parliamentary agents, &c.—be found that he was entitled to anything beyond costs out of pocket. The claim must have been limited to that; and this, whether when acting as agent, he were held to have been acting, and to have combined with it the character of private trustee or Parliamentary trustee. In the latter case, I think he would, if possible, be even in a less favourable position than the former. But in any view the material point is this, that the expenses are expenses which are here sought to be made good against the fund allowed to be raised by the private Act of Parliament, in order to provide for expenses, and that the amount of all such expenses must, by the Act, be fixed by the Court. The case truly is one in which the Parliamentary trustees come before the Court stating the actings which have been had in the matter embraced by the statute, and praying for inquiry into the expenses incurred, and for payment of the same. And it appears to be very clear indeed, that looking to the rule, and the principle and policy on which it rests, it is impossible that the Court could sanction a charge for any expenses for business that had been done by Mr Dundas as agent, except to the extent of costs out of pocket.

But then the statement is, that the business was not done by Mr Dundas, the trustee, individually as agent, but by the firm of Dundas and Wilson, of which he is a partner. I agree with the Lord Justice-Clerk, that the fact that a partner may share in the profit can make no difference. That it cannot do so consistently

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with the principle and policy of the rule, and without countenancing what would resolve into an invasion of it, is I think perfectly manifest. Upon this point I refer to the opinion of the Lord Justice-Clerk, and also to his Lordship's opinion in the cases of C. Douglas and T. Mackenzie. And I farther agree with his Lordship, for the reasons he has given in these opinions, that no weight can be attached to the allegation in regard to the saving of expense, by the business having been transacted by a trustee as agent, who had a previous knowledge of the affairs to which it relates, or by the firm of which he was a partner.

But then it is said that it was with the authority and approbation, not only of his co-trustees, that Mr Dundas's firm was employed to do the business, the charges for which are in question, but also with the knowledge and sanction of Mr Paterson, the heir of entail in possession, and the existing heirs-substitute, the parties beneficially interested, and that in that state of matters the objection to a claim for the ordinary remuneration for the business done does not hold. To this there are two answers. In the first place, there is no evidence produced of the alleged employment by the co-trustees upon the footing alleged, at least there is none of its having been given in the knowledge of the objection to which any charge beyond costs out of pocket would be liable, and upon the understanding that no such objection was to be taken. Certainly there is no evidence of any approbation by the heirs of entail other than Mr Paterson; and I do not know that even as to him any proper evidence has been furnished. Then, with regard to the heirs-substitute, their consent cannot be taken for granted from their not appearing as contradictors, which is all that is asserted as to them—and they are parties who have an interest in the fund from which payment is craved, whose interest cannot be overlooked in fixing the amount of expenses to be allowed. But, in the second place, even if there were evidence of the alleged consents, it does not appear to me that the Court, in discharging the duty devolved upon it by the Act, could sanction any expenses as chargeable, which by the rule applicable to a trustee acting as agent in the trust-business, would fall to be disallowed. The Court in fixing the amount of expenses to be paid, are bound to see that they are stated in terms of law; and no consent of parties can absolve them from that obligation, whatever effect it may have in reference to a claim made against the parties by whom the consent may have been given, and their separate funds. The assent of co-trustees must, I apprehend, be altogether unavailing. They cannot relieve their co-trustee from a part of his duty, or place him (or, which is the same thing, his firm) in a position conflicting with that duty, and which the law says he is disqualified from holding, or, at all events, disqualified from holding to the effect of more being allowed than costs out of pocket. And as respects the heirs of entail, I cannot see how, in such a case, where the whole body of the heirs of entail, existing and future, are interested, adequate consents — supposing all objection could be thereby removed — could be obtained. It may be true that there is no contradictor to the claim made by the petitioners, but that, in a case like the present, seems to me only to call upon the Court, in the discharge of its duty, to be the more strict and watchful in seeing that no expenses are permitted to be charged to which there is any legal objection. The only way, I apprehend, in which the objection which has arisen could have been obviated, and the Court enabled to fix the amount of expenses at the ordinary rate of remuneration, as the same might be taxed by the auditing officer, would have been to have had it so provided in the Act itself.

Whether or not, by any arrangement for employing Mr Wilson individually in the trust business — he being to draw the full profits — the force of the objection would have been removed, I give no opinion.

LORDS COWAN and MACKENZIE. — Upon the general question as to the competency of professional charges for agency by a trustee, or by a firm of which he is a partner, against the trust-estate, — we concur in the views and principles stated by the Lord Justice-Clerk and Lord Wood, and are of opinion that the charges for agency in the accounts of Messrs Dundas and Wilson, in so far as they are of that description, ought to be disallowed. We hold the general rule which prohibits such charges to be now clearly established; and, so far as we can see, there is nothing in the present case which should prevent that rule from being applied.

With respect to the claim for outlay, we are of opinion that Messrs Dundas and

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Wilson are entitled to all such charges and expenses actually paid by them out of pocket as shall appear to have been properly incurred and paid.

Lord Ardmillan.—In so far as regards the professional charges for agency by Mr Dundas, or Messrs Dundas and Wilson, I concur in the opinion of the Lord Justice-Clerk and Lord Wood.

I cannot, however, do so without feeling that there is hardship in refusing this remuneration, because there is no room to doubt that the charges are for business conducted for the benefit of the estate, on reasonable and even moderate terms, and by gentlemen of the highest character, acting in *bona fide*. But the rule which forbids such charges by a trustee, or by a firm of which a trustee is partner, is now settled by the highest authority, and on solid grounds of principle, and it must be applied.

To the reimbursement of outlay, or "costs out of pocket," I am of opinion that the compearers are entitled; and I concur with the Lord Justice-Clerk in thinking that the amount of such outlay should, as a general rule, be ascertained by the examination and report of the Auditor of Court.

In the present case, the accounts have been examined and reported on by a highly respectable and intelligent man of business; and I am not disposed to disturb his report, or put the estate to the expense of a new audit.

Lord Handyside.—I concur in the opinion of the Lord Justice-Clerk; with this qualification, however, that, along with Lord Wood, I reserve my opinion as to whether or not Mr Wilson, one of the partners, could have been employed individually, under an arrangement for his deriving the full profit of the employment.

Lord Murray.—I have the same feeling with Lord Ardmillan, that there is some hardship in refusing the professional charges for agency by Mr Dundas, because there is no reason to doubt that the charges are for business performed for the benefit of the estate, on reasonable and moderate terms, as his Lordship has observed. But the Court is not entitled to allow such circumstances to sanction a deviation from a rule which applies to all trustees, and to all men of business who are trustees, however respectable they may be. No trustee is entitled to place himself in a situation in which he has an interest different from the performance of his duty as trustee. The circumstance that he may be much too honourable a man to abuse the mixed duties which he endeavours to perform, cannot affect the case.

I therefore concur in the opinions of the Lord Justice-Clerk and Lord Wood, as well as those of Lords Cowan, Mackenzie, and Ardmillan.

Lord Neaves.—I am of opinion that the petitioners, the Castle Huntly trustees, are entitled to payment of the expenses incurred in obtaining the Act of Parliament in question, as reported by Mr Baillie. I consider that, in taking steps to obtain that Act, the trustees acted as individuals without the power or right, in the first instance, to bind the trust. In that position they were entitled to employ Messrs Dundas and Wilson as their agents, and they became personally responsible to them for the expense incurred. The Act was obtained, containing a clause entitling the trustees to take payment of "the amount of the expenses of applying for, obtaining, and passing this Act," and under that clause I consider the trustees entitled to be reimbursed or indemnified for the expenses which I think they legally incurred to their agents. I think that any other result would be unjust, and contrary to the Act of Parliament.

I am of opinion, that in so far as any of the expenses of carrying the Act into execution have been incurred to Messrs Dundas and Wilson, as agents for the trustees of George Paterson the younger, these expenses ought to be allowed, as reported on. They are not to come out of the trust-estate of George Paterson the younger, but out of that of George Paterson the elder; and I do not see how the trust of Paterson the elder can escape from payment of a fair charge, because the trustees of another estate have employed one of their number as agent. The objection, in point of principle, in such cases, appears to me to apply only to transactions by which a trustee on his own employment, or that of his co-trustees, obtains profit out of the trust-estate under his charge. But in so far as Messrs Dundas and Wilson acted for the trustees of Paterson the younger, they were not employed by the trustees of Paterson the elder, although that trust-estate is to pay them.

I am of opinion that Messrs Dundas and Wilson, in so far as they have acted in

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the execution of the Act of Parliament, as agents for the trustees of Paterson the elder, have no claim to remuneration from that trust-estate beyond expenses out of pocket. I think here that the rule against a trustee being *auctor in rem suam* directly and properly applies.

I think that the Court is bound to take cognisance of that matter now, and to disallow this part of the charges under the present petition. It has been argued that this case resembles that of a purchase by a trustee, which is good unless challenged, and which those who have the beneficial interest can alone set aside. But in that case an election has to be made. The purchase must either be adopted as it stands, or repudiated with all its benefits. Here the trust-estate has no election to make. It is entitled to take the labour bestowed by one of its trustees and his firm, and is entitled to that labour gratuitously.

II.—Douglas & Mackenzie.

LORD JUSTICE-CLERK.—There is no distinction between these cases.

The point raised is of very great importance, and I look to the result with much anxiety, as I should deprecate, for the sake of the strict and steady government of trusts, any departure from the principle involved in the discussion, and which I hold to be finally fixed.

In one of the cases I see a sort of quotation, as if from some interlocutor of Court (interlocutor in case of T. Mackenzie), in the matter of "law business incurred to partnerships, of which the factor is a partner." No such expression is in the interlocutor appointing the hearing; and the question was argued without special reference to partnerships, in which such officers of Court are interested. Nor do I see any relevancy in this incident in the cases. The interlocutor of Lord Neaves, reporting the case of Mackenzie, seems to be limited to that matter; but the interlocutor of the Court is not. The question before us is the propriety of factors *loco tutoris* and similar officers, acting as agents in the business of the estate committed to them, and making thereby professional profit. In the case of partnerships, if the factor does not personally conduct the agency, then he must make his partner acquainted with the matter, and might just as well have instructed another agent. And one main argument in support of the competency of the factor acting as agent would then fail, viz. that the factor already knows the business, and that thus some advantage and saving (how saving, has not been explained) are gained, if another party is not employed.

But I have noticed this point as to partnerships, for even in the argument there did seem to glide in some allusions to such cases.

The first consideration which strikes one in regard to the point raised is, that th competency of the course contended for is for the special advantage and benefit c law agents appointed as factors or curators, &c., in order to enable them to mak profit over and above the proper commission and charges belonging to the characte of the office to which they have been appointed. Other factors are paid by an satisfied with commission, and the repayment of the expenses incurred by them i the course of the management.

But if the Court once sanction the competency of agency on the estate bei taken up for profit by the factors, how can the Court stop short? Many cases have seen as to house property, of the appointment of builders. Builders, too, the country, are often employed to act as factors for small proprietors, as unde standing well the state and condition of steadings, and well qualified for su employment. Other tradesmen and merchants are often appointed when an esta is to be wound up. In old house property requiring repairs, or the rebuilding houses, is the builder to be allowed to execute repairs and rebuild? and why n on the principle contended for? An extensive ship-builder or carpenter is appointe say at Greenock, on the sequestration by the Court of a ship-building concern, which there have been disputes on the death of one partner, or on the death of ship-builder, leaving ships partly built, and useless (it may be said) unless finishe are such parties to be allowed to be themselves, at their own hands, the sh builders? Many other cases may be put, in which such work, just as fair as agen may be carried on, perhaps with less temptation and less favourable means creating work, and between which and agency no distinction in principle can drawn.

That others than law-agents will find out opportunities for extra work, we h

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an example of, in the case of Robertson, 26th May 1843. It had become necessary to wind up and sell off a very considerable stock in trade, and the factor, a merchant (at the request, too, of friends), had acted, being a good man of business, as an accountant, and charged L.60 for that work. Lord Wood, to whom we twice remitted the case to obtain information on the point, at last reported favourably, on the ground that it was a very special case. The extent of special services was proved to us, and with great difficulty, and with much hesitation, we pronounced this interlocutor :—"In respect of the special report by Lord Wood, as to the services of the factor, sustain the charge in the special circumstances of this case," with a warning that the same course would not be again followed, which warning entered both sets of reports. But if agency is to be actually sanctioned, we shall have extra charges in numerous cases.

The question is therefore of very wide application, and becomes a very grave matter when properly considered.

The case of law-agency by the factor I regard with peculiar distrust. Law-business is easily created, and it is seldom that, on a review of the matter, its inexpediency or recklessness can be ascertained, so as to make it a ground of forfeiture of the account.

It was on the same ground of distrust that the Act of Sederunt 1710, 23d November, declared "all writers, and other dependers on the session, wholly incapable of any such trust or office" as that of "factors on bankrupt and incumbered estates," lest, it is said, they may increase or prolong litigation.

The Court must be prepared to go far beyond the case of law-agents, if professional profit is allowed to be made over and above a full and adequate commission for all the proper duties belonging to the office of factor, of which law-agency is no part at all.

Further, this suggests a consideration of great weight. Although unfortunately there were no proper means for enforcing the regulations of the Act of Sederunt 1730, February 15th, yet that valuable set of regulations sets forth very anxiously, and with great foresight, the duties of the office of factors.

First, After describing the importance and objects of judicial factors in such circumstances, in particular, as the present (*loco tutoris* and legal incapacity), it proceeds to set forth certain regulations "for the faithful and punctual fulfilling of their trust." The factory is thus declared to be a trust. And in principle, it is eminently a trust, and that of the highest order—of great confidence on the one hand, and, being derived from the appointment of Court, of a very distinct kind, having, moreover, official responsibility attached to it. Factors are officers of Court with specific duties, in regard to what is declared to be a trust. Agency is no part of such duties—it does not belong to the office.

The undertaking of any such agency being wholly voluntary, is an act beyond the office, and cannot be recognised as undertaken under it. As factor, the officer has no right so to act.

Further, the Act of Sederunt 1730, does allude to remuneration for the duties of the factor, and distinctly holds that the factor is to be paid by salary. The clerk to the process or act of appointment was directed to be in truth the accountant in each case, and if the duties of the clerks had been enforced, the recent office of the Accountant of Court would not have been necessary. And I infer, that the salary in each case was to be judged of by the clerk. In older cases, a sort of salary is often mentioned as the mode of remuneration. When a commission came to be the more ordinary mode of remuneration, I have not seen materials for ascertaining, and have not time to examine. The Pupils' Protection Act assumes, that the duties appertaining to the office of factors and other such officers, are to be remunerated by "commission" (see sect. 6), which the accountant is to fix "according to his opinion of what is just in each particular case." I see no authority whatever in the statute for the Accountant or Court receiving and entertaining any account whatever in the name and behalf of the factor, except what falls under his proper factory business. If he has employed an agent for business done, then the claim of the agent is a charge against the factory estate, in the same way as repairs on buildings, or any other charges. And the Accountant, of course, in that way will call for such account, and deal with it as with any other claim against, or any item of discharge by, the factor, taken credit for in the factory account. But any account or

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claim by the factor himself, in his own name, and for his own behoof, in a separate character from that of factor, viz., as employed by himself as an agent, so as to make a charge for himself personally, I can find no warrant for the Accountant or Court receiving as competent. I think any such account is utterly incompetent under the statute. If work of any kind is to be done for the estate, whether law business, reaping a crop, mending panes of glass, or any other thing, it can only appear as a charge against the factor, as an item of discharge, and not as an account by itself, and for his behoof, over and above payment for the performance of his factory duty. On this ground alone, I hold any such account to be incompetent.

Such is the plan for the office of factor.

The office being declared to be a trust, by an Act of Sederunt, recognised and quoted in the recent Pupils' Protection Act, and which certainly must now be held to be the law of the land, it necessarily follows, that every rule, restraint, or obligation applicable to the character of trustees, must be binding and enforced as to such judicial trustees, so far as such can apply.

It does not appear to me to be competent for the Court, sitting in individual cases, to dispense with, or break through, any such rules and obligations, which the character of trustee implies and imposes.

This seems to me to be the only safe and sound principle.

Taking, then, factors to be trustees, with this only difference (unfavourable for this claim) that a certain payment or allowance is sanctioned for the performance of all the duties involved in the discharge of the trust committed to them, I hold that principle to be at once decisive of the present claims. Trustees cannot make profit by agency in the management of the trust; therefore factors cannot.

What Lord Lyndhurst has emphatically said as to law-agents who are trustees or executors, acting as solicitors in the proceedings connected with trusts, is most strictly applicable to factors and other officers of Court in the discharge of the trust committed to them, and for which they are to be fully paid.

In New v. Jones, 1 Hall and Twells, p. 632, on the then equity side of the Exchequer, Lord Lyndhurst said, when the argument began, "that it was the duty of a trustee to watch over the solicitor in all proceedings connected with the trust and to take care that he did only that which was proper, and that his charges were not unreasonable; he was also bound to tax the costs of the solicitor, if necessary The trustee being appointed for this duty, the question was, whether a court o equity would allow a trustee, acting as a solicitor to the trust-estate, his charges fo work and labour in that capacity."

At the close of the argument, Lord Lyndhurst gave this weighty declaration o his opinion :—" The sole question to be decided is, whether or not a solicitor wh was an executor or trustee, is entitled to be paid his bill of costs for business don by him as a solicitor in the execution of his trust. There is no point more clearl established as a general rule, by the case of Robinson v. Pott (3 P. Wms. p. 249 and other decisions, than that an executor or trustee is not entitled to be paid fo his trouble. If the accounts of the deceased are complicated, and the execut takes upon himself to settle and arrange those accounts, although it may take u much of his time and attention, the principle of equity is, that he is not entitled compensation for his time and trouble; if he chooses to employ an accountant settle these accounts for the expenses so occasioned, he is entitled to be remun rated out of the estate. The principle is this :—It is the duty of an executor ar a trustee to be the guardian of an estate, and to watch over the interests of tl estate committed to his charge. If he be allowed to perform the duties connect with the estate, and to claim compensation for his services, his interest would th be opposed to his duty, and, as a matter of prudence, the Court does not allow tl executor or trustee to place himself in that situation. If he chooses to perfor those duties or services on that estate, he is not entitled to receive compensatio The case applies as strongly to an attorney as to that of any other person ; for an attorney, who is an executor, performs business that was necessary to be tran acted,—if this attorney, being an executor, performs those duties himself, he, my opinion, is not entitled to be paid for the performance of those duties; it wou be placing his interests at variance with the duties he has to discharge. It w said that the bill might be taxed, and that this would be a sufficient check. I a of opinion that it would not; the estate has a right not only to the protection

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the taxing-officer, but also to the vigilance and guardianship of the executor, in addition to the check of the taxing-officer. There might be cases (I do not speak with reference to the present case) where a trustee, placed in the situation of a solicitor, might, if he were allowed to perform the duties of a solicitor, and to be paid for them, be so placed that he might find it very often proper to institute and carry on legal proceedings, which he would not do were he to derive no emolument from them, and were to employ another person. In point of prudence and propriety, and as a guard over the estate, I am of opinion, that it would not be proper that a solicitor, who is a trustee, should be distinguished from an ordinary trustee. If a trustee, who is a solicitor, acts as a solicitor, he is not entitled to charge for his labour; he is entitled only to be paid his costs out of pocket. This rule applies to the present case."

An attempt has been made to limit this general principle, and to restrain its application by the case of Craddock v. Piper, decided by Lord Cottenham. The facts here present no such case as that which Lord Cottenham seems to sanction as an exception. But the authority of that case (itself not very clear) cannot be relied upon at all, for in the number of the House of Lords Reports (distributed since this case was argued), the present Lord Chancellor, Lord Cranworth, said, in Manson v. Sir William Baillie and others (2 Macqueen, p. 82)—"I am inclined to think that the true principle was considerably trenched upon by Lord Cottenham, when he said that a solicitor might act as a solicitor for his co-trustee, and be allowed professional charges. I apprehend that the true principle is, that each trustee shall be a check and control on each and all of the co-trustees, a principle which is placed in danger by the allowance of pecuniary profit."

Lord Brougham, concurring in the opinion on the cause under appeal, seems to have added a few words, for the sake of alluding to Craddock v. Piper, and said:—"My Lords, a case has been referred to, more than once in the course of this argument, especially on the part of the appellant—I mean that of Craddock v. Pipers before Lord Cottenham, I think. If that case had been at all adopted in any of the decisions of your Lordships's House, I should be very slow to express any doubt which I might have upon it; but if it has never been so adopted or countenanced in decisions here, then I may be permitted to state that I have great doubts respecting the soundness of that decision to the length to which it goes."

Is there in reality any ground for a distinction?

I see none. A factory is a trust. The Act of Sederunt settles that point. Profit is made by the person holding that trust. Are these two things compatible?

As the result will be, that in all instances where agents of this Court, or of inferior courts, are named factors, they may make profit by agency in the business of the factory, I am of opinion that such agency must be disallowed—being carried on for profit over and above the proper remuneration for the duty of factor.

The middle course pointed at apparently by the Accountant, viz., that in respect of such agency, the factor's commission should be diminished, I do not understand at all, if agency by the factor is competent and legitimate. The agency is something over and above the performance of the whole duties of factor. All these are fulfilled, and ought to be paid for. And there is no principle whatever that I can see for diminishing the commission, as the whole charges for agency would have been paid to another agent if the factor had not acted as such. And if it is fitting and competent for the factor to act as agent in the law business of the trust, and if nothing wrong is detected, I cannot see why, on any consistent ground, his commission should therefore be diminished (having done all the duty for the performance of which it is to be adjusted), because he has done other work which, *ex hypothèse*, it is competent for him to do, and payment for which must have been made to another: Then why not to him, without diminishing his commission separately and fully earned—if such work, *ultra* of the duties as factor, can competently be done by him consistently with his office as factor?

Any such middle course, in truth, would involve an admission that the agency is against the duty of factor, and beyond the character of the office. Either the

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propriety of charge by the factor for law-agency, and other work done for the estate, must be sustained in every case, unless where it has been detected to be *mala fide* carried on, or it must be disallowed on a general principle.

An attempt was made to defend the propriety on a general ground, which was stated to take the case of factors out of the rule admitted to be applicable to trustees, and the result will be, if that ground is given effect to, that all factors who are law-agents may conduct all the law business of the estates which they manage.

That ground was the protection said to be afforded by the review by the Accountant of Court.

I could not give effect to that ground for exception—1. Because the Act of Sederunt declares the office to be a trust;—2. Because it is plainly unsound. The control by the review of the Accountant of Court was applied to offices which had long existed in the law, and therefore cannot change the character of such offices, or make that competent now which is in principle incompatible with the character of the office; and accordingly the Act of Parliament (sec. 32) states that it is not to affect the remuneration or responsibility of parties; the rubric says of factors. I rather understand the clause to apply to proper tutors, but the principle is plainly the foundation of the statute; and, 3. This ground really fails as to that large class of factors who are not amenable to the more efficient control of the Accountant than any which the Court can exercise. And agency surely is not to be held competent in the one class and not in the other? But, 4. A number of officers are brought under the control and review of the Accountant of Court, who, not being proper officers of Court, could only be dealt with formerly at common law in a very uncertain and unsatisfactory manner—such as tutors-at-law, nominate, or to insane persons. I suppose the rule as to them cannot be disputed. But if the control of the Accountant is such a security against abuse as to afford a reason for allowing the factors of the Court to make profit over and above their commission, why should not such control enable those to do so who have no commission at all? In fact, the general character of the enactment convinces me that all the cases were to be regulated by the same principles, except where remuneration was previously recognised.

But neither the control of the Accountant nor of the Court could check the evil intended to be guarded against.

That evil is, that the exercise of the unbiased judgment of the factor, with a view to save expense, cannot be secured to the estate, if he is allowed, because he is an agent, to carry on law business for his profit.

It is matter of relief in stating one's opinion, in the cases now before the Court, that the question occurs in all these cases in regard to gentlemen whom we all know cannot possibly have been under the operation of any such temptation to create expense. And therefore I shall state my opinion, without the least risk of personal imputation being inferred. But the character of these gentlemen calls on us not to be thereby influenced in a matter which ought to depend wholly on principle.

One great duty of a factor—perhaps the most important—is to avoid expense. The estates to which factors are appointed are generally so situated in many respects as to be very frequently exposed to great risk of expenses. The pupil (as here) may be left in a position in which there may be deeds to challenge, claims to vindicate and enforce, or to resist,—complicated matters in trade, or general debts to wind up and settle with adverse parties,—or matters to be carried through owing to legal incapacity,—questions of marriage and legitimacy to try or to resist. In short, all the difficulties incident to family affairs, to trade, to succession, and disputed rights and interests, may be said to be of very frequent occurrence in the cases which require the appointment of a factor *loco tutoris* or *curator bonis*, and of cautious selection for such offices. The expectations from successful lawsuits may be large. The funds to defray such are uncertain, or scarcely adequate, with a view to the future maintenance and means of the pupil. Hence the unbiased judgment of the officer in charge of the estate is most essential. He is to disburse the funds of a ward, if lawsuits are to be carried on. That is a most delicate trust.

Now, there are many very keen, zealous agents, on whose judgment as to insti-

tuting an action which he is to carry on, a client may not be very safe to rely, who may yet be most discriminating and provident as to the propriety and safety of legal proceedings, if compelled to view the matter in a wholly disinterested light, and when no possible temptation can bias the mind. There are others who, unconsciously to themselves, will be biassed by the prospect of litigation, in the animation of which they take real interest, as much as in its profits, and who look to increased reputation by the prospect they think they see in the distance of securing great benefit to the pupil's estate, and who will enter into the lawsuit with the keen feelings of an actual litigant, and get keener and keener as the stake becomes greater or more doubtful.

Others, again, have but an obtuse sense of responsibility, not such as to overcome the desire for a lawsuit, the profit of which they think (and justly) that they are sure of, whether successful or not.

There are a multitude of cases in which there may be no *mala fides*, but in which agents, when free of all control at the time, will be easily led into law business as to the trust-estate, which, if they were not to conduct it, they would view in a more dispassionate light, and with a view to save expense—an object which cannot, as the minds of men are constituted, be sufficiently secured, if the expense is to be a source of regular and competent and fair profit to the person who ought to study economy and prudence. I hold it to be not only a rule of prudence and propriety, but a sacred principle in regard to every sort of trust, especially in reference to property committed to the trust of another by reason of the inability of the owner to act for himself, that if money is to be expended in the business of the estate, he who is to expend it is not to make profit by reason of and through such expenditure.

It was said the check was sufficient when the factor is under the control of the Court, or Accountant, or both. The probability of detecting proof that a lawsuit was instituted *mala fide*, or even recklessly and rashly, is very slight indeed. If the factor is entitled to act as agent, he has the benefit of an opposite presumption in his favour. If not entitled to that presumption, then clearly he ought not to be allowed to act as agent. He will often have ample evidence apparently to show that it was a fair litigation; while, if not interested in instituting it, he would have more fully and cautiously examined that information, and reflected more on his responsibility in undertaking it on such materials. Then his statement, seemingly fair enough to counsel, easily obtains the sanction of an opinion on his case; and it will be a very rare case indeed in which such misconduct as to the institution of the action can be detected so fully as to infer the forfeiture of all charges of agency which he was entitled to conduct.

Now, against the risks of such influence on the mind of their own officers the Court are bound to guard. They can guard. And it seems to me quite inconsistent on the part of the Court recognising and giving effect to the hazard of such temptations in other cases, to permit unnecessarily their own officers to act in matters presenting such temptations.

It is of no avail to point to the instance of a factor of the name of Flowerdew, in which the impropriety of litigation was detected. The evidence happened to be flagrant. But the materials can seldom be obtained for such review of the grounds of a law-suit and proof of *mala fides*. But that case was imperfectly known, when the credit of such a result was given to the Accountant, who hardly ever can arrive at any such conclusion, at least without a contradictor; and the misfortune is, that the estate is in most instances unrepresented and unprotected, except by the factor. Flowerdew was dead. And on the application of some of the beneficiaries, another factor had been appointed, one of whose most important duties was to bring Flowerdew to account, and examine into his whole management. Aided by the parties conversant with the proceedings, and in possession of all the materials for judging of the propriety of Flowerdew's actions, viz. all the materials which Flowerdew himself was in possession of, the new factor, in bringing his management to account, had means for detecting recklessness, and for testing honesty or common prudence, which the Accountant can never possess. It is useless, indeed, to refer to the Accountant's means of inquiry as sufficient to ascertain the propriety of actions carried on by the factor, of which failure is no fair test by which to decide the matter, especially if he has the presumption in his favour, to which he is entitled, [illegible]

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if agency by him is not only competent but fair and legitimate. And if we are t enter into such specialties, the rule will, in regard to factors who are law-agents soon altogether be frittered away. Indeed, some of the supposed specialties, o others equally good, might easily be the result of management by the factor, withou such connivance being apparent to the Accountant.

Further, when the advantages of checks and control are founded upon, I mu say it would be very strange for the Court unnecessarily to allow factors to act agents (for it is wholly unnecessary), in the hope that they may be under suc control as may check the abuse to which such a permission may be turned. Th wiser, the more consistent, and the safer rule is, to withhold the permission whic requires such control.

But then it was contended that there were a variety of specialties in the prese cases, particularly in the case of the factor *loco tutoris*, which entitled him here act as agent, assuming the general rule to be against him. I cannot admit that t rule ought to admit of any exceptions, and I will venture to say that, in nine o of ten cases, the same or similar pleas might be urged. Indeed, some are equal applicable to any case, and are no specialties at all.

First, it was said that the factor *loco tutoris* was not suggested by either part but named (as is often done) by the Court, because in the prospect of the vario matters, in reference to the interests of the heir, to be considered by the factor, t selection of a professional person was desirable. And so it was;—but in order have the unbiassed judgment of such a person. Now, to turn round on the Cou and to urge (independently of anything being said by the Court at the time the selection), You must have intended me to carry on law-suits (a very differe matter from the consideration of the true interests of the pupil), is really absur If the factor, being, as I understand, suggested by the Court, undertook the offi in the view of such agency, the reply is clear,—he should have stated that as h condition of acceptance. And would the Court have accepted that condition? I truth, the fact of selection by the Court strikes me in the very opposite ligh Being asked by the Court to undertake the office, he was more especially bou to be guided by the strictest rules applicable to the office, and to abstain fr agency.

The second specialty alleged involves just the same point. The judgment o professional person was the ground of selection for the office; the agency was the object of the selection.

The third and fourth alleged specialties involve, in truth, the general point, a may be referred to, so far as correct in point of fact, in every case in which a la agent is appointed factor, and law business occurs. But they deserve special noti for the same circumstances are often urged—I may say always—in support exceptions to the individual case.

It is said that the accounts are strictly confined to proper legal business, a contain no charges for any business which belongs to the office of factor. Of cou not; for that would be objected to as double payment. Now, that is exactly w will occur in every case of the kind; and on that account, if the factor is allow to conduct legal business, which is over and above all the proper business of factory, for which a certain commission is the proper, and only the proper, remune tion,—on that account it is that I cannot comprehend why he should not receive full commission, merely because he also has (legitimately, *ex hypothesi*) done sc other business, which some one else must have done. That the charges as ag do not include any of the business and trouble belonging to the factory, and which he gets his commission, seems to be an observation without point or p tinency to the question, whether it is allowable for the factor to conduct t business, and does not advance one step the argument in support of the clair do so.

Then it is farther urged that great expense is saved by not employing anot agent but himself or his own firm. So far as any point occurs as to a "firm," observation really can make no difference. If the factor does not personally c duct the business, but hands it over to a partner, then that partner must be structed as much as a separate agent, and the factor will share in the profit with the alleged advantage to the estate. If it is said—which, however, cannot leg mately be said—that the partner may be, as it were, partner in the factory, t

that is most objectionable. The factor, and he alone, ought, by the duty attached to his selection, to perform all the duties which give him knowledge of the material interests of his pupil or of the estate. And that point is the same in principle with the question decided many years ago from Glasgow (Bannantine, I think, was the name of the case), where it was held to be illegal for a trustee on a sequestrated estate to be in a private partnership, as to the performance of the duties of such trustee. Whether the profits of factories and similar employments are shared between partners, is a separate matter, which involves no point in which the estate is interested. But the duty and trust of the office must be performed by the person selected for that office. I lay aside then the point as to the factor being a partner of a "firm," which seems to me to be utterly immaterial. But I should wish to have it explained—for in none of these discussions has it been explained—what is the saving to the estate, and wherein it consists. It is not stated that the full amount of legal charges are not included in the agency accounts for law business. All is charged that could be charged, I understand, exactly as if another agent had been employed. At least it is not stated that there is any abatement or different rates charged.

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There are some cases—such as this as to the pupil Reid's interests,—in which it may be said that the function of the agent could not well be discharged without full knowledge of the matters in which he was intrusted, and that another agent would have to examine and make himself acquainted with the facts. Let it be so; but that would be a very trifling charge if, as in this instance, the factor had done his duty as factor fully and faithfully, as we see that Mr Douglas did, and made himself well acquainted with all the circumstances on which he was to exercise his own judgment in considering whether lawsuits were expedient or necessary. And in proportion to the responsibility and trouble of that duty (here apparently an important duty for the factor to perform) ought to be the amount of the commission—which ought to include an ample consideration for the benefit to the pupil of the deliberate but unbiassed judgment of an experienced professional man in examining carefully the interests of the pupil in such matters as occurred here, and the prospects of success in instituting any actions at the instance of the pupil. I should say that is a case for a very high commission, and it was for the benefit of such judgment, I have no doubt, that the factor, in Reid's case, was selected as a cautious, prudent, and experienced professional person, trained up under admirable direction.

But after all, saving of some expense—if there was any in an exceptional case—is not to be put in the balance for a moment with the great importance of the general principle already stated—adherence to which is the true way to save expense, and study the real interests of the estate—viz., that if there must be expenditure in law business, or in other ways, he who is to sanction the expenditure, shall not have the profit that will be made in the course of such expenditure.

But really, after all, what was the business done in the cases before us? As [illegible] as can occur, and in which the instruction and employment of a separate agent could here imply no extra expense: In the case of the factor *loco tutoris*, the business done was—1. In consulting Counsel; 2. In making application to the Court for authority to carry out a settlement which the factor, in that character, had to adjust; and, 3, In carrying out that settlement and making up titles; And in the case of the *curator bonis*, the law business was to obtain special powers to some land—of the propriety of doing which, the curator was to inform himself, obtain reports, and form his own judgment, and to put that in writing. Any stranger could then, at once, draw out the petition. Hence, in these cases before us, it is in vain to say that there was any advantage or saving in not employing a separate agent.

While noticing these facts, to show how easily such a representation is made, I [illegible] to dispose of the cases wholly on a general principle.

In a case where the work has been done, one listens more favourably to the claim here made. But that is a very false view on which to proceed.

What, I ask, is the necessity for allowing a factor, who happens to be a law agent, to do that which no other factor is allowed to do? The Court are now asked on to sanction for law agents a departure from a most sacred and salutary rule. What reason, then, is there for such a course? None has been stated. The

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question has principally been argued in favour of the work actually done. But really, after the views stated in the House of Lords, and in this Court, the warning was sufficient.

As to outlay, I think the fees to counsel ought to be allowed. I think a factor, in such a case as that of Reid—indeed in any case—may himself consult counsel—and I have often seen it done. And though the statement for counsel ought not to be charged at the rates of agency fees, yet that should be fully taken into account in fixing the amount of the factor's commission. But other outlay is a very questionable matter indeed. A great part of such supposed outlay, say clerk's copying, &c., goes to support the general expenses of an agent's office. The whole charges for copyings are not paid over to that amount to clerks, but go to contribute to certain salaries, generally to clerks, and similar expenses, and from such charges the agent has thereby personal profit.

As to the case of the *curator bonis*, I apprehend that several of the largest items in the account fall within the proper duties of the office of curator, and in reference to which the commission should be fixed; such as making out his report to the Accountant of Court—communications as to the property with the sub-factor and the reporters. Except the fees to the accountant's office, I doubt whether any part of the account of Mackenzie and Fraser out of Court ought to enter any agent's account at all. But by putting it into the hands of an agent, an account of L.14, 8s. 2d. is made up, of which L.9, 9s. 6d. is admitted to be agent's profit. A large portion should have fallen within the trouble for which commission was adjusted. And one sees how easily numerous expenses may be run up, if the characters of factor and agent may be played off, and turned as easily as "the convertible coats" which are turned out and in with every appearance of sunshine or a shower. The account thus framed states,—The Accountant directed us to do so and so. No. The direction is necessarily to the curator, not to the agent.

However, the main object of this consultation is to lay down a general rule—as to which I trust there can be no doubt. If the Court say we will pass these accounts, but lay down a different rule as to the future, they must be prepared to pass all others in town and country for agency prior to this date.

I have adverted to the specialty urged by the factor *loco tutoris* to S. Reid, that he understood that he was selected in order to conduct the agency. If the First Division think that such a notion was in any way sanctioned by them by his selection, then his case is special, and no general question at all occurs. But as, with this point urged to them, the argument was ordered, I suppose such was not their understanding. If, however, it is, then on that most special ground, I would leave that case to the First Division, and would concur in sanctioning the agency on this occasion, if the Judges think that what passed gave the party ground to believe it was so intended.

It is quite plain that the accountant did not finally pass the first account in the factor's case. I concur with him in thinking that the accountant would not be precluded from revising a prior account (there being no exoneration), if objections afterwards occurred to him. And the Court cannot be precluded when they have pronounced no exoneration, but are asked to sanction such account.

Lord Murray.—I concur in the opinion of the Lord Justice-Clerk in these cases; but as he has stated very fully, both the authorities and the principles on which the general rule ought to be applied to factors *loco tutoris* and to *curator bonis*, it is unnecessary for me to add anything to his opinion.

Lord Handyside.—I concur in the opinion of the Lord Justice-Clerk, the grounds and reasons of which appear to me irresistible both on general principle and in their application to the particular cases before us. I had felt inclined to endeavour to find some foundation on which to support the allowance of the charges for agency in these cases, believing the understanding of law-agents appointed factors to have been, that their office did not disentitle them to charge for such business as is found here. But by the judgment of the House of Lords in the case of Rennie v. Morrison, April 1849, factors were thereafter at least instructed, from the highest quarter, of the incompatibility of the office with their acting as law-agents in the business of the estate. The judgment in that case appears to have a direct bearing on the present cases, and to have promulgated a rule in accordance, as I think, with sound principle, although in its first application it may have borne hard on the party who was then brought under it.

Lord Ardmillan.—I am unable to perceive any satisfactory ground of distinction between the claim for professional agency by a judicial factor and a similar claim by a trustee. Even irrespective of the use of the words "their trust," in the Act of Sederunt 15th February 1730, to which expression indeed I am not disposed to attach much weight, it appears to me that the office of judicial factor is eminently of a fiduciary character. The duties, the responsibilities, the relations, which are inherent in the office, are in all respects those of a trustee. The protection of the estate, its safe and economical management, and the independent and disinterested exercise of his own judgment in its administration, are intrusted to the factor by the Court; and the appointment of an officer of Court for the discharge of such duties implies the constitution of a trust.

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It is true that the office of judicial factor is not gratuitous. But the remuneration which the factor receives is for the discharge of the proper duties of the office, and is by a "commission" to be fixed by the Accountant of Court. I do not think that either the Act of Sederunt of 1730, or the Pupils Protection Act, contemplates a charge, by a factor, for professional agency, in addition to his commission. If no charge whatever for trouble is contemplated in the case of a trustee, no charge beyond the commission is contemplated in the case of a judicial factor.

It is also true that the proceedings of the factor are subject to the review of the Accountant of Court. This circumstance might indeed mitigate the evils, or diminish the hazard, of allowing such charges; but it does not affect the question of principle. If the judicial factor is, in truth and substance, a trustee, whose unbiassed and disinterested judgment in the administration of the estate is intended to be secured by his appointment, then the circumstance that his factorial administration is subject to review by the accountant, cannot affect the fiduciary character, nor the fiduciary responsibilities imposed on him. If he can act and charge as a professional agent in the management of the trust, then his judgment in engaging in law business cannot be said to be absolutely free from bias or self-interest. He may be—as I am satisfied the gentlemen who are now before the Court are—so conscientious and upright, as to be above the temptation to create expense. But, to the hazard of individual character, the law cannot leave the interest of pupils and others under incapacity. The protection of these interests is the province and the duty of the Court; and the matter must be disposed of on principle, and by the adoption and enforcement of a general rule.

If, therefore, there is no ground for distinguishing, in regard to agency, between a judicial factor and a trustee, it only remains to be considered whether a trustee, acting as agent, could make this claim for professional remuneration. On that point I agree with the Lord Justice-Clerk in opinion, that the claim could not be sustained. The point is settled; the decisions place it beyond a doubt; and I think that the rule now recognised as to trustees is sound and salutary, as well as authoritative, and that it ought to be applied to the case of judicial factors.

The professional services rendered by the factors, in both the cases before us, appear to have been judiciously performed, and beneficial to the estate. I understand that their commission remains to be fixed, or is still open for adjustment; and I am inclined to suggest that, under all the circumstances, a more than usually liberal commission should, in these cases, be allowed, as there may have been some misapprehension on the subject, and as the estates have been put to no cost which could have been avoided, and have obtained from the factors the beneficial services which could not have been dispensed with, and which must otherwise have been remunerated.

I am therefore of opinion, on the whole matter, that the factors' charges for professional agency ought not to be allowed, but that they are entitled to reimbursement of their outlay, and to such commission as may be fixed by the Accountant and sanctioned by the Court, as just and suitable under all the circumstances. I have not explained at any length the reasons which have led me to this conclusion, as I concur generally with the Lord Justice-Clerk.

Lords Cowan & Mackenzie.—We are of opinion that the charges for agency contained in the accounts of the curators on these estates ought to be disallowed; and to that effect we concur in the opinion of the Lord Justice-Clerk, and in his exposition of the principles which ought to be followed in the decision of this question.

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Although it is unnecessary for us to add anything to the views stated by his Lordship, we think it right to observe that the decision in the House of Lords in the case of Rennie, although heard *ex parte*, is entitled to the greatest weight, because the general principles which, as we think, ought to rule this case, were there held to be applicable in circumstances precisely similar.

The nature of the question raised in the case of Rennie will be best understood from the report of the decision in this Court, Morison v. Rennie, 14th July 1847, and in the House of Lords, 29th April 1849. The *curator bonis*, Mr Morison, was a Solicitor of the supreme Court, and the question was, whether agency and other business done by him could be competently charged against the estate? the ground of objection being, that a curator was in this respect in the same situatio with a trustee. The judgment of this Court was reversed; and it was declare that Mr Morison was not entitled to state against the estate any professiona charges, or charges for loss of time, or other profits or emoluments, save and excep his commission; but that he was entitled to all such charges and expenses actuall paid by him out of pocket as should appear to have been properly incurred an paid, and not to be covered by his commission.

The Lord Chancellor, in moving the judgment of the House of Lords, stated, th the rule which ought to be acted on was, "that a party in a fiduciary charact should not be allowed to charge anything in the way of profit;" and, apparentl with special reference to the office of curator being remunerative, he added,—"Su a party cannot make his office one of profit beyond the profit which is incident that office." And Lord Campbell, in stating his concurrence in the judgment, p his opinion upon the same general grounds.

We think this decision proceeded on sound principles of law, and not on a specialty. It appears to us to have given authoritative sanction, as applicable to cases of this kind, to a general rule, which, in our opinion, is well founded, a ought not to be departed from on any of the special grounds which were urged the argument.

Lord Benholme.—I concur in the opinion of the Lord Justice-Clerk.

I shall only add, that, like my brethren Lords Cowan and Mackenzie, I inclined to place great reliance on the judgment of the House of Lords in the c of Morison v. Rennie, 29th April 1849.

Lord Neaves. — I consider it to be fixed as a general rule, that a trustee enter into no contract or arrangement by which he is to derive profit out of trust-estate, except where this is either allowed by the trust-appointment, or aut ised or sanctioned by the beneficiaries.

I am of opinion, however, that this principle cannot be applied to cases like present, except under considerable modification. A *curator bonis*, or judicial fa is so far a trustee, that he holds and acts for behoof of others. But, properly sp ing, he is a manager,—the servant or officer of the Court, and the funds or e under his charge may be said to be *in manibus curiæ*. The Court, as the supr tribunal of the country, exercises a jurisdiction for protecting the interests of ab or incapable persons who have no other protector, and in doing so, has long in use to appoint a factor or curator to take the necessary management. As only means of securing the services of proper persons, the Court has thoug their duty to allow a remuneration to the parties so appointed,—a condition un in ordinary trusts, but recommended by the plainest expediency in such case reference to the interests of those concerned.

A judicial factor, therefore, under which name I here include a *curator bon* not in the situation of a *mortis causa* trustee, acting under the mandate of a dec person who cannot be consulted or appealed to. The Court is his constituent Court can deal with his actings in any way that they may think best for the b of the person or estate whose interest is involved; and the Court will orde to be remunerated according to what may appear to be just and reasonable i circumstances.

In this situation, I conceive, that while the factor cannot by his own act the benefit of any employment of a different nature on himself or on a copa with which he is concerned, it is within the power of the Court, in reviewi proceedings, to judge whether anything so done has been done beneficiall whether it ought or ought not to be remunerated. The office not being gra

but remunerative, I think the party holding it has a competent and reasonable claim to be paid for everything that he does, or assists in doing, in a manner beneficial to the estate. The remuneration of the factor is frequently by a commission on intromissions, but this may sometimes be insufficient and inappropriate. It is spoken of in the Act of Sederunt of 1730 as a salary, but it may and I think ought to vary from year to year, according to the trouble occasioned. I do not think it incompetent in any case where such a course is thought safe, to pay the factor specially by a *quantum meruit* on special work done.

Though it may sometimes be natural and advantageous, no favour is due to the position of factors employing themselves or their partnerships in conducting professional business for the factory, and I think that wherever there is any doubt of the work so done having been necessary or useful, no remuneration for it ought to be given. But, on the other hand, there may be cases where the matter is clear the other way, as where the factor or his firm act as agents in defending the estate against a serious and formidable action, and are successful in doing so, but cannot recover expenses from the other party; or where they consult counsel and effect an advantageous compromise or transaction as to some doubtful question. Even as to making up titles, while there may be cases to be regarded with great jealousy, I do not see that the same feeling is always necessary, as where an ordinary title is made up in the usual way for a necessary object. In all such cases, considering it to be within the power of the Court to remunerate the officer for whatever he does, I see no reason why a sufficient allowance should not be made to him for his whole trouble, including the professional part of it; or why the estate under his care should be saved from a fair charge which was otherwise inevitable. Nor do I think it of any importance whether the business charges are sustained specifically as such, or whether their amount is taken as a reasonable measure of the additional allowance thus to be given, provided always, 1st, that no allowance be made except for useful or proper services; 2d, that no allowance be made in a double form, for the same work or trouble; 3d, that the total allowance to the factor in every shape, shall not exceed a fair and reasonable remuneration for his total services.

The delicacy and difficulty which may attend such enquiries, may make it expedient for the Court to pass an Act of Sederunt, defining and fixing the duty of their officer in this respect, but until that be done, I see no legal incompetency in awarding to the factor the fair worth of his services; and I think it would be unreasonable to refuse to do so, wherever it can be safely done.

In the individual cases now before the Court, I see no ground for doubting that the business done by the curators was proper and beneficial; and I see neither any legal nor any equitable grounds for a fair remuneration being withheld.

I do not consider that the views now stated, are at variance with the decision of the House of Lords in the case of Robertson v. Morrison, 6 Bell's Appeals, p. 422. That case was decided *ex parte*, and the peculiarity of it was, that the curator, as alleged and assumed, had made specific charges for the very work for which his commission was payable; the Lord Chancellor observing, "Here is an office under which a party has charged five per cent. for the trouble belonging to the office of *curator bonorum*. He has, besides that, brought in a bill, in which he seems to charge for everything he has done, in addition to the five per cent. referable to his office. But if he is paid for every act he does, what is the five per cent. for?"

On the whole, I am of opinion, that, in these cases, a remit of new should be made to the Accountant of Court, to consider the trouble had, and professional work done, and to report what sum ought reasonably in each year to be allowed to the factor and curator respectively for their whole services of every kind.

At advising,—

Lord President.—In the case of Lord Gray, the opinions of the consulted Judges have all been given in, and they are nearly unanimous on the subject. They are of opinion that Mr Dundas, being in the position of a trustee, cannot be allowed to make any profit by the agency in connection with the trust-estate; and the principles on which that judgment rested are very forcibly put in the opinion of the Lord Justice-Clerk, in which the other Judges consulted all concurred, with the exception of Lord Neaves. Lord Neaves appears to distinguish between the expenses incurred in obtaining the Act of Parliament, and the expenses

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incurred by the trustees in the proper character of trustees. I cannot see anything in this distinction on which I can rest any part of my judgment. I think the principle on which the other Judges proceeded is a sound one, and I see no reason to differ from them. It is suggested that the accounts should be audited again by the Auditor of Court, as he is the proper officer to separate the sums which are out of pocket from the other charges, although the account has been already audited by Mr Baillie, whose capacity for doing these things is unquestionable. As the other Judges have concurred in that view also, I think we must take that course; and we must remit to the Auditor to separate that part of the account which consists of money paid out of pocket from the ordinary professional charges, allowing only that part which is paid out of pocket.

The next case is the case of Mr Douglas, who stands in the same position as Mr Mackenzie. We cannot deal with Mr Mackenzie's case in point of form, as his representatives are not here; but, in regard to Mr Douglas, his case is not in all respects the same as that of Mr Dundas. It involves this distinction, that, holding his office under an appointment of Court, he discharges his duty, not as a trustee, but as a party entitled to remuneration. It appears that Mr Douglas has in that capacity performed all the duties of a factor *loco tutoris*, and also, over and above these, the duties of an agent. The Judges are nearly unanimous in the opinion that the principle extends and applies to that case also, and that Mr Douglas can receive no part of his account as law agent, which is not for money paid out of pocket. That opinion has been given by a majority of the Judges, and must, of course, rule this case. I must, however, confess, for myself, that I think in these opinions the same weight has not been given which I should be disposed to give to a principle which their Lordships do not seem to have much adverted to,—I mean the principle that a party who has not undertaken a gratuitous office in any sense at all, has here done certain services, the benefit of which accresces to the estate, and yet he is to receive no recompense for them. I confess I think that has been a little lost sight of. To what extent the principle should go—what amount of these services we should allow if we entered into an investigation of the kind, is a matter we need not go into, since a majority of the Judges have decided that it is not to be gone into. I think there is a good deal in the principle which should have been given effect to; but it is only my individual opinion, and the opinion of a majority of the Judges is the other way. Therefore we can only allow costs out of pocket.

There is a minor point connected with this, as to which I am not sure that we have any very decided opinion,—that is, what constitutes costs out of pocket? One part of a writer's business consists in paying clerks who copy certain papers. Now I see an opinion is given, in which a majority of the Judges concur, that when clerks are paid by a salary it is impossible to separate that from the fees and profi of the agent. But this is not the general rule. I should think, if the copying i actually paid for, it is the same as employing a law stationer. I would rather hea that matter reported on.

Lord Ivory.—The case being decided by the opinion of the majority of th consulted Judges, I was inclined to submit by simply expressing my concurrence i the opinion of the minority; but, as it is thought right that we should all expre our views in regard to an important matter in practice, and in reference to th precise principle on which the practice is to rest, I shall endeavour to throw ou the ideas which have occurred to me, and which I have arrived at with great hesi tation, in reference to the questions that are raised in this case.

I do not disagree, generally speaking, with the doctrine on which the opinio of the majority of the Judges rests; and if the case is to be decided on mer authority, I am not very sure whether, since English authorities have been importe into our law on the matter, the opinion of the majority of the Judges could hav been different from what it is, whatever their individual opinions may have bee But, when I look to the principle laid down in the different cases, I am at a loss t extract what that principle is, and how far it goes. I rather think there has bee some looseness in the analysis of the different points of liability, and too much mi ing up of characters entirely distinct, where the liability rests on principles alt gether different.

There have been at various times various elements of principle laid down

dealing with cases of this sort. In the first place, it has been said that the office of a trustee is one which implies the performance of the duty gratuitously. In the second place, that a trustee is not to make profit of his office, or place himself in a situation in which he could make a profit. In the third place, that there is a conflict between interest and duty, and that he is not to place himself in a position extraneous to the trust, which shall place him in conflict with his duty as trustee; and lastly, it is said that the right principle after all is, that a trustee is to be held as a party who stands in a situation where it is his primary duty to act as a check on his co-trustees, and to keep himself in such a situation as to be a check on everybody connected with the trust; and, therefore, that the duty of an agent is incompatible with the office of a trustee, inasmuch as the party holding both offices cannot be an impartial check on himself.

Considering all these things, and looking to the varying aspects of the principle, I am afraid that even yet it has not come to any proper legal consistency, and that there is a good deal of looseness in regard to these matters both in England and here. I see that in the case of Broughton, Vice-Chancellor Stuart, while he yields to the authority of cases, strongly expresses himself to the effect that that case had introduced something of novelty in English practice,—so much so, that if the cases were to be opened up, he thinks a different conclusion might be come to.

The Lord Chancellor, in reviewing that judgment, does not go on that view, but reasserts the principle, and fortifies it with additional authority. Now, looking to the various elements thus introduced into the case, I do not think that the principle derived from the character of a trustee, in strictness, goes farther than this, that the person who is trustee shall not charge for that which he does *qua* trustee. He undertakes an office, which is by the law gratuitous; and if in the performance of the proper duties of a trustee he gives labour or skill, he is not to make a charge for that *qua* trustee. That will afford us very little assistance, however, when you come to engraft on the proper office of trustee the separate and proper office of agent, for it is the precise doctrine of all the cases, that what he does as agent is not done as trustee, but as something extraneous—a new function, which may be incompatible with the office of trustee, or which may not, but which certainly would not come within the category of non-liability, because he had undertaken to do the proper duties of the office of trustee gratuitously.

Then it is said that a trustee shall not make profit of his office, or take advantage of it, to place himself in a situation to make profit; that is to say, not to make profit at the expense of the estate. It is much the same thing as the principle in our law in regard to a tutor, that he cannot be *auctor in rem suam*. If, in the execution of his office of trustee, a gain results, that gain results not to himself, but to the estate. What is the proper meaning of making profit? The estate is entitled to the benefit of his gratuitous exertions, and he cannot keep any profit to himself.

But certainly we come nearer to the precision of principle, when we say that a trustee shall not place himself in a situation where his duty and interest may be brought in conflict,—that it is his duty to be a check on all others who deal with the trust, and to keep himself in a situation that he may call them to account,—that he is not to place himself in a situation which creates a direct or indirect incompatibility between himself and his co-trustees. And it is there that the principle is sound. But what is that? and how is it to be applied to his undertaking a separate office, for which he will be accountable? It is said that he shall not employ himself as agent, nor by his own act place himself in a position in which he shall be at once the party accountable, and the party accounted to. But that is a rule of practice rather than otherwise. It is an equitable interposition to protect the estate under his charge. It is not an absolute irregularity, nor a thing which makes it absolutely incompatible for him to discharge the duties of trustee. It is a rule founded on expediency, that having undertaken, in addition to the duties of trustee, the separate duties of the office of an agent, he shall not be allowed to make his charges against the estate in that character. Now, the principle there does not apply merely to the case of an agent or solicitor. There are cases in the books where the labour of an accountant has been objected to. But if there be anything at all in it, it must embrace the case of every man holding the office of trustee who does anything for the benefit of the estate at all. If he

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be a clothier, and gives his pupil a coat—or if he be a grocer or baker, and furnishes his pupil with bread and maintenance—or if the tutor does anything for the pupil in the way of his trade or calling, he shall have everything which can be resolved into elements of profit on his trade struck off his account under the above principle, because he has thereby placed himself in the situation of not sufficiently keeping himself pure. He is, in short, both debtor and creditor in the account.

That being so, it is very necessary that we should see exactly how far that principle is to go. Is it to be made the ground—as it seems to be, according to the decision now to be pronounced—for an unbending absolute rule to be applied exactly in all cases, favourable and unfavourable, where the management has been beneficial, as well as where it has been prejudicial? Is the same procrustian rule to be applied in every case? I see no equity in that, nor common sense. There may be great expediency from the difficulty of getting at what is the sound sense and justice of the case in particular instances; but it seems to me to come under the expression, "applying the broad axe" to the thing which shall operate most prejudicially in some cases, although in others it may operate beneficially. I do not say that the rule is bad in itself, but only that, when it is made so absolute and unbending, it is capable of being made an engine of considerable injustice; and, therefore, while I would not give any countenance to a party putting himself in a situation in which he would destroy his impartiality, or his ability to fulfil with purity the duties of his office, still, when it can be shown that what he has done has been well done, and at half the expense any extraneous party would have required, and when it is admitted that his management has been *in rem versam* of the estate under his charge, I would have all the presumptions against him, and I would throw the *onus* of proving the beneficial management upon his shoulders; but when that is the admitted situation of matters, or where it is proved to be so, is it justice to say in such circumstances that the factor's charges are not to be paid? There is no equity in that. It is only a way of getting rid of a difficult case; but, if we can get at a more equitable rule, it is right not to shut the door against it, and thus possibly to do injustice to other cases, and not to force on a pupil, who cannot speak for himself, a plea which his honour would shrink from, if he had been major, dealing in an accounting with this party. Therefore, it seems to me that there has been a straining of this principle till it has been reduced to a technical rule, which destroys all the elements of soundness in it. You obtain all that is desirable when you hold all the presumptions against the factor. But that being so, it is not equitable that you shall exclude him from the fair reward of his labour. It is a common saying that, if you demand equity on one side, you must give it on the other. Now, if the estate is saved by the acting of the trustee, is it equity that he should not get any compensation, when perhaps he has saved the estate at his own expense? If there be, confessedly, beneficial management, which has resulted from great labour and loss of time, shall you establish a rule which shall exclude proper compensation to the party who has not only acted most honourably but most liberally, in favour of his ward? But the rule, if it is to be laid down at all, must be carried that length. Where is it to stop? It is said that you may give costs out of pocket. Why? If the trustee has been *vergens ad inopiam*, or has been doing what the law cannot recognise to be right; if he has gone recklessly into a lawsuit which results in loss to the estate, why shall the estate bear the result of his acting, and not only his own costs out of pocket, but the costs of the adverse party? If a trustee places himself in a situation which is incompatible with doing his duty, then he is guilty of breach of trust, and is in the position of paying his expenses out of pocket. He must take the consequences of his own *culpa*.

Looking to the cases, they are open to very great observation. I do not yet see the footing on which they rest, especially the English authorities. Lord Cottenham says, in the case of Craddock, in speaking of the plea offered, that the party was one of several co-trustees, and he defended them in a suit—that he should not be allowed any part of his account at all, because, even if that were the rule, it would have a mischievous tendency; and the only effect of it would be, that a solicitor would appear for his co-trustees in another person's name, and as not appearing for himself. In other words, the rule is such, that it can easily be evaded. Look to one of the cases before us. I am made judicial factor, and cannot do that business of the estate; but you, another agent, shall allow me to

use your name, and in that way we shall play into each other's hands. I think that the rule will lead to greater danger than that we are avoiding. No honourable man would go into such a plot; but what is to prevent less scrupulous men doing so?

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Then Lord Cranworth says in the case of Broughton: "The rule appears not to be generally understood, though it is better understood now than it was formerly, for one continually sees provisions introduced into wills and settlements enabling a solicitor acting as trustee to receive remuneration, just as if he had not been appointed trustee, and it is very often convenient to make this arrangement." Why is it very convenient? It is convenient on the assumption that a man placed in that situation cannot perform his duty. Is this not another evasion forced upon its plain meaning because the Courts have run riot in applying the principle?

In the case of Lincoln v. Windsor, Vice-Chancellor Turner says there is a marked difference between costs incurred in a suit and costs incurred in the administration of an estate without the intervention of the Court. Where a trustee is brought into Court in a suit, he is necessarily made a party, and allowed his costs. The rule does not seem applicable to such cases, but this does not extend to cases of administration out of Court. In Court you have costs, out of Court you have not, and there you are tossed from pillar to post, and I know not where the principle is to rest. But I draw this conclusion from it, with reference especially to that class of cases now before us, and, in particular, the case of Lord Gray, where the expenses are ordered to be paid by the Act of Parliament, that you are totally out of the case where a trustee could be tempted from the path of purity, or is endeavouring to bring grist to his own mill by prosecuting a particular course. There has been nothing done but benefit to the estate, and yet somebody must suffer for it. That is a proposition very difficult to maintain; and that the party getting the benefit of the act of the trustee shall have all the benefit of the act, and yet shall take it for nothing—I cannot conceive there is any equity or sound principle in that. It goes beyond the punishment that a party acting indiscreetly should suffer. The rule should be, that whatever is *in rem versum* or beneficial to the estate, and whatever the ward adopts as good for himself, he shall pay for—he shall not adopt the benefit, and refuse the expense. Here a party gets an Act of Parliament through the exertions of a factor, and on the footing that the factor's expenses should be paid. But when they come to be taxed, he says, "No, you shall only get costs out of pocket." I could understand that, if he said this was so ill done I will have nothing to do with it. Take back your Act of Parliament. But there must be something loose in what leads to a conclusion such as I have arrived at, and still more if it happens under an application in which the factor comes to the Court for special power to make up titles to the estate to meet exigencies, and not doing it on his own responsibility. I do not see any right in saying that the party in such a case shall be excluded from all remuneration. It is very true, it may be said that the factor gets his powers from the Court, but in no other way where he is a professional man than where he is not a professional man. There is a great deal in that. The two things are separate. There are many things that a curator, who is a professional man, may do, which does not fall within his duties as curator. His cautioner, for example, would not be answerable for the acts he performs in the extraneous office, and that is, perhaps, a very good element for testing the separation between the two characters. But, however marked the separation of the two characters, all that is excluded when you say that the office of a trustee is gratuitous, and that you are not to make a profit of it, because the profit is made not as trustee, but as agent. Therefore, the question comes to be, what is necessary to check abuse? But, if there is no abuse to check, why should the Court force it upon the party. Is it a penalty, or is it a punishment? If the latter, I can understand it where a solicitor is deprived of his office for entering into a *pactum de quota litis*. But where it is merely a rule of practice for the sake of expediency, in order to get out of a difficulty—a set of [illegible] machinery—I am not for creating a machinery which shall equally act against everybody favourably and unfavourably, whether there is abuse or [illegible]; or whether the abuse be large or small.

Applying this principle to the case in hand, I can draw no great distinction

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between the one and the other—between the office of gratuitous trustee or the offic of a judicial factor. The distinction rests not on principle, but on degree. Ther is the same temptation to walk aside from the fair function of the office of trust but in the office of curatory there are two conditional elements of great importance In the first place, the office of judicial factor is not a gratuitous office, and, there fore, that element does not apply to it. It is to be paid for, and by commission and I make that remark in order to suggest a remedy. There is a remark by Lor Cranworth of some importance, that it is not to be paid for beyond that which i incident to the office—that is to say, you are to make the separation, and confin yourself to the proper functions of the trust. Now, it has been proposed in som of the opinions, that as one factor does a great deal more duty than another facto would do, if he is not to be paid either by his account or upon the principle *de i rem verso*, he should at all events have a larger commission. I should be ver willing to agree to that, but I do not see how it is to be got at, for the commissio is one thing, and the duties of the agent another, and these latter are not part o the statutory functions under the Act of Sederunt, or the Pupils Act, or thi private Act of Lord Gray; and, therefore, I think we should be rather gettin quit by a side wind of a principle which cannot be got rid of in any other way if we were to pay him in the shape of a commission for what he has lost in legitimate course. I am for paying him in the direct way. If he is entitled t recompense for what he does, give it him, but do not indirectly recompense hin for what he is not legitimately entitled to do.

Upon the whole, therefore, if the case had been open, I should have been fo giving expenses to all of those parties, in so far as they could shew, or it was no disputed, that their functions had been performed for the benefit of the estate. should presume against the party holding the office so far, that I would throw upo him the onus of proving that his duties had been beneficial to the estate; but if h could do so, then I should not deprive him of the benefit due to his labours.

Lord Curriehill.—In the first case of Lord Gray, the question is, whether o not the business accounts of a trustee acting as agent to the trust are to b allowed? The objection is founded on the principles that such a trust is a gra tuitous office, and that it would be dangerous to allow a trustee to employ himse as his agent, as the interests of a principal and agent in such cases are adverse t to each other in some respects. These are salutary principles, and must be allowe full operation in so far as they do not create injustice. But they may come int collision with another principle, *nemo locupletandus est detrimento alterius*, an injustice would often be done by a beneficiary getting gratuitously from the trust professional service, which he would have been bound to pay for, if it had bee done by any other person. And if the question had been open for our consider tion, I should have entered on it with the view of resolving it in a manner whic would give due effect to all these principles. The principle to which I have la adverted should have been allowed to modify the operation of the others. B after giving full attention to the judgments pronounced, not in England only, f I should not have held myself much bound by them, but in this Court and t House of Lords sitting on Scotch cases, I think that the question is no long open, and therefore I feel myself compelled, whatever views speculatively I m have, to assent to your Lordship's view,—that we cannot sustain the accoun except to the extent of money paid out of pocket.

The other class of cases relates to judicial factors appointed by this Cou These are not exactly in the same predicament, and the rules upon which the oth case is founded are not altogether applicable to them. Judicial factors are appoint by this Court. They are officers of this Court, subject to its control, and direct responsible to it. In this respect their position is different from that of a trust under a marriage-contract or testamentary settlement, or tutors or curators. T Court is their constituent. They cannot retain any part of the curatorial funds f any purpose whatever without the authority of the Court, nor apply any part the funds in remuneration of their own services, without obtaining that authorit Further, they are not gratuitous functionaries, but are appointed on the footi that they are to be fairly remunerated for their office. Thus they are more li trustees appointed to manage a sequestrated estate, or a trust created voluntar for behoof of creditors. The Act of Sederunt of 1730 assumes that they are

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be remunerated, for it says that they are to lose a half year's *salary* in the event of negligence. So also the Pupils Protection Act recognises their right to commission, according to "*what is just in each particular case;*" and accordingly, in practice they have always been remunerated by being allowed a commission. I do not care what is the name of that remuneration. The principle of the appointment is that they are not gratuitous officers, but to be fully and amply remunerated for what they do. They are to be paid on the principle *quantum meruit*. There is no fixed rate, and in practice it varies. I have seen the commission as low as one-half or one-fourth per cent, but in general it is five per cent, or even more. But remuneration is the condition of the factor's appointment, and therefore he is not in the predicament of a trustee under a *mortis causa* settlement.

If a demand were made by a judicial factor, not as in the present case, for the payment of a business account, on the footing that he stands to his constituent in the relation of client and agent—but that the Court, in fixing his commission, should inquire how far the estate had been benefitted by his professional labours, and fix his remuneration on the principle of *quantum meruit*, and of allowing it to be commensurate with the benefit derived by the estate from his services—I would hold myself, even under the decisions as they stand, quite open to consider that question. I do not think it is foreclosed by any decision. But even a judicial factor is not entitled just to say, I was the agent, I employed myself to do this business, and I must be paid without inquiry, whether or not it was injudicious to perform it.

I think that the decisions would bar a claim made on that footing. Yet if made on the footing which I have stated, I think it may be fairly maintained that it is open for the Court to go into such an inquiry; and, so far as the estate may be benefitted, to fix the remuneration of the trustee for his professional trouble. On that footing the estate would not be liable to those risks which the Courts in England and Scotland have contemplated might arise from a trustee being placed in the position of being both client and agent. For there is this check, that the Court is the constituent of the trustee, and he cannot get payment until he satisfies the Court that what he demands is well founded, and *in rem versam* of the estate. I cannot see why such a claim can be refused, upon the principle that the factor may be acting improperly, or contrary to his duty; because, if that were the case, he would not be entitled *even to his outlays*. But as he is held to be legally entitled to his outlays in his actings as agent for the benefit of the estate, such acting is not held to be illegal on his part. And therefore I do not see why his own services, as well as his own disbursements, should not fall under the operation of the principle, that he is to be remunerated for what he does beneficially for the estate.

There is no decision adverse to the principle which I hold myself open to consider when the case shall be presented to us. But on the footing on which the accounts are here presented to us, I cannot sustain them. I concur with the conclusion to which your Lordship has arrived; but I make these remarks in order to save myself when the question of remuneration in the shape of commission shall be presented to us.

Lord Deas being a party (as administrator for his children) to the case of Douglas, did not judge in any of the cases, which were heard together.

D. F. Inglis.—There has been here considerable expense incurred for printing for the purpose of settling a general principle, and it would be a hard thing that the agent who loses his account should also lose the expense of the discussion. We only wish our actual outlay.

Lord President.—No doubt this case was taken to settle other cases; but would the estate bear that? I think that expenses must follow the usual rule.

The Court pronounced the following interlocutors:—

"In respect of the opinions of the majority of the Judges, Find that Mr Dundas is not entitled to his business charges, except to the extent of the costs out of pocket, and remit," &c.

"In respect of the opinions of the majority of the Judges, Find that Mr

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Douglas is not entitled to his business charges, except to the extent of the costs out of pocket."

In the case of Baillie's curatory, Mr Mackenzie having recently died, and his representatives not having appeared, no interlocutor was pronounced.

DUNDAS & WILSON, C.S.—C. DOUGLAS & A. G. MONILAWS, W.S.—MACKENZIE & FRASER, W.S.—Agents.

No. 2.

SCOTTISH MISSIONARY SOCIETY, Reclaimers.—*More.*
BELL AND OTHERS, Respondents—*Marshall.*

Reclaiming note—Competency.

1ST DIVISION. Ld. Ardmillan. C.

A reclaiming note, in a process of multiplepoinding, having been moved, *Marshall* objected to its competency, that part of the record, authenticated by the Lord Ordinary, had not been appended, as required by the statute and Act of Sederunt, in so far as the claim and pleas of one of the claimants had not been printed; but it being admitted that this claim had no bearing upon the question brought before the Court by the reclaiming note, the Court repelled the objection, and ordered the note to be put to the roll.

JOSEPH LIDDLE, S.S.C.—BELL & M'LEAN, W.S.—HAY & PRINGLE, W.S.—Agents

No. 3.

JOHN MITCHELL, Pursuer and Respondent.—*Penney—Pattison.*
JOHN WILLIAM MAJOR, Defender and Advocator.—*D. F. Inglis—Monro.*

Bankruptcy—Sale—Evidence—Hypothec—Mora.—The trustee on a bankrupt estate, in accordance with a resolution of the creditors, agreed to sell, to a third party, furniture belonging to the bankrupt, at a valuation price; and with consent of two of the commissioners, he executed an assignation. The purchaser paid part of the price, but did not receive delivery of the assignation. In the interim the trustee was removed, but retained possession of the assignation, and having thereafter obtained payment from the purchaser of the balance of the price, he delivered the assignation. The purchaser allowed the bankrupt to remain in possession of the furniture. The new trustee repudiated the sale,—*Held*, reversing the judgment of the Sheriffs of Lanarkshire, (1), that the purchaser having paid the price in *bona fide*, the assignation, although not delivered till after the trustee was removed, was good evidence of the contract of sale, and having been allowed by the creditors to remain in the hands of the ex-trustee, it made him creditor of the purchaser, and therefore that the sale was completed, and the new trustee could not repudiate it; (2), that the purchaser was entitled to retain from the price sufficient to clear the furniture of the landlord's hypothec for rent, for which the furniture was liable.

1ST DIVISION.

Lord Neaves. L.

Sheriff-court of Lanarkshire.

WILLIAM DODDS, trustee on the sequestrated estate of Gibb and Company, in Glasgow, sold Gibb's furniture to John Mitchell for the *cumulo* price of L.61, conform to assignation by Dodds as trustee, with consent of two of the commissioners on the sequestrated estate. Dodds was afterwards removed from the office of trustee, and John W. Major was appointed in his stead. The new trustee, Major, repudiated the sale, and gave instructions for again selling the effects by public roup. Mitchell thereupon presented a petition to the Sheriff of Lanarkshire for interdict against the proposed proceedings. He produced the assignation, which was dated 15th and 16th June 1855, and also a receipt for the Martinmas rent of the house occupied by the bankrupt, and for which the furniture was liable, he having allowed the bankrupt the use of the furniture.

Major, the new trustee, denied that there was any *bona fide* sale of the furniture, and averred that the price stated by Mitchell was never paid to the former trustee Dodds, or at least was paid after Dodds had been removed from the office, or when Mitchell knew that a meeting had been called for the purpose of removing him.

The Sheriff allowed a proof. It appeared that L.61 was the valuation

price agreed upon between Dodds, the former trustee, and the purchaser Mitchell, but that before Mitchell had made any payment, the creditors of the bankrupt called a meeting upon the usual Gazette notice for the removal of Dodds from his office, and that a meeting was held on 2d July, at which the creditors did remove the trustee, and in which removal he acquiesced. Mitchell, the purchaser, deponed, that on the day after the valuation, or very soon thereafter, he met Dodds by appointment, and gave him a letter, saying that he would take the furniture, and become bound for the money. That he then considered the furniture was his—that he first paid a sum of L.20 to account, after which he got delivery of the assignation, and then a few days afterwards, a sum of L.28, being the balance of the price, except L.13, which he retained, in order to pay the rent. That the first notice he saw as to Dodd's removal was in the "Trades' Protection Circular," which he received on 13th July—that he had heard nothing of the matter previously, and that it was not before, but after he had made the second payment to Dodds, that he saw that notice.

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Major.

The Sheriff-substitute (Steele) pronounced an interlocutor, containing various findings in fact, *inter alia*, that the defender threatened to sell the household furniture *de plano*, without offering the pursuer any relief or indemnification whatever: And finding, in point of law, "that the original agreement was not legally deliverable, except *unico contextu* with payment of the price to a party legally qualified and authorised to receive the same: That, notwithstanding the pursuer's *bona fides* in the transactions, he was bound to see that he did at the time, and from time to time, transact with a party legally so qualified, the more especially as the creditors appear to have prosecuted, with all due diligence, the measures for the removal of the trustee and the election of his successor, and not to have been aware of the late trustee's intention to uplift the money from the pursuer: Finds, for that reason, and also because the pursuer never attained the natural possession of the furniture, that he is not entitled in law to vindicate his alleged title to possess under the assignment obtained by him *a non habente potestatem*, to the effect of either absolutely preventing the present trustee from now taking possession thereof, or even of requiring him, before taking such possession, to refund the two payments made to his predecessor after he was deprived of his office: Finds, however, in regard to the rent paid by the pursuer, after the present defender had been appointed, and the demand for which formed a *nexus* upon the furniture available against all concerned, that the defender ought, in any view, to have offered to indemnify the pursuer against that payment, which was evidently *in rem versam* of the bankrupt estate: Therefore, to that extent, and until the defender shall repay to the pursuer the foresaid sum of L.13, and interest, interdicts, prohibits, and discharges, in terms of the prayer of the petition, and, *quoad ultra*, assoilzies the defender from the conclusions for interdict: Finds the defender liable in expenses, in respect of his having refused all indemnification, but subject to modification in respect of the pursuer's having failed upon certain of the main conclusions of his action; allows an account," &c.

On appeal the Sheriff-principal adhered, "with this variation, that the expenses found due to the pursuer are hereby modified to one-half of the costs incurred by him."

Both parties advocated.

For Mitchell it was pleaded;—That there was no plea that he was not in possession of the furniture, nor statement of fact to that effect. The interlocutor of the Sheriff, therefore, did not go far enough. Judgment ought to be pronounced in terms of the original petition, with expenses.

For Major, the trustee, it was pleaded;—That the interlocutor of the Sheriff went too far. There had been no *mora* on the part of the creditors in appointing a new trustee, and on the facts as narrated in the interlocutor

No. 1.

Nov. 12, 1856.
Scottish Missionary Society v. Bell.

Mitchell v. Major.

Douglas is not entitled to his business charges, except to the extent of the costs out of pocket."

In the case of Baillie's curatory, Mr Mackenzie having recently died, and his representatives not having appeared, no interlocutor was pronounced.

DUNDAS & WILSON, C.S.—C. DOUGLAS & A. G. MONILAWS, W.S.—MACKENZIE & FRASER, W.S.—Agents.

No. 2.

SCOTTISH MISSIONARY SOCIETY, Reclaimers.—*More.*
BELL AND OTHERS, Respondents—*Marshall.*

Reclaiming note—Competency.

1ST DIVISION.
Ld. Ardmillan.
C.

A reclaiming note, in a process of multiplepoinding, having been moved, *Marshall* objected to its competency, that part of the record, authenticated by the Lord Ordinary, had not been appended, as required by the statute and Act of Sederunt, in so far as the claim and pleas of one of the claimants had not been printed; but it being admitted that this claim had no bearing upon the question brought before the Court by the reclaiming note, the Court repelled the objection, and ordered the note to be put to the roll.

JOSEPH LIDDLE, S.S.C.—BELL & M'LEAN, W.S.—HAY & PRINGLE, W.S.—Agents

No. 3.

JOHN MITCHELL, Pursuer and Respondent.—*Penney—Pattison.*
JOHN WILLIAM MAJOR, Defender and Advocator.—*D. F. Inglis—Monro.*

Bankruptcy—Sale—Evidence—Hypothec—Mora.—The trustee on a bankrupt estate, in accordance with a resolution of the creditors, agreed to sell, to a third party, furniture belonging to the bankrupt, at a valuation price; and with consent of two of the commissioners, he executed an assignation. The purchaser paid part of the price, but did not receive delivery of the assignation. In the interim the trustee was removed, but retained possession of the assignation, and having thereafter obtained payment from the purchaser of the balance of the price, he delivered the assignation. The purchaser allowed the bankrupt to remain in possession of the furniture. The new trustee repudiated the sale,—*Held*, reversing the judgment of the Sheriffs of Lanarkshire, (1), that the purchaser having paid the price in *bona fide*, the assignation, although not delivered till after the trustee was removed, was good evidence of the contract of sale, and having been allowed by the creditors to remain in the hands of the ex-trustee, it made him creditor of the purchaser, and therefore that the sale was completed, and the new trustee could not repudiate it; (2), that the purchaser was entitled to retain from the price sufficient to clear the furniture of the landlord's hypothec for rent, for which the furniture was liable.

1ST DIVISION.
Lord Neaves.
L.
Sheriff-court of Lanarkshire.

WILLIAM DODDS, trustee on the sequestrated estate of Gibb and Company in Glasgow, sold Gibb's furniture to John Mitchell for the *cumulo* price of L.61, conform to assignation by Dodds as trustee, with consent of two of the commissioners on the sequestrated estate. Dodds was afterwards removed from the office of trustee, and John W. Major was appointed in his stead. The new trustee, Major, repudiated the sale, and gave instructions for again selling the effects by public roup. Mitchell thereupon presented a petition to the Sheriff of Lanarkshire for interdict against the proposed proceedings. He produced the assignation, which was dated 15th and 16th June 185[illegible] and also a receipt for the Martinmas rent of the house occupied by the bankrupt, and for which the furniture was liable, he having allowed the bankrupt the use of the furniture.

Major, the new trustee, denied that there was any *bona fide* sale of the furniture, and averred that the price stated by Mitchell was never paid to the former trustee Dodds, or at least was paid after Dodds had been removed from the office, or when Mitchell knew that a meeting had been called for the purpose of removing him.

The Sheriff allowed a proof. It appeared that L.61 was the valuation

price agreed upon between Dodds, the former trustee, and the purchaser Mitchell, but that before Mitchell had made any payment, the creditors of the bankrupt called a meeting upon the usual Gazette notice for the removal of Dodds from his office, and that a meeting was held on 2d July, at which the creditors did remove the trustee, and in which removal he acquiesced. Mitchell, the purchaser, deponed, that on the day after the valuation, or very soon thereafter, he met Dodds by appointment, and gave him a letter, saying that he would take the furniture, and become bound for the money. That he then considered the furniture was his—that he first paid a sum of L.20 to account, after which he got delivery of the assignation, and then a few days afterwards, a sum of L.28, being the balance of the price, except L.13, which he retained, in order to pay the rent. That the first notice he saw as to Dodd's removal was in the "Trades' Protection Circular," which he received on 13th July—that he had heard nothing of the matter previously, and that it was not before, but after he had made the second payment to Dodds, that he saw that notice.

The Sheriff-substitute (Steele) pronounced an interlocutor, containing various findings in fact, *inter alia*, that the defender threatened to sell the household furniture *de plano*, without offering the pursuer any relief or indemnification whatever: And finding, in point of law, "that the original agreement was not legally deliverable, except *unico contextu* with payment of the price to a party legally qualified and authorised to receive the same: That, notwithstanding the pursuer's *bona fides* in the transactions, he was bound to see that he did at the time, and from time to time, transact with a party legally so qualified, the more especially as the creditors appear to have prosecuted, with all due diligence, the measures for the removal of the trustee and the election of his successor, and not to have been aware of the late trustee's intention to uplift the money from the pursuer: Finds, for that reason, and also because the pursuer never attained the natural possession of the furniture, that he is not entitled in law to vindicate his alleged title to possess under the assignment obtained by him *a non habente potestatem*, to the effect of either absolutely preventing the present trustee from now taking possession thereof, or even of requiring him, before taking such possession, to refund the two payments made to his predecessor after he was deprived of his office: Finds, however, in regard to the rent paid by the pursuer, after the present defender had been appointed, and the demand for which formed a *nexus* upon the furniture available against all concerned, that the defender ought, in any view, to have offered to indemnify the pursuer against that payment, which was evidently *in rem versam* of the bankrupt estate: Therefore, to that extent, and until the defender shall repay to the pursuer the foresaid sum of L.13, and interest, interdicts, prohibits, and discharges, in terms of the prayer of the petition, and, *quoad ultra*, assoilzies the defender from the conclusions for interdict: Finds the defender liable in expenses, in respect of his having refused all indemnification, but subject to modification in respect of the pursuer's having failed upon certain of the main conclusions of his action; allows an account," &c.

On appeal the Sheriff-principal adhered, "with this variation, that the expenses found due to the pursuer are hereby modified to one-half of the costs incurred by him."

Both parties advocated.

For Mitchell it was pleaded;—That there was no plea that he was not in possession of the furniture, nor statement of fact to that effect. The interlocutor of the Sheriff, therefore, did not go far enough. Judgment ought to be pronounced in terms of the original petition, with expenses.

For Major, the trustee, it was pleaded;—That the interlocutor of the Sheriff went too far. There had been no *mora* on the part of the creditors in appointing a new trustee, and on the facts as narrated in the interlocutor

No. 3. itself, interdict ought to have been refused, while the judgment on the point of expenses was equally erroneous.

Nov. 12, 1856. Mitchell v. Major.

Senior counsel were not called in.

Lord Ivory.—It is not necessary to hear farther. This is a question between seller and purchaser. There is here no competition for the real right of property. The question is one where a completed contract of sale raises all the rights in the parties which are necessary to solve the question. A meeting of creditors authorised this sale at a valuation, under the authority of the then trustee Dodds. There is an assignation executed on the 15th and 16th June with consent of the commissioners carrying out the sale previously entered into. It is true the assignation was not then delivered. But it is evidence of the contract of sale, and of the right of the purchaser to have delivery on his payment of the price. The question comes to be, whether the price has been paid. Now, if there had been no change of trustee, it is perfectly clear that the receipt given by Dodds would have been a good one, and delivery of the assignation would have compensated for the want of the price. Dodds was removed, but it is clear that there is soundness in the finding of fact, that the payment made by Mitchell to Dodds was in perfect good faith. No doubt at that time there had been an advertisement calling for the removal of Dodds, the trustee, and there was an actual removal of the trustee by the creditors before the payment of the price, and, if known to Mitchell, that would have put him in *mala fide* to pay to Dodds. But why did the creditors allow this document to remain in his hands, if they did not intend that it should remain with him? Mitchell is without blame. But the creditors cannot be said to be free from blame, for they left in the hands of Dodds, who was no longer trustee, a document which made him creditor of Mitchell, and they must take the consequence.

There only remains the matter of L.13, retained by Mitchell for the rent. Now, it appears from the date of the assignation, that the bankrupt had remained in possession of the house, and that the furniture bad been in it subsequent to the term of Whitsunday. Liability to the landlord was therefore incurred, and attached to the furniture in the shape of hypothec. No purchaser would have paid the price before getting quit of the landlord's claim. That seems to me to be the whole case. It is needless to go into the question, whether there was delivery to one party or another. The obligation is sufficient, and the creditors must bear the loss of their own negligence. Therefore, I think we should advocate the cause in both advocations, and pronounce judgment in favour of Mitchell, with full expenses.

Lord Curriehill.—I entirely concur. I would only remark, that I think this assignation is an article of legal evidence. It certainly would have been competent evidence if it had been delivered. The objection taken is, that although dated 15th June, it was not delivered. But I think it was effectual without delivery; for this reason, that it appears from the evidence that there had been a previous contract of sale, and the seller was bound to deliver the assignation in implement of that contract; and one of the cases stated in Erskine, in which a deed is effectual without delivery, is that where the granter is under an anterior obligation to grant it. Therefore, I hold that it is an important part of the evidence in the case. And there being a contract of sale, the seller is not entitled to lay hands on the articles and sell them a second time, even if the price had not been paid. His right in that case would be only a right of retention. He cannot sell without judicial authority. So that, although no part of the price had been paid here, I would have been of opinion that the interdict should be granted.

Lord Deas. — This is a somewhat suspicious transaction. But suspicion is not proof. The creditors allege that Mitchell knew the meeting was called for Dodds' removal, before he paid any part of the price. But they lead no proof, except by adducing Mitchell himself, who denies all such knowledge. I take the transaction, therefore, as a *bona fide* one; and the whole question then comes to be, which party was most to blame for the payment being made to the wrong person? I think the creditors were most to blame. They had authorised the trustee, Dodds, and the commissioners, to sell by private bargain, and the commissioners, as representing the creditors, sign the assignation and entrust it to Dodds; thus giving him the power to deliver the assignation, and get payment of the price, which he did. The creditors empower the commissioners to act for

them, and for any rashness on the part of the Commissioners, whereby Mitchell, the purchaser, was misled, the creditors must be responsible. Actual delivery of the furniture by getting it into his own possession, might have been material or conclusive for Dodds; but it does not follow that his *jus ad rem* is not sufficient without such delivery in a question with the creditors, the sellers, acting through those they had empowered to represent them.

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The LORD PRESIDENT concurred.

THE COURT pronounced the following interlocutor:—" Having heard counsel for the parties in this advocation, and in the counter advocation Major v. Mitchell, conjoins the said two advocations, advocate the cause, and recall the interlocutor submitted to review: Find it proved, in point of fact, 1st, That early in June 1855, there was a concluded agreement between John Mitchell in the Court below, and William Dodds, the trustee on the sequestrated estates of T. B. Gibb and Company, and as having full authority to that effect from the creditors and commissioners for the purchase and sale of the household furniture belonging to and then in the possession of William Gibb, one of the bankrupts, at the price of L.61, 18s. 6d., which agreement was subsequently embodied and set forth in a deed of assignation executed by the said William Dodds, as trustee foresaid, and by the said commissioners, of dates the 15th and 16th June: 2d, That under and in respect of this agreement, two payments to account of the price were made by the said John Mitchell to the said William Dodds, viz., one of L.20 on the 5th July 1855, and the other of L.28 a few days thereafter; that a third sum of L.13, which was at first retained by the said John Mitchell in respect of the half year's rent due for the bankrupt's house for the Martinmas following, and for which the said furniture stood subject to the landlord's hypothec, was afterwards (7th December 1855) paid by the said John Mitchell to the landlord, in satisfaction and extinction of the said half year's rent: 3d, That although, at the respective dates of the said two payments to William Dodds, it now appears that the said William Dodds had been removed by the creditors from his office of trustee, yet no notice or interpretation to that effect was either at or prior to said payments made by the creditors to the said John Mitchell; and, on the contrary, the said William Dodds was still ostensibly accredited as trustee in the matter of the said sale, having been left by the creditors in possession of the documents connected with the sale, and especially of the foresaid deed of assignation executed by authority of the creditors, and with concurrence of the commissioners, in favour of the said John Mitchell; and the said assignation was accordingly, upon occasion of the foresaid second payment, delivered by the said William Dodds, still holding the ostensible character of trustee, to the said John Mitchell, as in implement and execution of the sale: 4th, That the payments of L.20 and L.28 made to the said William Dodds by the said John Mitchell as aforesaid, were made by the said John Mitchell in the *bona fide* belief that the said William Dodds did still actually hold the office of trustee, and as such was entitled to represent and act for the creditors, and that the said John Mitchell was in utter ignorance either that the said William Dodds had been removed from his said office, or even that any steps had been taken by the creditors with that view: Find, in these circumstances, in point of law, that in respect of the *bona fides* of the said John Mitchell, induced as it was by the proceedings of the creditors themselves, the two payments made by him to the said William Dodds, are to be held as having been made to one duly entitled to represent the creditors and the bankrupt estate, and consequently are, in this question, to

No. 3. — Nov. 12, 1856. M'Kellar.

be imputed *pro tanto* in satisfaction and extinction of the price of the furniture; that as to the remaining L.13 (being within a few shillings of the balance of said price), the said John Mitchell was entitled at first to retain the same in security and relief as against the landlord's claims, and afterwards to pay the same to the landlord in satisfaction of his hypothec, and in discharge of the rent, for which the creditors would otherwise have been liable; and generally, that in the whole circumstances, the creditors and their new trustee, the advocator, John William Major (respondent in the Court below), were not entitled to dispose, by a second sale or otherwise, of the household furniture in dispute, and that the said John Mitchell was entitled to seek protection by interdict against any such threatened or attempted proceeding: Therefore, interdict, prohibit, and discharge, as craved, and decern: Find the said John Mitchell entitled to expenses of process, both in this Court and in the Court below: Allows an account thereof to be given in, and remit the same, when lodged, to the Auditor of Court to tax and report."

FERGUSON & STUART, W.S.—A. K. MONSON, S.S.C.—Agents.

No. 4. ARCHIBALD M'KELLAR AND OTHERS, Petitioners.—*Fraser.*

Process—Partibus—Roll of Defenders—After decree had been extracted, authority granted to amend extract.—The pursuers of a declaratory adjudication obtained decree. The extract adopted the words of the *partibus* and roll, which bore to be "against John Ker, residing," &c., but omitted to state the *character* in which he was called, viz., as "eldest son and heir of the deceased John Ker," &c. Authority granted to the extractor to insert in the extract the words omitted in the *partibus* and roll, and to the deputy-keeper of the records to make the corresponding addition to the record copy; but *held* that it was unnecessary to amend the *partibus*.

Nov. 12, 1856. — 1st Division. Ld Mackenzie. L.

THE pursuers, as trustees of a friendly society or lodge in Greenock, raised an action of declaratory adjudication against John Kerr, residing in Linkinvalley Mills, Birmingham county, Pennsylvania, in the United States of America, eldest son and heir of the deceased John Kerr, merchant in Greenock, and the Officers of State for Her Majesty's interest, as *ultima hæres* of former office-bearers of the society, the object of the action being to complete a title in the persons of the pursuers to certain heritable property in Greenock, the title to which had been taken to the deceased John Kerr, and the other office-bearers named, for behoof of the society. The pursuers obtained decree in terms of the conclusions of their action, which decree they extracted.

The extract bore, adopting the words of the *partibus*, that decree was pronounced against John Kerr, residing at Linkinvalley Mills, Birmingham county, Pennsylvania, in the United States of America, and Her Majesty's Officers of State for Scotland, as representing Her Majesty as *ultima hæres* of Josiah Ritchie, shoemaker, Greenock, and Archibald Munn, cooper there, wardens, and John Graham, coppersmith there, treasurer of the said lodge Greenock Mountstewart Kilwinning, all now deceased, defenders. And the extract also bore that the heritable right to the subjects in question, "which stood in the persons of the said deceased John Kerr, Josiah Ritchie," &c. now pertains and belongs to the pursuers.

The extract did not in this way shew the connection of John Kerr, defender, with John Kerr, deceased, his father, master of the lodge, though it was only in the character of his father's heir that he was called as a party; and the father was, in the extract, styled "the said deceased John Kerr," without being previously there named.

The pursuers now presented this petition, stating that as purchasers or others dealing with the pursuers might object to the extract on the ground mentioned, they considered it advisable to obtain authority to amend the *partibus* and roll, and to the extractor of Court, and deputy-keeper of the records, to amend the extract and the record to the effect of adding after the words "John Kerr, residing at Linkinvalley Mills, Birmingham county, Pennsylvania, United States of America," the following words, "eldest son and heir of the deceased John Kerr, merchant in Greenock, master of the said lodge, Greenock Mountstewart Kilwinning;" and they referred as authority for this application to cases cited, 2 Shand's Practice, p. 1017, sect. 5.

On the report of the Lord Ordinary, the Court appointed the extractor to report on the matter involved in the petition.

The extractor reported as follows:—"In 1788 the friendly society or lodge of free masons, mentioned in the petition, acquired some real property in Greenock, and took the conveyance thereto in the names of John Kerr, merchant in Greenock, then master, and of certain others, being the wardens and treasurer for the time being of the society, 'for behoof of themselves and their successors in office.' Infeftment immediately followed in favour of these parties, and the title was afterwards confirmed by the superiors. The property has ever since been possessed and enjoyed by the society.

"The whole of the office-bearers mentioned in the disposition of 1788 having died without executing a special conveyance to 'their successors in office,' the petitioners, with the view of completing a feudal title to the subjects, and following the course adopted 'in all cases of the like nature' (Dalziel, 11th March 1756), raised, in January 1850, a summons of declarator-adjudication, calling 'as parties to this action,'—1st, The heir of line of John Kerr, the master; and 2dly, Her Majesty's Officers of State, for Her Majesty's interest, as *ultima hæres* of the wardens and treasurer of 1788. This form of summons, requiring no preliminary charges to enter heir, contains, of course, no personal conclusions against parties so called. They are cited, as in the case of Renunciation to be heir, merely as nominal defenders. The property is not to be adjudged *from* them, but 'adjudged, decerned, and declared to pertain and belong to the pursuers.'

"Defences having been lodged by a party, compearer, who alleged, that as a member of the society, his name ought to have been conjoined with those of the pursuers, a supplementary summons was raised in June 1850, and conjoined with the previous action, to have it found and declared that the pursuers were the sole and only members of the society. The defence was ultimately repelled, with expenses, and decree pronounced in terms of the conclusions of the conjoined actions.

"In the course of the narratives of both summonses, which are in the old form, and therefore do not contain the names and designations of pursuers and defenders *in gremio*, as now required (13 & 14 Vict., c. 36), the heir of John Kerr of 1788 is described as 'John Kerr, residing at Linkinvalley Mills, Birmingham county, Pennsylvania, in the United States of America, eldest son and heir of the said deceased John Kerr.'

"The messenger's executions on both summonses bear that he cited 'John Kerr, residing' (&c., as above), 'son and heir of the deceased John Kerr, merchant in Greenock,' and that he had served copies of the summonses upon him in these terms.

"It also appears from the printed record of Edictal Citations, of 16th January and 14th June 1850, that he was cited by the same designation and character of 'son and heir.'

"It is an old established rule that a *partibus* or roll, where one is necessary, shall contain the 'names and designations' of all the defenders—A. S., 10th December 1687; (Watson's New Form of Process, 2d Edition, pp.

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53–4; Beveridge, p. 245; and A. S., 11th July 1828, sect. 27.) It is from the principal *partibus* or roll, thus prepared and lodged in process, and authenticated by the clerk's office mark, that every decree against defenders is entered in the minute-book of Court. And, in like manner, it is to it that the extractor must look when preparing an extract of the decree. Neither the extractor nor the clerks of Court are entitled to make, or permit any alteration or correction whatever to be made, on a *partibus* or roll after the cause has been called, and more especially after decree has been pronounced.—(Shand's Practice, p. 268, and cases there referred to.)

"Where the name of a defender happens, by some oversight, to be omitted in preparing the roll, and the omission is discovered before extract, the cause is called *de novo* on a separate partibus as against that defender, and a new decerniture is taken against him, and put up in the minute-book. Slight changes or additions are also sometimes made in framing a *partibus* before the cause is called; as, where a defender may have changed his residence between the date of raising and executing the action and the date of calling in Court, thus:—'Against A. B., formerly residing in Edinburgh, now in Glasgow.' There are frequent instances of summonses being raised and executed against two or more defenders, conjunctly and severally, but which, when brought into Court, are purposely called against, perhaps, only one, without being accompanied by a minute of restriction. In those cases, when decree is pronounced 'in terms of the conclusions of the libel,' extract goes out against one only, as if he had been the only defender cited; and the proceedings are thereupon sent to the record as in an exhausted cause. There are many other specialties in connection with a partibus or roll, all tending to shew its binding and important character when decree is pronounced, and extract is required. As another instance, besides those mentioned, it is not unusual for practitioners, when preparing the roll of defenders, and notes for the printed calling list (where the names and designations of defenders, as given in the summons, appear to be unnecessarily long and minute), to abridge these, but so as to make no material difference, or leave any room for doubt or question, that the party called to enter appearance is the party described in the summons, and who has been cited by the messenger.

"The several rolls prepared in these conjoined actions give the name and designation of John Ker, junior, as contained in the summonses, viz.:—'John Ker, residing at Linkinvalley Mills, Birmingham county, Pennsylvania, United States of America.' The link of relationship, or his character of son and heir of John Kerr, the master of the mason lodge, does not seem to have been considered necessary. At all events, it is omitted (as is sometimes done in other cases) in the roll; and of course his character of son and heir could not appear in the printed minute-book, nor in what is called the *instance and against* in the commencement of the extract, as descriptive of pursuers and defenders.

"It was not for the extractor, even if he had noticed the abridgment, to presume to give any opinion on the subject, or to say whether he thought this omission important or unimportant. All he could do in the discharge of his ministerial duty was to have recourse to the rolls as his sole and only guide; and in reading these rolls as they stand, with the name and residence of John Kerr Junior so fully expressed, it would have been difficult for him to have said that there was not apparently a full 'name and designation,' as required by the acts of sederunt, sufficiently identifying John Kerr. Had there been a palpable error in the roll, the extractor might, and probably would, have pointed it out to the agent for his consideration. But he considers himself in no way responsible for an erroneous partibus or roll in any case. Before it reaches him it has passed through the Court unobjected to, and he can neither alter, abridge, nor amplify it, nor allow it to be interfered

with. He is humbly of opinion, therefore, that the extract in this case could not have been prepared in any other terms than those in which it was issued, without a very serious and dangerous deviation from the known and only safe course of practice.

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Paterson v. Baxter.

"With regard to the statements contained in the petition, the reporter has examined and compared these with the proceedings in the conjoined actions, and finds them to be accurately stated, And, in conclusion, he has humbly and respectfully to state, that if the Court shall be of opinion, 1st, that the character of relationship of John Kerr to the Master of the Mason Lodge in 1788 ought to have appeared in the extract, in order to enable the petitioners to obtain charters of adjudication from the superiors, and complete a good and valid feudal title; and 2d, that there are precedents of a similar nature, or circumstances in this particular case sufficient to induce their Lordships to grant the prayer of the petition, there can be no difficulty in complying with the authority as craved."

The Court, on 19th July, pronounced the following interlocutor:—"Having resumed consideration of this petition, with the report of the extractor, Find it unnecessary to amend the partibus, and *quoad ultra* grant the prayer of the petition, and decern."

Hugh Lyon, S.S.C.—Agent.

No. 5.

William Paterson, Pursuer.—*Penney—W. H. Thomson.*
Janet Govan or Baxter or Spouse, Defenders.—*Macfarlane.*

Process—Diligence—When it may be competently granted.—In an action on a bill the general defence was, that in the circumstances the bill could not be taken as conclusive of the sum claimed. The record was closed, and put to the debate roll to consider the mode of proof; and a general diligence was, before debate, then craved by the defenders for the recovery of various documents, many of them not the writ of the pursuer;—*Held* (altering judgment of Lord Ordinary), that before hearing parties such a diligence ought not to be granted; without prejudice, however, to a diligence to recover writ of the pursuer, to instruct his non-onerosity as holder of the bill, or to a more general diligence, if, after hearing parties, the Lord Ordinary should see cause to grant it.

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1st Division.
Ld. Ardmillan.
C.

Paterson, a writer in Dumbarton, brought this action against Mrs Baxter and her husband for payment of a bill for L.190, payable one day after date, and alleged to have been granted by Mrs Baxter before her marriage. The defenders denied that Mrs Baxter was due the pursuer so large a sum; and they explained that she had signed a blank bill stamp for the purpose of retiring a previous bill of smaller amount granted by her for certain advances made on her behoof by the pursuer.

On 24th June 1856, the Lord Ordinary pronounced an interlocutor closing the record, and appointing parties to debate. Thereafter the defenders moved for a diligence to recover the books of the late Mr John Paterson (the pursuer's father) and of William Paterson, the pursuer, and all letters addressed by them to the defenders, all bills and vouchers for sums paid by them on behalf of the defenders, and the disposition and deed of settlement of the late Mr John Paterson, with the states of his affairs relating in any manner to sums due to him by the defenders, and the inventory and confirmation of his estate, and the relative lists of debts due to him.

On [illegible] June the Lord Ordinary pronounced an interlocutor, "under reserving all the pleas of the parties, granting diligence against havers for the recovery of the documents contained in the specification."

Against this interlocutor the pursuer reclaimed, and pleaded;—That the [illegible] to a plea of non-onerosity, and therefore the presumption of [illegible] only be overcome by the writ or oath of the pursuer.

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—
Nov. 13, 1856.
Paterson v.
Baxter.

The mode of proof was therefore limited; but the specification of writs here called for by the defenders included many writs not the writ of the pursuer and which it was therefore incompetent to call for. Farther, a diligence t recover writs was incompetent at this stage of the process. The record wa closed, and the case put to the debate roll for the purpose of considering th mode of proof; but until that was determined, it was premature to grant diligence against havers.

The defenders pleaded;—That it must be shown that this diligence wa incompetent at any stage, otherwise it was now competent. It not unfre quently happened, that when after a long delay a case came out for debat there was farther delay by a diligence, then for the first time asked, whic might have been asked, and would have been granted at an earlier stag Some of the documents were unquestionably the writ of the pursuer. Th others had a material bearing on the case, and should it come to be dete mined by the pursuer's oath, might competently be shown to him in ord to refresh his memory. He had therefore no interest to object.

Lord President.—This diligence, being asked for after closing the record, in a much more favourable position than if asked before closing the record. Agai it is asked in a case belonging to a particular class, where the proof is of a limited kin This is an action on a bill, and the pleas of the pursuer are founded on his privileg as holder of the bill. The first defence is, "In the circumstances stated, the bill ca not be taken as conclusive in support of the sum now claimed;" and then follow number of defences which proceed on that assumption. It is in that state of ma ters that the defenders ask for diligence to recover various documents, some them said to be the writ of the pursuer.

It appears to me that this is not the stage at which this diligence can be grante The first thing to be considered is, what is the mode of proof applicable to t case. If the party was to ask for diligence to recover the writs of the pursuer instruct the non-onerosity of the bill, that would be a different thing. But that not asked, and therefore the course which I would suggest to yonr Lordships to recall in *hoc statu* the interlocutor of the Lord Ordinary; but, at sametime, n to prevent him, before answer, granting such diligence as I have referred to.

Lord Ivory.—I am disposed to accede to that course, as perhaps most in co sistence with strict pleading. But I must say that I am not satisfied with a pa who stands on his privilege so abstractly as here. There seems to be enough his own explanation to go into a question of accounting. He himself also calls production of this bill, and, if both parties wish it to be produced, it is awkw to refuse a diligence to that effect. But all that is open. I think that the erro the Lord Ordinary is in granting this diligence, as of right, to the party demand it, before hearing parties on the pleas of the case; but if that interlocutor recalled in *hoc stau*, without otherwise fettering his Lordship's hands, that will be open to him, of course, subject to the correction of the Court, and I wo reserve all expenses.

Lord Curriehill.—I concur.

Lord Deas.—This is an action on a bill. If the pursuer had stood upon his bill, said nothing as to how the value was made up, he would have been entitled to benefit of the rule of law, that non-onerosity could only be proved by his wri oath. Does he forfeit that benefit by entering into details about the value, wh were unnecessary? I am not prepared to assume that. And if this be not assum then we could only grant the diligence, as the Lord Ordinary has virtually d *before answer*. The propriety of that course comes thus to be the question. I th the more correct course would be to limit the diligence to the pursuer's writ, w would include his books; and to allow the question as to a farther diligenc stand over till the competency of a proof at large should be determined. But your Lordships seem to think the specification is not properly framed for the lim purpose I have referred to, I do not object to the total recall of the interlocut *hoc statu*.

The Court pronounced the following interlocutor:—"Recall in *statu* the Lord Ordinary's interlocutor of the 28th of June last.

remit to the Lord Ordinary to proceed with the cause, without prejudice to his Lordship's granting diligence to recover writ of the pursuer, to instruct his non-onerosity as holder of the bill sued for, or to his Lordship afterwards granting more general diligence, if upon hearing parties on the merits of the cause he sees cause to do so, and reserve all question of expenses."

No. 5. — Nov. 13, 1856. Anderson v. Wilson.

J. & J. MACANDREW, S.S.C. JOHN LEISHMAN, W.S. Agents.

JOHN ANDERSON AND OTHERS (Blaikie's Trustees), Pursuers.—*G. G. Bell —Lee.* No. 6.

WALTER AND JOHN FIDDES WILSON, Defenders.—*Penney— W. Watson.*

Sale—Price—Delivery.—A purchaser offered to take delivery of the subject at what he said was the contract price. This was refused by the seller's trustees, who claimed a price entered in the books of the seller, who had died. The purchaser then wrote, declining to take the goods at any price. In an action for implement raised on their view of the price, the trustees put in a minute, tendering delivery at the price alleged by the purchaser;—*Held* (*aff.* judgment of Lord Handyside) that the purchaser had been entitled to annul the contract.

Nov. 13, 1856. — 2D DIVISION. Ld. Handyside. I.

MR GEORGE BLAIKIE sold his clip of wool to the defenders, W. & J. Fiddes, but owing to Mr Blaikie's illness, no settlement took place during his life, and a dispute arose with his trustees, which ended in their raising this action against the purchasers. The details of the case appear from the interlocutor of the Lord Ordinary, before whom it came by advocation:—"Advocates the cause: Finds that a purchase of a clip of wool was made by the defender John Fiddes Wilson from the late Mr Blaikie, of whom the pursuers are the testamentary trustees: Finds that the terms of the bargain were not reduced to writing, and that the defenders and the pursuers differed as to the terms on which the purchase was made: Finds that the pursuers retained possession of the wool, offering delivery only on payment by the defenders of the price, according to an invoice sent by them, and the defenders refusing to take delivery, excepting on the terms on which they represented they had made the purchase: Finds that the pursuers not having acceded to the defenders' terms, they declined to take, and rejected the wool: Finds that the pursuers thereupon brought the process under advocation, in which they concluded for a certain sum as the alleged price of the wool stated to be deposited in the warehouse ready to be delivered up to the defenders on payment of the said price, interest due thereon, warehouse rent, and expenses of process: Finds that the Sheriff-substitute pronounced an interlocutor, which was acquiesced in by the pursuers, and became final, finding 'it admitted by the letter produced in process, and also by the statements in the record, that the defenders purchased the clip of wool in question from the late Mr Blaikie, and that there was thus a concluded bargain betwixt the parties to that effect; but Finds that this admission, being the only evidence of the contract, must be received with its qualifications, viz., that if the wool should fall in value, the price was to be 31s. 6d. per stone, and that the cotted fleeces were to be at half price, or half weight; and in respect parties were at issue as to the alleged fall in price, and alleged weights, before answer, allows them a proof of their respective averments, and to both parties a conjunct probation:' Finds that the pursuers did not lead any proof, but lodged a minute restricting their claim against the defenders to the price of 31s. 6d. per stone, and agreeing to accept half price for the cotted or padded fleeces: Finds that in abandoning the leading of any proof, and so restricting their claim, the pursuers accepted the terms of the bargain which were [illegible] by the defenders, and which they offered to implement: Finds that under these circumstances the pursuers failed to establish the terms of

No. 6. — Nov. 13, 1856. Anderson v. Wilson.

the bargain as averred by them upon record: Finds that having so failed, they were not warranted in having withheld delivery from the defenders, and that the defenders were entitled to refuse taking delivery on the terms required, and to reject the wool and void the purchase: Therefore, recalls the interlocutor complained of, assoilzies the defenders from the conclusions of the action, and decerns: Finds them entitled to expenses of process in the Sheriff-court, and in this Court; allows accounts thereof to be given in," &c.*

The interlocutor of the Sheriff-substitute (Craigie), pronounced after the minute of restriction, above referred to, had been lodged by the pursuers, was as follows:—"Finds that the pursuers have failed to prove that the fixed price of the wool was to be 32s. 6d. per stone, and that it is not denied, in answer to the statement in article 2 of the defender's answers to the condescendence, that there was a fall in the price of wool subsequent to the date of sale, so as to entitle the defender to the deduction of 1s. per stone: Finds that the pursuers have refused delivery, except on payment of the full price of 32s. 6d., and on other conditions, in which they were not entitled to insist, was equivalent to a refusal of delivery on the terms of the contract, and that the defender was therefore entitled, in terms of his letter of December 8, 1854, to annul the bargain altogether: Therefore, sustains the defences, and assoilzies the defender from the conclusions of the action, and finds him entitled to expenses."

The Sheriff-depute (Rutherford) recalled this interlocutor, and decerned in terms of the minute of restriction, on the grounds stated in his note,†

* "NOTE.—The Lord Ordinary regrets that he is unable to adopt the judgment of the Sheriff, for the result is unfortunate to the trustees of Mr Blaikie, whose proceedings were quite natural under the circumstances. But he conceives that the previous interlocutor of the Sheriff-substitute proceeds on a sounder view of the legal position of the parties. The short view of the case is, that the respondents found themselves unable to establish, by the necessary evidence, the terms of the bargain as represented by them, both when they withheld delivery, and subsequently under the summons raised by them. It appears to follow, that the advocators must be held to have been in the right as to the terms of the bargain, and, on the refusal of the respondents to give delivery except on their own terms, became entitled to throw up the bargain. The expenses of the action must, in the usual course, be allowed to the advocators."

† "NOTE.—It appears that the defenders purchased the wool from the deceas George Blaikie so long ago as in August 1853, the price entered in his book bein L.1, 12s. 6d. per stone. The defenders admit this, but add a stipulation that ther was to be a deduction of 1s. per stone if markets fell, and the cotted fleeces to b only half price. At the sale it was agreed that the defender was to pack the woo and return and settle the price. Accordingly, in February 1854, the defender, J. F. Wilson, packed the wool in his own sheets, and would then have settled the pri had Mr Blaikie's illness not prevented him, and it was then arranged that he wa to return for this purpose so soon as notice was given him by Blaikie. In conse quence of Blaikie's death, no settlement took place. It then became necessary tha Blaikie's trustees should arrange with the defenders to receive the wool and sett the price. Here much unnecessary delay took place on the part of the defender Letters were written to J. F. Wilson, one of the defenders, on 20th March, 19 July, and 11th August 1854 (a period of five months), which he allowed to rema unanswered. He was again written to on 17th November, to which he replies th he is ready to take and pay for the wool, but had received no invoice. In the co respondence which follows, objections are first made in Wilson's letter of 2 November to the price charged, and deduction claimed from price of 1s. per ston and cotted fleeces at half price; and on this being declined, he again writes, on 8 December, refusing to have any thing further to do with the wool. In the proce parties were allowed a proof of the terms of the bargain, when the pursuers gave the minute No. 15, proposing to allow the deductions claimed by the defenders,

which were substantially those which the pursuers urged in support of their reclaiming note against the Lord Ordinary's judgment. No. 6.

Nov. 14, 1856.

Keddie v. Gray.

LORD COWAN.—In my view, there is no substantial difference between the parties as to the price; but then the pursuers, instead of asking for inquiry, as the defenders would not take delivery at their price, raised this action, in which they have adhered to a price which they could not prove. I concur with the Lord Ordinary.

LORD JUSTICE-CLERK.—No doubt if the defenders had refused altogether to take the wool, the pursuers' position would have been different; but the pursuers had full notice that delivery would be taken on certain terms, and they write refusing these—only in the present action, for the first time, saying they agree to their terms. Had they acquiesced in the defenders' view at first, when it was made known to them, they might have been entitled to enforce implement, but it is too late now.

LORDS MURRAY and WOOD concurred.

THE COURT adhered, and found additional expenses due.

W. HORSBURGH, W.S.—JAMES SOMERVILLE, S.S.C.—Agents.

KEDDIE AND COMPANY, Pursuers.—*Maidment.* No. 7.
J. AND J. GRAY, Defenders.—*Moir.*

Process—Summons—Error in partibus.—The partibus of a summons erroneously designed the defenders, who founded on the irregularity as fatal to the action;—*Question*, whether, the defenders objecting, the partibus could competently be amended? and whether the objection could be sustained as a defence?

Nov. 14, 1856.

1st Division. Ld. Benholme.

THE Lord Ordinary verbally reported the following point:—An action had been called at the instance of Keddie and Company against J. and J. Gray. The defenders were correctly enough designed in the body of the summons, and also in the printed calling list, as "proprietors and publishers of the *North British Advertiser*," but in the partibus they were called "J. and J. Gray, proprietors and publishers of the *Edinburgh Advertiser*," a paper with which they had no concern. They pled;—"The summons has not been regularly brought into Court, and will therefore fall to be dismissed." His Lordship stated that he had been asked for authority to amend the partibus, but did not feel at liberty to grant it.

Moir, for the defenders;—There is here an unquestionably erroneous partibus. In the case of M'Donnel,[1] the party in whose favour decree had been pronounced, presented a regular petition to the Court, which was not opposed, and the Court allowed the error to be amended; but here there is no such formal application, and at the first opportunity after the calling the defenders have taken the objection. The defect cannot now be remedied.[2]

Maidment, for the pursuers, moved to be allowed to make the necessary

which the defender objects, and craves to be assoilzied. In considering the whole case, the Sheriff is of opinion that the bargain was completed with the deceased George Blaikie, and homologated by both parties when the wool was weighed and packed by the defender in his own sheets. That no invoice was necessary, as the contents of the sheets were known to the defender, and it was the duty of the defender to receive the wool from the executors of the deceased George Blaikie when applied to for that purpose, leaving only the question of the price as the proper subject of litigation. As the pursuers prosecuted for a larger sum than that admitted by the defenders, and which smaller sum they are now willing to receive, and for which they now crave decree, the Sheriff finds the defenders entitled to expenses, subject however to modification, as although they have been partially successful in their defence, their plea to be assoilzied from the conclusions of the summons has not been sustained."

[1] M'Donnel, 21st Jan. 1830, 8 S. p. 361.

[2] A. S. 10th March 1772, Shand's Practice, 268.

No. 7. — Nov. 14, 1856. Drummond and Others.

amendment. The Court had the power to grant such authority, and had been in the habit of granting it.[1]

LORD IVORY.—You have it in your own power to make this amendment. You have only to call the summons again. Do you insist upon a judgment?

Maidment.—If the Court indicate an opinion against us, we shall certainly not insist upon our motion.

LORD IVORY.—It will not be a judgment in the case, but only that the case is not properly before the Lord Ordinary. There is a case in the books, but the reference at present escapes me, where the summons having been unduly enrolled the objection was taken; and, in the meantime, various deliverances had been written as in the cause, and the result was, that all these deliverances, which had been written before the objection was taken, were held as *pro non scriptis.*[2]

LORD DEAS.—I think the parties ought to adjust this matter. I am not satisfied that this objection by the defenders to a defect in their own designation, if pushed to a judgment before the Lord Ordinary, ought to go any deeper than to induce the Lord Ordinary to continue the cause, so as to give opportunity for applying to the Court for authority to correct the error. But if the matter be arranged, it is unnecessary to go into this question. The party committing the error must of course be responsible for expenses caused by it.

LORD PRESIDENT.—I understand the parties to be satisfied with the interlocutor we propose to pronounce.

LORD IVORY.—The enrolment not being good, the case is in the position of being *coram non judice.*

THE COURT pronounced the following interlocutor :—"The Lords, upon the report of Lord Benholme, Ordinary, Find that in respect the defenders are erroneously designed in the partibus on the summons, the calling and enrolling of the summons as against them have been irregular, and the cause ought not to be proceeded with on that partibus: And in respect the counsel for the pursuers has now stated at the bar that they do not intend to proceed farther under the calling and enrolments which have already taken place, Find the defenders entitled to the expenses of the present discussion; modify the same to L.2, 2s. sterling; and decern against the pursuers for payment thereof to the defender."

W. WALLACE, S.S.C.—MURDOCH & BOYD, S.S.C. Agents.

No. 8. DRUMMOND AND OTHERS, Petitioners.—*G. G. Bell.*

Process—Bankruptcy—Procedure under Act 19 & 20 *Vict. cap.* 79.—The new Bankrupt Act came into operation on the 1st November 1856;—*Held* (1) that sequestrations applied for and awarded before the 1st November may be conducted under the old Act; (2) that where proceedings have been commenced under the old Act, but sequestration has not been awarded before the 1st November 1856 sequestration may now be awarded under the new Act without any special interlocutor to that effect.

Nov. 14, 1856. — 1st Division. Ld Mackenzie.

THE Lord Ordinary reported the following point for the opinion of the Court as to the operation of the new Bankrupt Act :—Under the new Bankrupt Act of 19th July 1856, it is provided that the Act shall come into operation "on and after the first day of November, one thousand eight hundred and fifty-six." By the second section it is provided that the Act 54 George III. c. 137, 2 & 3 Vict. cap. 41, and 16 & 17 Vict. cap. 53 "are hereby repealed; saving always their effect in regard to any act or deed done or granted prior to the date of this Act coming into operation." Section third provides—"That all sequestrations awarded on and after the

[1] M'Kellar, *supra*, p. 34. [2] See Macleod v. Rose, Jan. 29, 1833.

said date, or proceedings occurring on or after the said date in sequestrations which have been awarded before it under former Acts, unless it be otherwise hereinafter provided, *shall*, if, and so soon as an interlocutor to that effect, pronounced by the Lord Ordinary, shall become final; or if, and so soon as an interlocutor to that effect shall be pronounced by the Court, be regulated by this Act: Provided always, that until such interlocutor by the Lord Ordinary shall become final, or until such interlocutor shall be pronounced by the Court, proceedings in sequestrations awarded before the said date shall be conducted as if the Acts hereby repealed were still in force, and such proceedings thereon shall be as valid as if the said Acts were unrepealed."

His Lordship had no doubt that proceedings in sequestrations, awarded under the old Act, might be conducted under the old Act, unless there be an interlocutor by the Court that they shall be conducted under the new Act. But in regard to sequestration awarded after the date of the new Act, he stated that there was some awkwardness in the use of the word "shall" in section 3, which had given rise to a difficulty amongst practitioners, (1) whether, when sequestration is applied for after the 1st November 1856, it can be awarded without an interlocutor declaring that the proceedings shall be regulated by the new Act; and (2) whether, where the proceedings were commenced under the old Act, but sequestration had not been "awarded" till the date of the new Act, sequestration can now be awarded; and, if so, whether any interlocutor is required declaring that the proceedings shall be under the new Act. In one of the cases reported by his Lordship the *induciæ* of the Gazette notice expired on the 31st October, and the minute for awarding sequestration could not be presented till the following day, the 1st November, when the new Act came into operation.

Lord President.—This third clause contemplates only two classes of cases, the one in which sequestration has been awarded after the date of the Act, and the other where the proceedings occur after the date of the Act, in sequestrations which have been awarded before the 1st November. Now this sequestration fell to be awarded after the date which would bring it under the new Act; but then application was made for it under the old Act. I think it is competent here to award sequestration under the new Act.

The second question is, whether it would require a deliverance to regulate that matter. Though not necessary, it may perhaps be proper to express that in the interlocutor.

Lord Ivory.—I see no objection to that course being followed *ob cautelam*; but I see no difficulty. I think the third clause includes all sequestrations, of whatever kind—those awarded both under the new Act and under the old Act. There is a saving clause at the end of section two, in regard to any act or deed done or granted prior to the new Act coming into operation, which removes all doubt on the subject.

Lord Curriehill.—I think Lord Ivory's view is sound. There is no doubt of the validity of that procedure prior to 1st November. The procedure is saved by the concluding clause of the second section. What is to take place now is to award sequestration, which by the third clause may competently be done.

Lord Deas.—I concur.

Lord Mackenzie.—I understand the Court hold that it is not necessary to do anything more than merely to award sequestration.

Lord President.—It is so.

The usual note was given in to the Bill-Chamber, detailing the procedure, and referring to the New Bankrupt Act; and Lord Mackenzie pronounced the usual interlocutor, awarding sequestration on the 16th November.

Dickson & Steuart, W.S.—Agents.

No. 9.
—
Nov. 15, 1856.
Murray v.
Donnelly.

JOHN MURRAY, Objector.—*Millar.*
THOMAS HUGH DONNELLY, Respondent.—*A. Mure.*

Bankruptcy—Personal protection—Title to appear.—A bankrupt has a title, without concurrence of his trustee, to reclaim against an interlocutor by a Lord Ordinary in a question of personal protection.

Voting—Voucher.—Held (*aff.* judgment of Lord Mackenzie, *abs.* Lord Justice-Clerk), that brokers, holding no assignation from the underwriters, and not producing the policies of insurance, are not entitled to rank upon the bankrupt estate of the insured on an account for premiums, nor can they vote in a question of granting personal protection.

Voting—Writ—Vitiation.—The change of *i* into *y*, in the subscription of an affidavit and claim, where neither the altered spelling nor the hand-writing corresponded with those of a bill on which the claim was founded, is a vitiation *in essentialibus,* and cuts down the vote of the claimant in the sequestration.

2ND DIVISION.
Ld. Mackenzie.
L.

THIS was a reclaiming note by a bankrupt, Thomas Donnelly, against a judgment by the Lord Ordinary recalling a Sheriff-court interlocutor granting him personal protection. One of the creditors had brought under appeal this interlocutor pronounced on the petition of the trustee, and he now objected to the reclaiming note, as it was presented in name of the bankrupt alone. But the Court held that as it was a creditor who had appealed, the bankrupt had been entitled to appear and defend the inferior court judgment, and, in a case of personal protection, was equally entitled to reclaim against the adverse interlocutor of the Lord Ordinary.

Donnelly's estates were sequestrated in June, and (as stated by the Lord Ordinary in his note), " at the general meeting held 26th July 1856, three creditors voted that the personal protection to the bankrupt should be renewed for two years from that date. These creditors were—James Donnelly, the bankrupt's brother, who claims to be ranked under three separate affidavits for L.683, 7s.; Hugh Dempster, as mandatory for Seller and Robertson, claiming to be ranked for L.63, 3s., and the said Hugh Dempster as mandatory for Thomas M'Alindon, claiming to be ranked for L.28, 9s. 8d. On the other hand, James Murray, whose claim amounts to L.114, 0s. 3d., moved and voted that the bankrupt's personal protection should not be renewed. There was thus an apparent majority of the creditors, both in number and value, in favour of the resolution that the personal protection should be renewed for two years.

" It appears from the minutes of the meeting, that James Murray ' protested against the validity of the votes tendered for the motion of the said James Donnelly,' and this was followed by an appeal to the Sheriff against the resolution. At the same time, the trustee presented a petition to the Sheriff, to grant a renewal of the personal protection in terms of the resolution at the meeting of creditors.

" By the interlocutor of 26th August 1856, the Sheriff-substitute found that as no specific objections were stated at the meeting to the votes of the creditors who supported the resolution, it was incompetent under an appeal against the resolution, to advance any such objections, and therefore he granted the protection as craved. There is reason to believe that this interlocutor was intended to dispose both of the appeal at Murray's instance and of the petition for renewal of the protection. But in order to obviate any difficulty in point of form, the parties consented that both applications should be conjoined and disposed of by one judgment in this Court.

" The Lord Ordinary is of opinion, that it is competent under an appeal against a resolution of the creditors to object that it has not been carried by a legal majority in number and value of the creditors present and entitled to vote, although no special objections to the votes have been stated at the meeting, especially where the minutes bear, as they do here, that the dissentient creditor protested against the validity of the votes tendered in favour of the resolutions.

No. 9.

Nov. 15, 1856.
Murray v.
Donnelly.

"By the 58th section of the Bankrupt Act of 1839, which regulates this matter, the majority in number and value of the creditors present at the meeting 'may resolve that the personal protection of the bankrupt ought to be renewed for such time as they may think fit, and in such case the trustee shall apply to the Sheriff, who shall renew the protection.' According to the construction put upon this clause, it is imperative on the Sheriff to grant personal protection to a bankrupt, when the application is duly made, and no objection is taken to the legality or regularity of the votes of the creditors who resolved to grant it. But, in the present case, James Murray, the objecting creditor, has appealed against the resolution, on the ground that it was not carried by a legal majority in number and value, or at least in number of the creditors present and entitled to vote—and the Lord Ordinary is humbly of opinion that the appeal is well founded, and must be sustained.

"Some formidable objections were stated to the claims of James Donnelly, the bankrupt's brother, which greatly exceed in value the debts of all the other creditors. But supposing his vote should be sustained to the full extent claimed, so as to give a preponderance in value in favour of the resolution, this will not be sufficient unless there is also a majority in number. Now, the only other creditors who voted for the resolution were Seller and Robertson, and Thomas M'Alindon. But it is objected by the appellant, Murray, that both their votes are bad.

"As to Sellar and Robertson's claim, it appears to be founded on an account for premiums of insurance on a vessel called the 'Druid,' and incidents connected therewith, amounting to L.63, 3s. To this it is objected, that no documents are produced to instruct that Seller and Robertson are creditors for the amount claimed. Along with the affidavit they produced merely an account, which gives no information of the character in which they acted, and it might have been supposed that they had acted as brokers or agents for the bankrupt, and had paid the premiums to the underwriters on his account. But if this had been their true position, they would have required to instruct their claim by a receipt or voucher, shewing that they had paid the premiums. It appears, however, from an unaccepted bill now produced, that Sellar and Robertson claim payment of this account, not in their own right as having paid the premiums, but merely as agents of the underwriters who signed the policy. But there is no assignation from the underwriters, and no authority of any kind from them to shew that Sellar and Robertson are entitled to sue, or to claim to be ranked in the sequestration for this debt. For this reason, it is thought this claim must be rejected as not duly vouched.

"With regard to M'Alindon's claim, the Lord Ordinary thinks it must be rejected, because, apart from other objections, the signature of the claimant to the affidavit, and the signature to the mandate, are both palpably vitiated and erased. These signatures are different in the spelling, and different in appearance from the signature on the back of the bill; and it is thought that documents which have been so tampered with, can make no faith in judgment.

"If both these votes are bad, it follows that the resolution for renewal of the personal protection was not carried by a majority in number of the creditors present, and entitled to vote at the meeting."

The following is the interlocutor pronounced by the Lord Ordinary:—

"Recalls the interlocutor of the Sheriff-substitute complained of, dated 26th August 1856: Finds that the resolution that the bankrupt's personal protection should be renewed, was not carried by a legal majority in number of the creditors present and entitled to vote at the meeting held on 26th July 1856: Therefore, sustains the appeal at the instance of James Murray against the said resolution, and refuses the prayer of the petition for renewal of the personal protection to the bankrupt: Dismisses the counter appeal

No. 9. for James Donnelly and the bankrupt: Finds them liable in expenses to the appellant, James Murray, both in this Court and before the Sheriff."

Nov. 15, 1856. Murray v. Donnelly.

I. As to Sellar and Robertson's claim, the bankrupt now contended that the Lord Ordinary had erred, that the brokers were fully entitled to claim on an open account, and that it was not necessary that the policy should be produced, for the policy always bore that the money had been paid to the insurer, and brokers stood to both parties as principals,—thus the relation of debtor and creditor existed directly between the insured and the claimants.[1]

It was contended for Murray, that they were truly in a discussion as to whether or no the 11th section of 2 and 3 Vict. c. 41 had been complied with. All the vouchers to prove the debt had to be produced, and nothing which was not referred to in the affidavit could be adduced as a proof of debt, and if the proof were not in the party's possession at the time of the claim, the explanation of the reason had to be made in the affidavit, but in it no allusion was made to the policy,[2] and the whole of the account was,—

"Mr T. H. Donnelly, Greenock, Dr. to Sellar & Robertson in sequestration.
"1853, Nov. 25, For premium of insurance, and stamp, *per* Druid, L.65 5
"1854, Oct. 31, For interest and bill stamp for bill discd. - 0 18

L.66 3

Lord Wood.—I am for adhering to the interlocutor. No doubt a party may claim upon an affidavit and an open account, where the nature of the claim and the position of parties is set forth. But a more unsatisfactory statement than we have here could not be,—if this were enough to satisfy the requirements of the statute then anything would be so. It is not indeed necessary to produce vouchers sufficient to prove the debt. It is sufficient, if what must reasonably be supposed to be in the party's possession be produced, with an explanation of the cause of his not having more. Now the claim here is for premiums of insurance, and all that is produced is the account: no explanation of any kind is given. If the party making the affidavit could have produced the policy, which ought to have been in his possession, that would have done. If he could not, he should have explained the reason; but neither has been done, and, for all we know, it may have been in his possession at the time the claim was lodged, when it certainly ought to have been produced.

Lord Cowan.—The view I take of this case is very much the same. There might have been some difficulty if we were dealing only with the description in the bill and the absence of an assignation; but what we must deal with is the affidavit and account, which are vague and general in the extreme. That, however, need not have proved a fatal objection, if the policy had been produced; but if the creditor's vote could be admitted without the policy, what would prevent any broker from claiming thousands on an open account? The mere affidavit, and this vague account, are quite insufficient to support the right to vote. It is clear that the creditors were in a position to produce some voucher or other in support of the claim. It is impossible to hold that they were not. Mr Bell (Com. vol. i. p. 60 lays down the whole law on this subject to the same effect as stated to us from the English authorities, and especially states that the policy is the proper evidence of the broker's claim for premiums against the insured.

Lord Murray.—I am entirely of the same way of thinking, and am for adhering though not on all the particular grounds set forth by the Lord Ordinary. I hold that the claim is not sufficiently vouched. What evidence is there that this man is a broker, or effected any insurance at all, if the policy is not produced?

II. The objection to M'Alindon's vote was, that the spelling of the subscription to the affidavit, and also to a mandate to a party to act for him, h

[1] Arnold, Mar. Insurance, p. 109 and 137; Power v. Butcher, 1829, B. & vol. x. p. 239; Park on Mar. Insurance, p. 820.

[2] Laidlaw v. Wilson, 27th Jan. 1844, ante, vol. vi, p. 530; Woodside v. Espl 15th July1847, ante, vol. ix, p. 1486.

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been altered, and the letter *i* substituted for *y*, whereas it was spelt with *y* on a bill referred to in the affidavit, the writing of which endorsation on the bill was observed to differ considerably from the vitiated subscriptions. That there was any material difference was denied by the bankrupt, who farther said there was no allegation of fraud. The alteration had been made in presence of the justice of the peace, and at any rate it did not amount to vitiation, as enough remained unaltered to identify the signature.[1]

It was replied that affidavits, like other documents, if tampered with, made no faith in judgment. Any alteration making a difference after the deed left the subscriber's hand was a vitiation. There was no evidence, and it was denied that this had been done in presence of the justice by the party, and the subscription differed from that on the bill on which it bore to be founded.

Lord Murray.—I regard signature as a solemnity of these affidavits, and look upon this one as wanting that solemnity. The question as to whether an alteration from *i* to *y* would deprive a document of all faith is a nice one; but I should hesitate to alter a judgment consistent, I think, with the appearance of the whole documents.

Lord Wood.—I agree with your Lordship. The case quoted does not apply. There the signature was not legible, but it was argued, "the Justice of Peace tells you what it is." But here the signature is vitiated, and there is no resemblance between the signatures on the bill and on the mandate and affidavit. I cannot sustain this as a duly authenticated document.

Lord Cowan.—I am very unwilling to arrive at that conclusion, but it is the only safe one. A mere interchange of *i* and *y* I might not in such a name regard as a serious objection; but the radical and dangerous objection is to our looking at all at a signature altered and vitiated both in affidavit and mandate; and when, in addition, it differs from the one on the bill, I concur with the Lord Ordinary that a document so tampered with can make no faith in judgment.

The Court adhered.

John M. Junner, S.S.C.—John Leishman, W.S.—Agents.

No. 10.

Robert Hill, Suspender.—*Mair.*
Robert Lockhart Dymock, Respondent.—*Gifford.*

Process—*Procedure under the* 9*th Geo. IV. c.* 58, *and* 16*th & *17*th Vict. c.* 67 (*for the regulation of public-houses*).—A sentence and conviction for breach of certificate under the statutes passed for the regulation of public-houses, bore that certain witnesses were examined, and then proceeded—"The bailie convicts the said Robert Hill of the offence charged against him;" but it did not say that the witnesses were credible, nor that the case was proved by their evidence, nor that the complaint was proved at all;—*Held* (affirming judgment of Lord Ordinary), that these omissions were such a deviation from the form of procedure pointed out by the statute, that the judgment was null and void.

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1st Division.
Lord Neaves.
C.

The suspender, Robert Hill, was, on 18th July 1855, convicted in the [illegible]mburgh Police-court on the complaint of the respondent Dymock, procurator-fiscal of the burgh, of a breach of the regulations of his certificate as a grocer and spirit-dealer, and sentenced to pay a fine of L.5, with expenses, within fourteen days. He failed to do so, and was incarcerated. Thereupon he presented the present note of suspension and liberation, impugning the sentence on various grounds. The Lord Ordinary thus stated the point to which the attention of the Court was now directed:—

"The proceedings in this case took place under the 9th Geo. IV. c. 58, and 16th & 17th Vict. c. 67, passed for the regulation of public-houses. The suspender has been convicted of a breach or contravention of the condi-

[1] [illegible] v. M'Clymont, Feb. 17, 1852, ante, vol. xiv. p. 508.

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tions of his certificate, and the procedure ought to have taken place in conformity with the provisions of the former of those statutes.

"Various objections have been stated in this suspension to the regularity of the proceedings. But several of these appear to the Lord Ordinary to be unfounded. He thinks, however, that the sentence pronounced by the convicting magistrate is liable to one objection, which is fatal to its validity.

"By the 9th Geo. IV. c. 58, sect. 23, it is enacted that, under a complaint for breach of certificate, the accused party may be convened before the sheriff or magistrates therein mentioned, when 'it shall be lawful for such sheriff or bailie, or two or more justices of the peace, to inquire into the truth of the allegations in such complaint, and on the same being proved, either by the confession of the party complained against, or by the testimony on oath (or affirmation if a Quaker) of one or more credible witness or witnesses, or upon other legal evidence, to pronounce judgment and convict the party of the offence complained against, without any written pleadings or record of evidence, it being hereby provided that a record shall be preserved of the charge and of the judgment pronounced.' 'And all such records, to be so preserved as aforesaid, shall be in the form contained in the schedule annexed to the body of this Act therein designated by the letter D, or to such effect.'

"The form of conviction is framed to meet several cases. Thus: 'Compeared C D, and the complaint being read over to him, he confessed the offence therein charged;' then follow the signatures; '(or) Compeared C D, and the complaint being read over to him, he denied the same; but it was proved against him by the oath of R S, a credible witness; (or) C D having failed to appear, and due proof, by the oath of constable, being made, that he had duly summoned the said C D, and the complaint being read over, the same was proved against him by the oath of R S, a credible witness, and therefore the justices (or sheriff or bailie) convict the said C D of the offence charged against him, being a first (second or third) offence, and find him liable in the sum of ,' &c.

"The procedure in the present case bears, that on the complaint being read over to him, the suspender denied the same. It also sets forth that, at the first diet, one witness was examined on oath in support of the complaint and at an adjourned diet another witness, and that certain witnesses wer[e] also examined on oath in exculpation.

"The sentence and conviction then proceeds as follows:—'The baili[e] convicts the said Robert Hill of the offence charged against him, being [a] first offence, and finds him liable in the sum of L.5 of penalty."

The complainer pleaded;—That the sentence did not bear either that th[e] complaint was proved against him, or that it was proved against him by [a] credible witness or witnesses, or whether it was proved by the evidence [of] one witness or both, but merely that the witnesses were examined in suppo[rt] of the complaint.

The Lord Ordinary pronounced the following interlocutor:—"Finds th[at] the judgment or conviction on which the warrant of imprisonment und[er] suspension proceeded, is not framed in the form and manner required by th[e] statutes applicable thereto, and that the said judgment or conviction, an[d] warrant of imprisonment proceeding thereon, are null and inept: Therefo[re] suspends the letters *simpliciter*, and decerns, and grants warrant of liberati[on] as craved: Finds the suspender entitled to expenses, subject to modific[a]tion," &c.*

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* Note.—(After the narrative above quoted):—

"The Lord Ordinary feels that proceedings of this kind are not to be view[ed] with the strictness applicable to a proper criminal trial. But he conceives th[at] these must be carried on with a due regard, in all substantial respects, to the stat[u]

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The respondent reclaimed, and pleaded; — That the provisions of the statutes as to the forms of proceedings ought to be liberally interpreted, as

authorising them. At common law, the evidence taken under such procedure would need to be reduced to writing. But the statute has dispensed with this solemnity, and has provided a substitute. It is sufficient if the Judge preserves a record of the charge and judgment in the form contained in the schedule, 'or to such effect.' It appears to the Lord Ordinary to be an essential part of that schedule to set forth, as the case may be, either that the accused confessed the offence, or that it was proved against him by such and such evidence. If there is no confession, the record ought to bear that the case was proved by evidence. There may be various ways of doing this. The statute has given one form — 'It was proved against him by the oath of R. S., a credible witness.' But equivalent expressions may be sufficient, as if the Magistrate found that the case was proved by the witness or witnesses mentioned, which would necessarily imply that they were credible, as they were believed. Here, however, there is nothing that seems to correspond with the requirement of the statute. It is mentioned that witnesses were examined on oath. But it is neither said that they were credible, which the schedule bears, nor is it said or found that the case was proved by their evidence. It is not even said or found that the complaint was proved at all. The Magistrate at once convicts the accused, which it is thought is not sufficiently specific, nor a sufficient compliance with the schedule. In the mouth of a jury, a conviction is a finding of guilty. But here, in the mouth of the Judge, the statute, with its schedule, seems to employ the term 'convict' not as a verdict on the facts, but as a condemnatory sentence. The intention of the Legislature is that the judgment shall bear that the complaint was proved in one way or other, and 'therefore the justices convict the said C. D. of the offence charged against him.' The conviction here takes place without any previous narrative of the complaint being confessed or otherwise proved, and thus there seems a substantial departure from that form of record which is to supply the place of the actual evidence adduced. It may be inferred that the Magistrate not only believed the witnesses adduced in support of the complaint, but that he considered it to be proved by that evidence, otherwise he would not have convicted. But inference, however natural, seems inadmissible where the statute has required an explicit statement. A Judge, ignorant of his duty, might convict upon evidence that was not legal, as upon notoriety, or upon his own knowledge, or he might possibly convict upon what was 'other legal evidence' than a credible witness or witnesses. It was therefore right that he should be required to state in his record, in such a case as the present, that the offence, when denied, was proved by the witnesses mentioned as adduced, or by other legal evidence, specifying what that was, if it existed.

"Giving every effect to the consideration that these are rather civil than criminal proceedings, and keeping in view that the statute does not require a literal transcript of the schedule, the Lord Ordinary has still thought that there is here too considerable a deviation from the form prescribed to admit of the sentence being sustained; and he will only farther observe, that this deviation is the less entitled to indulgence as it was wholly unnecessary and uncalled for.

"The Lord Ordinary ought also to state, that he entertains doubts of the regularity of the warrant of imprisonment. The sentence here adjudged the suspender to pay to the complainer the sum of 'L.2, 10s., being a half part of said penalty, and the remainder to the Deaf and Dumb Institution, Edinburgh, and also to pay the sum of 18s. of expenses of conviction.' Thereafter, 'the Bailie, in respect that the above mentioned Robert Hill has not paid to the complainer the sums of penalty and expenses before mentioned, within the period allowed to him for doing so, which has now elapsed, grants warrant to constables of Court to apprehend him and incarcerate him,' &c., 'for the period of twenty days from this date, unless the said sum shall be sooner paid.'

"As only one half of the penalty was payable to the complainer, and the other half to the Deaf and Dumb Institution, there is here a want of proper correspondence between the warrant of imprisonment and the previous sentence. The warrant appears to be granted to enforce the whole sums decerned for, but it seems [illegible] that these should have been paid wholly to the complainer.

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being merely directory. They were not enforced by the sanction of nullity. In the present case, the provisions had in all points been substantially complied with, and the whole proceedings stood unreduced.

The suspender was not called on.

LORD PRESIDENT.—This interlocutor must be substantially adhered to. There is here a very palpable deviation from the course of procedure pointed out by the Act, and such as we cannot sanction. The conviction and judgment complained of must fall. It follows that the suspender is entitled to his liberation.

LORDS IVORY and CURRIEHILL concurred.

LORD DEAS.—I am of the same opinion. Leaving out of view, in the meantime, the paragraph about expenses, I concur in every word in the Lord Ordinary's note.

The suspender had also reclaimed against the interlocutor of the Lord Ordinary, so far as it found him entitled only to modified expenses. Upon this point,—

LORD PRESIDENT.—The suspender is entitled to his full expenses.

THE COURT pronounced the following interlocutor:—" Alter the Lord Ordinary's interlocutor, as reclaimed against by the suspender Robert Hill, in so far as that interlocutor finds expenses due to the suspender, subject to modification: Find the suspender entitled to full expenses of process: *Quoad ultra* adhere to the said interlocutor: Find the suspender entitled to additional expenses," &c.

DAVID MANSON, S.S.C.—PATRICK GRAHAM, W.S.—Agents.

No. 11.

MARGARET HUME AND OTHERS, Complainers.—*Penney—Gifford.*
THE MAGISTRATES OF EDINBURGH, Respondents.—*D. F. Inglis—Young.*

Process—Interdict.—A church originally belonging to an hospital was sold after having for many years been used as a parish church;—*Interdict*, pending a declarator, against building a new church with the price (affirming judgment of Lord Benholme) *refused.*

Nov. 18, 1856. — 2D DIVISION. Bill-Chamber. I.

THIS was a note of suspension brought in name of pensioners enjoying th benefit of the Trinity Hospital of Edinburgh against the Magistrates, both a representing the community of the city, and as governors of that hospital.

The objects of the application are thus set forth by the Lord Ordinary o the Bills:—" The Trinity College Church, after the Reformation, wa acquired from the Crown by the Magistrates and Council of Edinburgh.

" Within a few years of its acquisition, it appears to have been appropr ated as a parish church to one of the ecclesiastical districts of the city; an at the debate it was admitted, that, for between two and three centuries, has, with some short interruptions, been used as a parish church down t the time when it was acquired by the North British Railway Company und the powers of an Act of Parliament.

" By this Act, the Railway Company were prevented from taking posse sion until they had agreed with the Magistrates on a plan for rebuilding t church upon a site equally convenient for the parish at the expense of t Railway Company. An alternative was, however, provided in these terms :- ' Declaring that it shall be competent for the Railway Company to off and the said Magistrates and Council are hereby authorised to accept of,

If, on the other hand, the warrant was only intended to enforce part of the su due, it is loosely and ambiguously framed.

" The Lord Ordinary has only given expenses, subject to modification, as he co siders several of the grounds of suspension to be frivolous as well as unfounded.

sum of money as compensation for the said church, and in lieu of the foregoing obligation.'

"It appears that, at first, it was intended that the Railway Company should build the church. But difficulties having arisen as to the performance of their obligation in this form, the parties resorted to the other alternative, and it was agreed that a sum of money should be paid by the Railway Company to the Magistrates in lieu of the obligation of rebuilding. The respondents are now in the course of employing this money in rebuilding the church themselves, which, under the original obligation, the Railway Company, in concert with them, would have been bound to rebuild.

"The suspenders have raised against them an action of declarator, in which they maintain that the money ought not to be applied in rebuilding the church *at all*, but laid out exclusively in supporting the Trinity Hospital, of which the suspenders are pensioners.

"The Lord Ordinary entertains grave doubts of the title of the suspenders. But he does not found his present decision upon that point, which, as well as the merits of the case, will form the subjects of deliberate consideration in the action of declarator.

"The note of suspension has for its object to interdict, in the meantime, during the subsistence of the other action, the steps resolved on by the respondents for rebuilding the church; and, by refusing the note, the Lord Ordinary does no more than announce his opinion, that, in the circumstances of the case, such interdict ought not to be granted. In a possessory action like the present, he considers that it is his duty to pay regard principally to the state of possession under which this church has for so long a period been used as a parish church, until that was interrupted by the proceedings of the Railway Company, under an Act of Parliament, which plainly imposed it as a condition and a duty upon all concerned that a price was to be paid which was to be sufficient to rebuild, and which was to be employed in rebuilding, the parish church, which had been interfered with by the statutory arrangement."

Against the Lord Ordinary's interlocutor, which refused the note with expenses, a reclaiming note was presented, and in support of it it was argued;—The church was not ordinary property of the community, but was specially granted, along with a number of other subjects, for the erection and maintenance of an hospital, and "for no other use." The Magistrates had full power to dispose of the church, and of the rest of these subjects, as to them might seem fit; but then, if any was so disposed of, the proceeds must be applied to the purposes of the hospital, as in point of fact the proceeds of all other property sold had been applied. The church was the only part of the grant not applied to the use of the hospital. The Governors could not make a profit of it, and so they put it to the use of a parish church; and the question was, whether that long use would entitle the Magistrates to divert it or its price—now that they had been able to turn it to profit—from its original purpose. No apology even was offered for the proposal, except the long misapplication of the subject which had taken place. A declarator had been raised, but unless interdict were granted, it might be too late to interfere, as steps were in course of being taken for carrying out the threatened misappropriation of the funds.

The respondents were not called upon.

LORD JUSTICE-CLERK.—I never knew an application for interdict more extraordinary than the present. There was a church as well as other property conveyed to the Magistrates, to erect and maintain an Hospital. There were poor to be maintained in the Hospital, and there can be no doubt that the Church being there was [illegible] to those in the Hospital, and that one was required for them. [illegible], it was not to be limited to them, and its use was not so limited. [illegible] centuries, and was eventually sold to a railway com-

No. 11. — Nov. 18, 1856. Mason. — Callaghan and Others v. Monkland Iron Co.

pany under an Act of Parliament, on condition that they should rebuild it, and w are now asked to interdict the Magistrates from fulfilling that obligation. And thi at the instance of some of the pensioners of the Hospital, whose names are actuall used to prevent the Hospital having a church,—I say *used*, for who supposes th these old women desire not to have a church, while they are not complaining c inadequate allowances?

Lord Murray.—I never knew an application for interdict on such ground What we may do when the declarator comes before us is another question.

Lord Wood.—I also am for refusing the interdict.

Lord Cowan.—I am of the same opinion. As parties are at issue in a declarato I abstain from giving any reasons. But this is a very remarkable application, whe the object in view of the Town-Council is to put things in *statu quo*. By tl erection of the church, the state of possession will be brought into the precise co dition it was in for centuries before the Act of Parliament passed, or the fun came into the hands of the Magistrates.

The Court adhered.

Wotherspoon & Mack, S.S.C.—Patrick Graham, W.S.—Agents.

No. 12.

Hector Mason.—*Pattison.*

Process—Partibus.

2d Division.

The partibus, and not the entry in the rolls, determines the Division the Court to which a case belongs; and where a case was marked on tl partibus "First Division," but was enrolled and afterwards treated as a Seco Division case, a reclaiming note was found to belong to the First Division

No. 13.

Mrs Boyle or Callaghan, and Mrs Walls or Lenaghan and Othe Pursuers.—*Pattison—Millar—Moir.*

The Monkland Iron and Steel Company, Defenders.—*D. F. Inglis- Young—A. B. Shand.*

Process—Jury trial—Verdict—New trial.—Where, to an issue which had t branches, the jury returned a general verdict for the pursuers, a new trial granted, on the ground that it would have been contrary to evidence to retur verdict for the pursuers on the first branch.

Bill of Exceptions.—The Court refused a bill of exceptions to the refusal c Judge to give the jury a direction ambiguous in its terms.

Nov. 18, 1856. — 2d Division. Lord Deas, presiding Judge. R.

There were two actions of damages brought against the Monkland I and Steel Company by the widows and families of two workmen, who c in consequence of injuries received in a coal-pit when in the defend employment. They were engaged in driving a mine in the pit. They removed from the place where they were working to be out of the wa stones, while firing one of their shots; immediately after which they he a "blower," or rush of fire-damp. This frightened them, and they v going to leave the pit; but, in the first instance, Lenaghan returne where they had been working for a waistcoat, with a naked lamp in hand, whereupon an explosion took place. The two men, who were m injured, then went to the bottom of the shaft, and gave the usual signa have the cage taken up, but it was not raised; and for a good many h the men remained up to the middle in water which had accumulated. T were then taken up in a "kettle," and carried home; both of them within two days.

The pursuers alleged that the cause of the fire-damp accumulating, s to injure the deceased, was the carelessness of the defenders, or those whom they were responsible, in not having the ventilating apparatus in per order; and that the cause of their not being taken up out of the pit

that the gearing of the cage was not in proper order, and that the engineman had neglected his duty, and not attended to the signal. No. 13.

The defenders did not admit any deficiency of ventilation, but maintained that the contractors for the mine were alone responsible, if there were any; and that the deceased had lost their lives by their own recklessness in not retiring whenever they perceived their danger; instead of which, Lenaghan had caused the explosion by going to where he knew the fire-damp to be with his naked lamp. Nov. 18, 1856. Callaghan and Others v. Monkland Iron Co.

The injury to the gearing of the cage, they said, was caused by the explosion itself, and was what made it impossible for the engineman to work it, although he heard the signal.

The two cases under a joint minute went to trial together before Lord Deas, at the Spring Circuit in Glasgow, on issues identical, except as to the amount of damages claimed:—

"It being admitted that the defenders are proprietors or lessees of a pit at or near Gartlee, near Airdrie, known by the name of Number Four, Brownsburn Pit, and that they were in the occupation thereof during the year 1852,—

"Whether, on or about 23d or 24th March 1852, the said deceased James Lenaghan, when engaged in the service and employment of the defenders, in forming or driving a stone mine or road in the said pit, with the view of searching for ironstone on behalf of the defenders, sustained severe bodily injury in consequence of an explosion of fire-damp in said pit, caused by the fault of the defenders?

"And whether the said deceased, after being injured as aforesaid, sustained farther severe bodily injury from being detained for several hours at the bottom of the said pit, by reason of the person or persons in charge of the same, and of the engine and cage and apparatus connected therewith, in neglect of the proper signal to raise the same, and of his or their duty, unduly delaying to raise the said deceased from the bottom of the said pit, or by reason of the engine gearing and cage not being in proper working order, and fit for the purpose for which they were intended?

"And whether the death of the said deceased was occasioned by the said injuries, or by one or other of them, and by the fault of the defenders, to the loss, injury, and damage of the pursuers?

"2d *February* 1856.—Damages laid at L.1000 sterling."

After the evidence had been led, and counsel had spoken upon it, "Lord Deas charged the jury, and the jury retired, but were recalled by the Judge to make an explanation to them as to the amount and mode of assessing damages; which having been made, the said counsel for the defenders did then and there require the said Lord Deas to direct the jury in point of law, that if the deceased James Lenaghan and Edward Callaghan sustained severe bodily injury in consequence of an explosion of fire-damp in the pit, caused not by the fault of the defenders, but by the negligence or recklessness of themselves, or either of them, the defenders were entitled to a verdict, although it should be proved that, after being so injured, they had sustained farther severe bodily injury from being detained for several hours at the bottom of the pit by reason of the engineman, in neglect of the proper signal, unduly delaying to raise them, unless it should have been proved that the said farther injury occasioned the deaths of the said James Lenaghan and Edward Callaghan. But the said Lord Deas did then and there refuse to give the said direction. And the counsel for the said defenders thereupon excepted to this refusal."

The [illegible] the following verdict:—"In respect of the matters [illegible], they find for the pursuers, and assess the damages at L.20[illegible]."

In the [illegible] they assessed the damages at L.300.

No. 13.
—
Nov. 18, 1856.
Callaghan and Others v. Monkland Iron Co.

The Monklands Iron Company now attempted to have both verdicts se aside—1st, on account of the presiding Judge having refused to give th direction craved; and, 2d, as contrary to the evidence.

I. Where the issues were so confused, it was impossible, from a genera verdict, to discover what grounds the jury had gone upon. They migh have held, 1st, that the cause of death was the explosion; or, 2d, that it wa the detention in the pit; or, 3d, both combined; or, 4th, they might hav held that the fault of the defenders caused the explosion; or, 5th, that i was the cause not of the explosion but of the detention. Such an issue a that sent to the jury required construction, and the refusal of the presidin Judge to give the direction sought, was equivalent to his declining to co strue the issue. The direction they had asked for was essential to prote the jury, and it meant that the defenders were not to be held responsib even if the detention had been their fault, unless it were proved that, bu for the detention, the lives of the deceased would have been saved; an obscurity in its terms was caused by the terms of the issue to which it ha reference. Whether the exception was good or bad, the refusal to constru was a miscarriage, and a new trial should be granted.

II. At any rate, the general verdict must be taken as affirming that th explosion was caused by the fault of the defenders, a proposition contra dicted by the entire evidence.

The pursuers contended—I. That there was no presumption on the bill exceptions that the Judge had refused to construe the issue. On the co trary, it was to be presumed that he had said everything the defende thought necessary, except what was in the exception, and that he had sa nothing but what was right—or what was objected to, must have al appeared in the exception;—but the direction asked for was either total erroneous in point of law, or so obscure, that it would only have confus the jury. Its natural meaning was, that the injury from the explosion w to be thrown out of view altogether, and that a verdict should be given f the defenders, unless the entire mischief was done by the further inju caused by the detention at the bottom of shaft; such direction was clearl erroneous, for the pursuers would have been entitled to a verdict even ha the jury been satisfied that the deaths were occasioned by the combin effects of the injuries caused by the explosion and the detention, if th thought the defenders were responsible either for the explosion or for t detention, which was parallel to the case of injury done to a man in we health.

II. As to the construction of the verdict, the Court would not dist it, because, in some possible view of it, it might be contrary to eviden but only if it were contrary to every reasonable construction of the eviden which it was maintained not to be.

After consultation,—

Lord Justice-Clerk.—The Court cannot sustain this exception, it is so an guous, and so uncertainly worded. We do not mean to say that there is no great deal of matter for the consideration of the jury which may be involved in exception, but we do not think the refusing it implies any denial of that.

But we think the affirming the first issue implied in the general verdict is much against evidence, that we cannot but grant a new trial on that ground.

The Court pronounced the following interlocutor:—"Disallow said exception, in respect the meaning of the directions asked fr the learned Judge does not clearly appear on the face of the wo employed; and find the defenders liable in the expenses of the bill, and reserve all other questions of expenses, and also set a the said verdict, and grant a new trial; allow the pursuer to lo an account of the expenses of said discussion, and remit," &c.

David Manson, S.S.C.—John Ross, S.S.C.—Agents.

WILLIAM CHARLES WRYGHTE, Petitioner.—*Penney—Young.* No. 14.
DONALD LINDSAY, Respondent.—*D. F. Inglis—E. S. Gordon.*

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Partnership—Bankruptcy—Executor—Liability of estate of deceased partner for future losses of a joint-stock company, Acts 2 & 3 Vict. cap. 41, and 16 & 17 Vict. cap. 53—Joint-Stock Companies' winding up Acts 11 & 12 Vict. cap. 45, and 12 & 13 Vict. cap. 108.—A Scotch partner of an English joint-stock company died, and his heir administered *inter alia* to his father's shares. The subscribed capital had been duly paid up, and the company was then solvent. It afterwards became embarrassed, and the winding up Acts having been passed, an official manager was appointed. He made a call upon the executorial estate of the deceased partner, which call was not paid. He then applied for sequestration of the estate of the deceased partner in respect of the call;—*Held*, that the claim was not a debt due by the deceased partner in the sense of the statute 2 & 3 Vict. cap. 41, and, therefore, that sequestration was incompetent.

Process—It is incompetent for the Lord Ordinary to report a sequestration case by formal interlocutor for the decision of the Inner House.

1st Division.
Bill-Chamber.
Ld Mackenzie.
Bill-Chamber Clerk.

THE late Sir Francis Walker Drummond, Bart., was a partner of the Royal Bank of Australia to the extent of 140 shares at L.50 each. Sir Francis died on 29th February 1844. At that date, the Bank was solvent. Sir Francis left a trust-disposition and deed of settlement, dated 3d August 1840, by which he nominated certain parties as his trustees. The trustees did not act, and Sir James Walker Drummond, the eldest son of Sir Francis, made up a title as heir to his father's heritable properties, and, as executor, was confirmed to his father's moveable property in Scotland, and took out letters of administration to his father's personal property in England. Among other personal property to which Sir James administered were the 140 shares of the Australian Bank.

After Sir James W. Drummond administered as executor, two calls were made on the shareholders of the bank. These were duly intimated to Sir James, and paid by him as a shareholder of the bank; one of L.5 per share on 27th November 1847, and the other of L.2, 10s. per share on 4th September 1848.

The affairs of the Royal Bank of Australia became embarassed sometime prior to 1850, and the petitioner, Mr Wryghte, was (23d April 1850) appointed official manager of the bank by the Master of the High Court of Chancery, charged with the winding up of the affairs of the bank, in pursuance of the Acts 11 & 12 Vict. cap. 45, and 12 & 13 Vict. cap. 108, commonly called the Joint-Stock Companies' Winding up Acts, 1848 and 1849.

These Acts were intended to establish what was considered to be a beneficial mode of winding up the affairs of any company in England and Ireland which should either be insolvent, or "shall have been dissolved, or shall have ceased to carry on business, or shall be carrying on business only for the purpose of winding up its affairs, and the same shall not be completely wound up; or if any other matter or thing shall be shown which, in the opinion of the Court, shall render it just and equitable that the company should be dissolved."—Act 1848, sect. 5.

The mode provided for the winding up of the affairs of such companies as the Australian Bank will be found in the clauses of the Acts quoted below. The official manager is required *inter alia* to make up a list of contributories, which may consist of all the members or of a few selected from them, and this list being approved of by the Master in Chancery, the official manager may, under the control of the Master, proceed against them all as a class or individually for whatever sums he may require for the purposes of winding up.

On the [illegible] occasion such a list was made up and approved of, and the name [illegible] Walker Drummond was in the list.

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On 9th August 1854, the Master of Chancery ordered that Sir James Walker Drummond, as executor of Sir Francis, should pay a sum of L.14,000, as the proportion effeiring to his 140 shares, of a call of L.100 per share, made on all the contributories of the Royal Bank. This order was sent by the petitioner to Mr John Archibald Campbell, W.S.; and Mr James Lamond, S.S.C., as acting for him, emitted an affidavit, setting forth, "that application had been duly made to Sir James Walker Drummond, Bart., executor foresaid, for payment of the said sum of L.14,000, by transmitting to him a copy of said order, with a demand for payment thereof, through the General Post-Office, Edinburgh," (to what address was not stated,) "on the 6th day of October 1854; and default has been made by the said Sir James Walker Drummond, Bart., foresaid, in payment thereof."

The petitioner emitted an affidavit, dated the 17th day of August 1855, to the effect that Sir James Walker Drummond had not paid the L.14,000, as directed by the order of the Master of Chancery. These orders and affidavits were, in terms of the Acts, registered in the books of Council and Session upon the 13th day of August 1855, and the petitioner thereupon raised letters of horning and poinding against Sir James as his father's executor, dated and signeted the 30th day of August 1855. Sir James was charged edictally as furth of Scotland.

On 8th March 1856, the Master in Chancery pronounced the following order:—" Upon hearing what was this day alleged before me by Mr H. Harris, solicitor to William Charles Wryghte, official manager appointed by me of the above named company, I do order that the said official manager, by his said solicitor, do forthwith proceed to apply for sequestration of the estates of Sir Francis Walker Drummond deceased, according to the law of Scotland, and to take all such steps as may be necessary for that purpose And I further order that the said William Charles Wryghte do prove under such sequestration for the sum of L.14,000, being the sum mentioned in my order in this matter of the 9th day of August 1854."

On 14th March 1856 the petitioner emitted another affidavit, which set forth his own appointment as official manager of the Royal Bank of Australia and the circumstance of the late Sir Francis Walker Drummond having been proprietor of 140 shares of the Bank, and his liability for the capital of L.5(a-share. It further set forth that Sir Francis "was farther liable to mak payment of what other or additional sum might fall on him as his propor tional share of the losses incurred by the said Company: That the sai Royal Bank of Australia was constituted by a contract or deed of settlemer which is dated the 3d day of August 1840, and is subscribed by the sai Sir Francis Walker Drummond as a shareholder thereof: Depones, That b virtue of the said Acts hereinbefore mentioned, termed respectively, 'Th Joint Stock Companies Winding up Act, 1848,' and 'The Joint Stock Com panies Winding up Amendment Act, 1849,' the deponent, subsequently t the death of the said Sir Francis Walker Drummond, made up a list of th members or shareholders, partners, and other contributories of the said Roya Bank of Australia, and included therein as a contributory Sir James Walke Drummond, Baronet of Hawthornden, as executor of the said Sir Franc Walker Drummond, for the said 140 shares, and the said Sir James Walke Drummond, executor foresaid, was by the said Master included in the sai list of contributories for and in respect of the said 140 shares: That by th said Acts, power was given to the Master in Chancery, charged with th winding up of the said Company, to make calls from time to time for th purpose of liquidating the debts and claims due from the said Royal Ban of Australia, and all costs and expenses incurred in winding up the sa Bank: That the said Master did, acting under the said Acts, duly make call on all the contributories or shareholders of the said Company of L.10 per share, which, on the 140 shares held by the said Sir Francis Walke

Drummond as aforesaid, amounted to the sum of L.14,000. Depones farther, that by the said Act 11 & 12 Victoria, cap. 45, it is enacted, that on production at the office in Edinburgh, kept for the registration of deeds, bonds, protests, and other writs registered in the books of Council and Session, of an office copy of any order of the Court, or of the Master, made in any proceedings under or by virtue of the said Act, and of an affidavit, that an application had been duly made to the person mentioned in such order for payment of the sum thereby ordered to be paid by him, and that default had been made in payment thereof, then such order should be registerable in like manner as a bond executed according to the law of Scotland, with a clause of registration therein contained, and decree should be interponed to such order, on which execution should pass in like manner as execution passes upon a decree interponed to such bond, and should have the like effect upon and against the person named in such order as if he had executed such bond."

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The affidavit then narrated the orders and affidavits above mentioned, and concluded as follows:—" Depones, That a liability for the said sum of L.14,000 was incurred by the said Sir Francis Walker Drummond anterior to his death, and that the same is now due from his estate to the deponent, as official manager foresaid, and that no part of the said sum has been paid or compensated to the deponent: Depones, That the deponent has been informed that the firm of Walker and Melville, writers to the Signet, and James Moncrieff Melville, writer to the Signet, a partner of said firm, are bound to relieve the said Sir Francis Walker Drummond, or his estate, of the said sum now claimed, or part thereof, in respect they are said to be parties interested in the said shares, or some part thereof, but the deponent does not know the extent to which said firm, or said James Moncrieff Melville, are bound to relieve the said estate of the said Sir Francis Walker Drummond, and with this explanation, and reserving any claim on the said Walker and Melville and James Moncrieff Melville, if such there be, depones, That the deponent does not hold any obligant other than the said Sir Francis Walker Drummond and Sir James Walker Drummond, his executor, bound for the said debt, and no security except what is before stated: That to the best of the deponent's knowledge and belief, no part of the said sum has been paid or compensated to the said Royal Bank of Australia, or to any person competent or authorised to receive payment for or on account of the said Bank, nor is any obligant or security held by the said Bank, or any person on behalf of the said Bank, other than as before stated."

Founding upon the preceding orders and other vouchers, Wryghte, in his character of official manager, and, as such, being a creditor to the extent required by law of Sir Francis Walker Drummond, presented the present petition for sequestration of the estates of Sir Francis under the 2d & 3d Vict. cap. 41, and the 16th & 17th Vict. cap. 53.

This petition was opposed by Mr Donald Lindsay, accountant, who, on the application of Lady Walker Drummond, as a creditor of her husband, and as a beneficiary under his settlement, was, on 11th March 1856, appointed "judicial factor on the estate, heritable and moveable, of the deceased Sir Francis Walker Drummond, with the usual powers, he finding caution before extract."

Section 127 of the Winding up Act 1848 provides, " That this Act shall [illegible] apply to Scotland, except in so far as is by this Act specially provided." The Master in Chancery, on the report of the official manager, is empowered to determine the persons who shall be called " contributories,"—being the [illegible] of the company and every other person liable to contribute to the [illegible] of any of the debts, liabilities, or loss. The 50th section provides [illegible] manager shall be entitled to insist in all " actions, suits, [illegible] proceedings at law or in equity," and that " all debts which might [illegible] by or on behalf of the Company against the estate of any

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bankrupt or insolvent debtor to the Company, shall and may be proved against such estate by the official manager."

Section 83 is as follows:—"That at any time before the whole of the assets of such company shall have been collected or converted, and if the assets remaining to be collected or converted shall not be capable of being immediately realised, although such assets may not appear to be insufficient, and also after the assets of the company shall have been wholly exhausted, it shall be lawful for the Master, from time to time, to make calls on the contributories, or on such individual contributories, or classes of contributories, as he may think proper (but so far only as such contributories respectively shall be liable at law or in equity to pay the same), as well for raising such amount as may be necessary to pay the debts or liabilities, or any of the debts or liabilities of such company, or any part thereof, or the costs, charges, and expenses of winding up the same; as also for the purpose of adjusting and settling the respective claims of contributories upon each other, or upon the Company, whether such claims shall have arisen since or before the date of the petition for dissolution and winding up, or for winding up as the case may be; and the amount to be raised by means of such calls, and also the residue of the assets and estate of the Company after the payment of all debts and liabilities, costs, charges, and expenses shall be paid and distributed by the official manager under the directions of the Master, so and in such manner as shall (as far as possible) satisfy all such claims, and shall finally wind up and settle the affairs of the Company."

The 89th section provides, "That in case any money shall be due from the estate of a deceased contributory whose executor or administrator shall not admit assets, it shall be lawful for the Master to direct that any suit or action shall be brought, or other steps taken for compelling payment of what shall be so due, and for obtaining, if necessary, an administration of the estate of such deceased contributory, in or towards payment of his debts, and that any such suit or action shall and may be brought by the official manager by the style and designation aforesaid, and the production of the order, or an office copy of the order, for payment of any balance, shall be sufficient evidence of the debt, in respect of which action or suit shall be brought as aforesaid."

Section 116 enacts, "That, on production at the office in Edinburgh, kept for the registration of deeds, bonds, protests, and other writs registered in the books of Council and Session, of an office copy of any order of the Court, or of the Master, made in any proceeding under, or by virtue of this Act, and of an affidavit, that application has been duly made to the person mentioned in such order, for payment of the sum thereby ordered to be paid by him, and that default has been made in payment thereof; then such order shall thereupon be registerable, in like manner as a bond executed according to the law of Scotland, with a clause of registration therein contained; and decreet shall be interponed to such order, upon which execution shall pass, in like manner as execution passes upon a decree interponed to such bond, and shall have the like effect upon and against the person named in such order as if he had executed such bond."

The Act of 1849 contains, *inter alia*, provisions authorising the examination of persons in Scotland, whether contributories or not, in reference to the estate of the company (sect. 21); and affidavits to be sworn in Scotland before any competent court or person (sect. 24); while by the 40th section, it is enacted, "That this Act shall not apply to Scotland, except so far as by this Act, or by the said Joint-Stock Companies Winding-up Act 1848, is specially provided."

The 28th section provides, that the calls to be made by the Master on the contributories may be fixed, after taking into consideration "the probability, that some of the contributories upon whom the said call shall be made,

should partly or wholly fail to pay their respective proportions of the same." The 30th section is in these terms, "And be it enacted, that where any contributory of the Company is a bankrupt, or insolvent, it shall be lawful for the official manager to prove, in the matter of such bankruptcy or insolvency, for any balance ordered by the Master, to be proved against the estate of such contributory, and to take and receive dividends in respect of such balance in the matter of the bankruptcy or insolvency, as a separate debt due from such bankrupt or insolvent, and rateably with the other separate creditors. Provided always, that if any creditors of the Company, not being such petitioning creditor, under the fiat as after mentioned, shall have proved, or shall prove against the estate of such bankrupt or insolvent contributory, in respect of any debt due from the company, then the dividends received by the official manager from the estate of such bankrupt or insolvent contributory, shall be paid, and distributed by the official manager, under the direction of the Master, in the first instance, rateably amongst the creditors of the Company, so proving against the estate of such bankrupt or insolvent contributory as aforesaid, until the debts due to such creditors respectively be fully paid, and subject thereto such dividends shall be applied by the official managers towards the general purposes of the winding-up of the affairs of the Company. Provided also, that in case any such fiat shall have been issued on the petition of a joint creditor of the said company in respect of his joint debt, and he shall have proved such joint debt for the purpose of receiving dividends under such fiat, then any dividends paid to such petitioning creditor, under such proof, shall be set against the dividends payable to such official manager in respect of the proof so made by him as aforesaid, so far as the same will extend."

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The Lord Ordinary reported the case by interlocutor dated 4th June 1856.*

When the case was called for debate,

Penney, for the petitioner, submitted that the case was not competently before the Court. According to the statute, it was the Lord Ordinary and

* "NOTE.—The Lord Ordinary has reported this case, because the whole question, as to the appointment of Mr Lindsay as judicial factor, was recently before the Court; and because an interlocutor awarding sequestration is not subject to review, though an application may be made for its recall.

"No opposition has been offered to the prayer of the petition being granted by Sir James Walker Drummond, the heir-at-law and executor confirmed of the late Sir Francis Walker Drummond, or by Lady Walker Drummond, who, as a creditor of her husband, and as a beneficiary under his settlement, lately applied for and obtained the appointment of a judicial factor on his estate, and no objections have been stated by any of the other representatives of the deceased who have been cited. The only opposing party is Mr Donald Lindsay, who was appointed by the Court on the 11th March last to be "judicial factor on the estate, heritable and moveable, of the said deceased Sir Francis Walker Drummond, with the usual powers.'

"It may be mentioned that, before the answers were lodged, a short discussion took place before the Lord Ordinary, in the course of which it was stated that if the petitioner's claim be sustained in the ranking to the full extent, the estate of the late Sir Francis Walker Drummond will not be sufficient to meet his debts and obligations. A deceased debtor's estate, however, may be sequestrated whether insolvent or not, and the existence of a previous trust-deed is no bar to the sequestration. If, therefore, the requisites of the Act have been complied with,—and, as at present advised, the Lord Ordinary is not satisfied that any of the objections to the form of the proceedings is well founded,—it is thought no sufficient cause has been shewn why sequestration should not be awarded, having regard to the embarrassed position in which the affairs of the estate now stand, and the important consideration that no opposition is offered by any of the relations or proper representatives of the late Sir Francis W. Drummond."

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not this Division, who could award sequestration, and therefore the question was, when a case was thus reported, and the Court afterwards remitted to the Lord Ordinary to award sequestration, whether that would not be the act of the Inner House?

The Lord Ordinary was then sent for, and having appeared at the table,

LORD PRESIDENT.—A doubt has been raised whether, in this sequestration case, it is competent for the Inner House to pronounce an interlocutor, although it may be competent for the Lord Ordinary to advise with the Court. The interlocutor to be pronounced by us would bear to be a judgment of the Inner House on the report of the Lord Ordinary. The competency of that is doubted, and it occurs to us that a way of getting rid of the objection is to hold this interlocutor reporting the case as pronounced by inadvertency, to supersede and hold *pro non scripto* what has been since done, and to hold the case now to be verbally reported by your Lordship. We need not detain your Lordship for the argument, but we will let you know the result.

The argument was then proceeded with.

The petitioner pleaded;—That the Australian Bank itself would have been undoubtedly entitled to ask for sequestration of the estates of Sir Francis Walker Drummond. The petitioner, as official manager, came exactly in the place of the Company. He was creditor of the Company's debtors, and was in the position of a partner, appointed by co-partners, to collect all the debts and assets of the Company on the event of a dissolution. These Winding up Acts were said not to be applicable to Scotland, where there were Scotch partners of an English company. But Scotch debtors were liable to be prosecuted by the Company, and by the official manager as representing them in Scotland; and if entitled to prosecute in Scotland, they were entitled to all the remedies which the law of Scotland afforded. If the Company could sue out a sequestration, so could the official manager. He was required to collect the debts, and empowered to sue for them; and if so, he was entitled to do diligence, and therefore to sue sequestration.

The execution which the Act authorised for recovery of a debt of this nature, was not execution merely against the person, but against the estate of the debtor, in the same manner, and to the same effect, as if the debtor had executed a bond; and this was merely following up the general provisions of the statute authorising him to sue for and recover all debts, and take all manner of steps at law or in equity necessary for that purpose.

Applying these provisions to the present case, the petitioner's affidavit bore, that Sir James Walker Drummond was included amongst the contributories, but not in an individual capacity, but as representing the estate of his father. Therefore, it was the executry estate of the father which was the debtor. The affidavit farther set forth, that the call was made upon him as executor, and that a registered order was equivalent to a decree of the Court to make payment of the L.14,000 of debt due by his father. If the official manager was the proper creditor entitled to sue a sequestration, there was here a proper judgment set forth in the affidavit, and supported by the necessary documents.

Again, it was said that this was a contingent debt,—that is, a debt which could not be presently exacted. But this could be presently exacted, and not only so, but might be exacted by the most stringent of remedies—by horning and poinding. It had been farther urged, that the official manager might be possessed, in course of time, of so much money, that there might be a large balance over. But that did not make this less a present debt. Therefore, it was a mistake to say that the debt was contingent. It was the ultimate question of repeating that was contingent. It might, or might not be, that there would be funds over for dividing. But the debt was presently exigible. If contingent, as regarded Sir James Walker Drummond, it was equally contingent as regarded all the contributories; and

therefore the purpose of the statute, which was intended to provide for immediate payment, would be defeated. It was a debt enforcible by all diligence of law, and therefore by the diligence of sequestration.[1]

The respondent pleaded;—First, that under the Winding-up Acts this was not a debt for which application could competently be made for sequestration; second, that it was not a debt due by Sir Francis Walker Drummond, or now by his estate; and, third, that there was no authority within the Acts of Parliament—which were the sole title of the petitioner—for suing such a remedy as the present.

The effect of inserting the name of a person in the list of contributories, was to make the party who was so inserted in the list the sole representative of the shares, in respect of which he was so inserted, and as respondent for the calls made upon them. The list of contributories being made up, the Act was to be directed against them. The power given to the Master in Chancery was an extraordinary power. It was not known to any ordinary contract of copartnery. It was one which might be exercised in the most tyrannical manner, for the Master in Chancery was perfectly uncontrollable. He had the unlimited disposal of the question, not only how much money be wanted, but also how it should be contributed, by what proportions, and by what individuals, or class of contributories. Under section 83, a person might be called on to pay a call which he was not liable for under the contract of copartnery as unpaid capital, nor liable to pay at common law; and if Sir Francis Walker Drummond had been alive, and had been inserted in a list of contributories, such a call might have been made upon him, but such call was not made, and never could be, for he died before the list was made up.

Again—this was a call, not for a debt due, but to make an advance under a statutory obligation. Suppose there had been no Winding-up Acts, and, for the purpose of bringing the affairs of the Company to a satisfactory conclusion, the partners had granted bonds for sums of money, such partners would have been in the position in which the contributories were. Suppose Sir Francis Walker Drummond had granted such a bond, that would not have been a ground for sequestrating his estate.

Take in connection with section 83 the 28th section of the new statute. This statute also provided for the making calls effectual, but the statute directed the mode of enforcing them only against contributories and their estates. There was no power to prove against the estate of anybody else. It runs throughout the statute that it is only against contributories and their estates that the Act is enforcible. "Contributories" could not mean a deceased partner and his executors. It was in contrast to every living member of the Company, who was not necessarily a proprietor or registered member of the Company.

It was said that the liability was incurred by Sir Francis in his lifetime, and was now due. Liability for what? Was it a debt due by the estate of the deceased? As a partner of the Company in 1844, his affairs were in a most flourishing condition, and the subscribed capital on his shares had been paid up. How, therefore, was he then liable for L.14,000? Yet that was the proposition now maintained by the petitioner. It was said to be a debt of the deceased's estate; but at his death there was nothing owing by him, or by any other partner of the Company. There was a liability for the debts of the Company; but there were then no company debts. Therefore the liability referred to must be a liability for debts not then existing. But that

[1] Newall's Trustees v. Aitcheson, 13th June 1840, ante, vol. ii. p. 1108; Macdonald v. Auld, 13th June 1840, ante, vol. ii. p. 1104; Alexander v. Barclay, 14th Jan. 1845, ante, vol. vii. p. 264; Roger v. Gellatly's Trustees, 10th June 1850, ante, vol. xii p. 985; Milne v. Milne, 13th June 1850, ante, vol. xii. p. 1007.

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could not be called a debt then existing and exigible against him and his estate. The debt never existed, in fact or in law, during the lifetime of Sir Francis, and therefore it was in the same position as if it had been brought into existence by his executor executing a bond, as the statute itself puts it. That was a debt of the executor, and it might be a debt of the executry estate; but it never was a debt of Sir Francis, and never of his estate while it remained in his hands. If this liability be admitted as a ground for sequestration, all the debts incurred by the executor in the management of the estate might equally be allowed as a ground for sequestration. But these were not debts of the deceased.

At advising,—

Lord President.—There can be no doubt that, by the law of Scotland, from a very remote period, the estate of a deceased debtor could be made available towards satisfaction of his debts and liabilities, whether the estate was heritable or personal, or whether any one came forward to represent him as heir or executor or not. The procedure is familiar, and of every day occurrence. There is no want of machinery for accomplishing it. But the particular process of sequestration and distribution, as in bankruptcy, of the estate of a deceased debtor, was introduced for the first time by the statute 2 and 3 Vict. cap. 41. Neither is there any doubt that, according to the law of Scotland, Sir Francis, by becoming a partner of the Company, and signing the contract, bound himself, and his estate, for the fulfilment of all the obligations which he thereby undertook; for example, for payment of the whole sum subscribed or effeiring to his subscription, if required, and even beyond that to contribute towards payment of the ascertained debts of the Company, contracted while he continued to be a partner. That liability he, according to the law of Scotland, and in the case of a Scotch Company, would be held to have contracted; and there can be no doubt that his estate might be made available for that purpose, either at the instance of the creditors of the Company, or in a question with the copartners. But the question here does not relate to this abstract principle, as to which there can be no doubt, and which is not disputed; nor is the question whether, if this had been a Scotch Company, the estate of Sir Francis might not have been so reached and made available. But what the respondent, Mr Lindsay, disputes, is the right of the petitioner to sue a sequestration under the statute 2 and 3 Vict. cap. 41. That is the question we have to deal with.

The statute 2 and 3 Vict. cap. 41, has extended the application of the process of sequestration to various classes of cases, to which it was not previously applicable. Among others, it has extended it to the estates of persons deceased. That is in some respects treated in the statute as an exceptional class, and special provisions are made in regard to it; but I do not see that anything in this case turns on these special provisions. This is a case in which more than six months had elapsed from the death of the party, and in such a case the petitioning creditor is not required to prove the insolvency of the estate in order to get diligence on his petition. But in every case of sequestration of the estate of a deceased debtor, the leading requisites of the statute are, in the first place, that *the deceased party* whose estate is sought to be sequestrated shall have been a *debtor*—a deceased debtor; and, in the second place, that the party who petitions for sequestration shall be in the position of *a creditor of the deceased* to a certain amount. The present case turns on the question whether these relations subsist between Mr Wryghte and the late Sir Francis Walker Drummond, with reference to the sum of L.14,000 mentioned in the affidavit, and on which the present application is rested.

I am of opinion that the evidence does not instruct the existence of that relation so as to warrant the awarding of the sequestration applied for. I do not think, that in regard to the L.14,000 mentioned in the affidavit, Sir Francis Walker Drummond can be regarded as a deceased debtor in the sense of the statute 2 and 3 Victoria, or that Mr Wryghte can be held to be a creditor having a debt to that amount against Sir Francis. This leads me to inquire how that debt of L.14,000 arises, of what it consists, and what is Mr Wryghte's title to demand it. It is not a debt which Sir Francis is said to have contracted to the Company in any transactions with them as bankers, or otherwise. Mr Wryghte is the official manager appointed under the Winding-up Acts, and the L.14,000, as I trace it, is the amount

of a call made by him in virtue of the powers conferred on him by these Acts, to make calls on those persons whom the statute describes as contributories. In that view of the matter, it is necessary to examine the provisions of the Acts in regard to the making of calls, and undoubtedly the powers which are conferred on the official manager in that respect are very great. The leading provisions applicable to that subject, and to which I particularly direct attention, are section 83 of the Act 1848, and section 28 of the Act 1849, which comes in place of section 83 of the previous Act.

It appears to me that, from the power thereby conferred to make calls, it results that the power vested in the official manager, under some control from the Master in Chancery, is a very expansive power, and reaches to the various matters which I shall particularly have to notice. At present I may remark, that the calls, such as they are, and whatever their object, are to be made from certain persons designated as contributories, and not necessarily from the whole contributories rateably, but may be made from certain of them selected arbitrarily. But before stating what I think is the import of the power of making calls, I wish to direct attention to the clauses of the statute, which form a sort of code of regulations for making up a statutory list, which shall be conclusive, of the persons who are to be treated as contributories—sections 76, 77, and 79 of the Act of 1848.

Now, from all these provisions in the statute, it is clear, in regard to the calls referred to in section 83, that, in the first place, the call is not limited to the payment of the subscribed capital or input stock. In the second place, that the call is not limited to a proportional share of the debts, nor even to the whole debts of the Company, but comprehends other things, such as claims arising or coming into existence after the Winding-up Act has come into operation. In the third place, it is not to replace losses, but may be made, although there has been no loss by the Company, and no deficiency of assets. In the fourth place, it is substantially a call for an advance of money, or an impressment of funds in the meantime, which may, in part or in whole, be afterwards repeated from the assets of the Company. There is a special provision to that effect. In the fifth place, it is not necessarily made on all the contributories. It may be made only on individuals, or a class of them; and although that does not appear to have been done here, it is of some importance in considering the nature and qualities of the claim. In the sixth place, the parties against whom alone the statute authorises the enforcement of the call are the contributories—being, I suppose, the persons whose names shall be on the authorised and authenticated statutory list.

A call so made is a statutory demand of a very peculiar kind. The liability for it is a statutory liability. The right to make it, and the liability to satisfy it, both spring from statute. They had no legal existence before the date of the statute, so far as has been explained to us. The Company was an English Company, but we have not been told, as matter of fact, that, according to the law of England, such a demand could have been made and enforced before the date of the statute. We know that, by the law of Scotland, it certainly could not. The statute does not extend to Scotland, except in certain portions of it. So far as it does extend, our duty, of course, is to apply it. I am now dealing with the peculiar character of the claim on which Mr Wryghte rests his title in this case.

Having explained the nature of the calls authorised by the statute to be made against certain contributories, I shall now advert to the affidavit of the petitioner in support of his title. From this affidavit it appears that the sum of L.14,000, upon which Mr Wryghte rests his title, is the amount of a call made by him under the authority of the statute, for the purposes and with the qualities to which I have referred. He states in the affidavit that Sir Francis Walker Drummond was, before his death, liable to make payment of L.3850, as the balance of a contribution of L.50 per share on the 140 shares held by him of the capital stock of the Company. This application, however, is not for sequestrating the estate in respect of the non-payment of that sum. The petitioner says farther, that Sir Francis Walker Drummond is liable to make payment "for what other additional sums might fall on him as his proportional share of the losses incurred by the said Company." This is not a claim for any such proportional share of the losses of the Company. It does not appear from this affidavit that there was any such loss;—there were no ascertained losses, nor apportionment of loss to each shareholder. The demand for seques-

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tration is not rested on any such claim. The statement made in the affidavit may be true; and if so, it is equally true that, if a claim be made *habile modo* for relieving those liabilities, the law of Scotland affords the means of making it good. But such claims are not the subject-matter of this demand. The ground of this demand is a sum of L.14,000, called for under the authority of the Winding-up Acts, for the purposes there mentioned, under the discretion there given, with the chance of repayment thereof—for the accomplishment of the temporary objects there mentioned—the impressment of cash in hand. That is the nature of the demand. The petitioner says, in the end of the affidavit—and there it is that he seems to bring the matter to a point—that a liability for this L.14,000 was incurred by Sir Francis Walker Drummond, anterior to his death, and that the same is now due from his estate to the deponent, as official manager. I do not know how that can be. It is not deducible from any facts stated. It is not stated that any such liability was possible by the law of England prior to his death, or otherwise, than under this statute. But the statute did not exist for years after his death. What meaning is attached in the affidavit to the word "liability" I do not know. The term may, in the law of England, be appropriate to such a case, and the meaning attached to it by the maker of this affidavit no doubt enables him to swear that there is a liability. But we are now dealing with a matter of remedy according to the law of Scotland. We are dealing with a remedy sought under the statute 2 & 3 Victoria, cap. 41, and the call of L.14,000 is clearly not a debt due by the deceased Sir Francis Walker Drummond in the sense of that statute. But the case must be brought up to that point. Sir Francis must have been a deceased debtor in that L.14,000. I cannot see any way of construing the facts, so as to bring matters into that position, nor can I see how this L.14,000 had any shape or subsistence while Sir Francis was alive. It was the creature of statute, brought into existence after his death. No doubt Parliament could make his estates liable for debts contracted by anybody else,—it is omnipotent,—but we have not that kind of liability to deal with here, and no statute has said that the estate of a deceased debtor is to be liable to sequestration for such a claim as this. We must in this proceeding read the claim with reference to the 41st section of the Act of 2 & 3 Victoria, and I do not find in the whole of this affidavit, or in the history of this sum, anything to constitute Sir Francis Drummoud a deceased debtor for the sum of L.14,000 referred to, or to make the claimant a creditor of Sir Francis in a debt of his for that sum. In that view of the matter, I cannot see how it is to be regarded as a claim under which sequestration can be awarded.

But the statute itself, while it gives this very great power and latitude of making calls for winding up the estate, which may be a very wise thing, and beneficial for everybody, has also provided the machinery for making the power effectual; and it has, among the most leading provisions, pointed out the parties against whom the power is to be directed. They are the parties whose names are included in a certain statutory list as contributories. I do not say whether there might not have been grounds for proceeding to any extremities as regards the contributories, but Sir Francis Walker Drummond is not in that list. If Sir Francis had been in that list, and had died pending proceedings, I pronounce no opinion whether the Act of 2 & 3 Victoria might not have come into play; for it might then have been held to be a debt in some sense of the word. But Sir Francis is not in that list; and the question is not whether there is any remedy against the estate of Sir Francis, but whether this particular remedy of sequestration of his estate can follow upon such a demand as this, when the statute which creates the demand has pointed out other parties as the parties who are to be debtors in the demand. There may be, and no doubt there are, modes of getting at the executry estate of Sir Francis. But these modes are very different from sequestration under the 2d & 3d of Victoria.

The statute under which the petitioner is acting says, that the registration of the order by the Master in Chancery and of the affidavit, becomes equivalent to a decree of sequestration. They have been so recorded, and diligence against Sir James Walker Drummond has passed upon them. That is the highest point to which the claim can be pushed in the way of giving it the aspect of a debt. But is that enough? I shall suppose that Sir James Walker Drummond had executed a bond, narrating all the steps that are narrated in this affidavit, and narrating all

the provisions of the statute and all the qualifications that attach to these calls, and had by that bond bound himself to pay. That would not, in my opinion, have altered the position of things. It would not make this claim a debt of Sir Francis in the sense of the 2d & 3d of Victoria; and therefore, in every view which I have been able to take of this case, the remedy sought is not a suitable remedy. The petitioner does not possess the relation to the deceased which the statute of 2 & 3 Victoria requires, prior to authorising the issuing of sequestration. It is satisfactory at same time to know, that the estate of the deceased is in safe keeping. It is under judicial authority and management, and no danger can result from the party being obliged to resort to the ordinary remedies—if he is entitled to them—which a creditor must resort to, independent of the Act of 2 & 3 Victoria. No. 14. — Nov. 21, 1856. Hosie v. Edinburgh and Glasgow Railway Co.

Lord Ivory.—I am entirely of the same opinion.

Lord Curriehill.—I also agree, and have nothing to add.

Lord Deas.—I entirely agree with the grounds of judgment stated by your Lordship. The Winding-up Acts do not apply to Scotland, except in so far as specially provided. It is provided that an order of the Master, registered here, shall have the same effect against the person named in the order as a registered bond by that person would have had. But a bond executed by Sir James, for this L.14,000, would not have entitled the official manager to the particular remedy now sought against the estate of Sir Francis under the statutes 2 & 3 Vict. c. 41, and 16 & 17 Vict. c. 53. The fact would have remained, that Sir Francis was not a deceased debtor on this L.14,000, in the sense of these statutes.

On 18th July 1856, the Lord Ordinary pronounced this interlocutor:—"Having advised with the Lords of the First Division of the Court, Refuses the petition for sequestration: Finds the petitioner liable in expenses," &c.

Against this interlocutor the petitioner reclaimed. Of this date,

The Court adhered.

Webster & Renny, W.S.—Dundas & Wilson, C.S.—Agents.

James Hosie, Petitioner.—*Gifford*. No. 15.

The Edinburgh and Glasgow Railway Company, Respondents.—*D. F. Inglis—Patton.*

Railway—Process—Act 8 & 9 *Vict. cap.* 33, *sect.* 83—*Railway Clauses Consolidation Act*, 1845—17 & 18 *Vict. cap.* 31, *sects.* 2 *and* 3—*Railway and Canal Traffic Act*, 1854.—A summary petition for interdict and penalties against a railway company for alleged contravention of the Railway Clauses Consolidation Act, which was alleged also to be a contravention of the Traffic Act—the latter Act alone providing for a summary remedy;—Objection, that in so far as the petition was founded on the Railway Clauses Act it was incompetent, *repelled* (*diss.* Lord Deas.)

The petitioner, James Hosie, was a coal lessee at Bathgate. In the present application he set forth that he had occasion to make use of the Edinburgh and Glasgow Railway, with its branches, for the conveyance of the produce of his mineral fields, and that the Company exacted from him a rate of 3s. 1½d. per ton; but that he had ascertained that the Company conveyed the produce of other mineral fields in the same district, over the same portion of their lines, and for the same or for a greater distance, at different and lower rates. The petitioner specified one instance of the preference he complained of, and stated (art. 12) that "similar preferences were given by the respondents to other traders, thus subjecting the petitioner to an undue and unreasonable disadvantage;" that he had complained thereof to the Railway Company, but that they refused to give any redress. Nov. 21, 1856. — 1st Division. Ld. Mackenzie L.

The petition was founded upon sect. 83* of the Act 8 & 9 Vict. cap. 33;

* "Whereas it is expedient that the Company should be enabled to vary the tolls upon the railway, so as to accommodate them to the circumstances of the traffic: but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly

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(the Railway Clauses Consolidation Scotland Act, 1845;) and upon sect. 2† of the Act 17 & 18 Vict. cap. 31 (the Railway and Canal Traffic Act, 1854.) And it prayed the Court to find that the preference stated by the petitioner "was a contravention and violation of the statutes, and, in particular, of the Railway and Canal Traffic Act; and to interdict the Railway Company from continuing such violation or contravention of the said Act, and to enjoin obedience to the same, with certification that, in case of disobedience, the Court will proceed in terms of the said statute."

The Court remitted to the Junior Lord Ordinary to make up a record, which having been done, his Lordship made great avizandum to the Court.

The respondents now pleaded (first plea); —1. That in so far as the petition was founded on the Act 8 & 9 Victoria, cap. 33, it was incompetent. Actions founded on the statute could be raised only by way of ordinary action.

At advising,—

LORD PRESIDENT.—The only matter for decision at present is the objection taken to the competency of the petition. No question has yet been raised as to the relevancy or sufficiency of the averments, except in regard to the 12th article of the condescendence, and as to it there has been no argument. I shall, therefore, confine my observations to the objection of incompetency. That objection has been

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creating a monopoly, either in the hands of the Company or of particular parties; it shall be lawful, therefore, for the Company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorised to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the railway."

† "That every Railway Company, Canal Company, and Railway and Canal Company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to, or in favour of, any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. And every railway company and canal company, and railway and canal company, having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference, advantage, or prejudice, or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals, or railways and canals, as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf."

By the same statute, sect. 3, it is provided that "it shall be lawful for any company or person complaining against any such companies or company of anything done, or of any omission made in violation or contravention of this Act, to apply in a summary way, by motion or summons, in England to her Majesty's Court of Common Pleas at Westminster, or in Ireland to any of her Majesty's superior courts in Dublin, or in Scotland to the Court of Session in Scotland, as the case may be, to any Judge of any such Court."

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put in this way:—The petition, it is said, is founded on alleged contravention of two several statutes—viz. 8th & 9th Vict. c. 33, being the General Railway Clauses Act, and the 18th & 19th Vict. c. 31, being the Railway and Canal Traffic Act—and it is said, that although procedure by summary petition to the Court of Session may be competent in the case of an alleged contravention of the Traffic Act, that form of procedure is not sanctioned by the Railway Clauses Act, and is not competent in the case of an alleged contravention of that Act. Consequently, according to the contention of the respondents, the present petition, in so far as it is founded on the Railway Clauses Act, and sets forth a contravention of that Act, is incompetent, and ought to be dismissed. I am not disposed to adopt that view of the case. The petition, in so far as it is founded on alleged contravention of the Traffic Act, is not said to be incompetent; and there is nothing complained of in the petition that is not alleged to be a contravention of the Traffic Act. The Railway Clauses Act is also founded on; and I am not of opinion that the use made of the Railway Clauses Act in the petition is an incompetent use, or renders the petition to any extent incompetent. The facts alleged in the petition, and there founded on as constituting a contravention of the Traffic Act, amount in substance to this, that undue or unreasonable preference or advantage over the petitioner is given by the respondents to certain other parties, inasmuch as their coals are carried at rates less than those charged against the petitioner, in the circumstances and to the extent set forth. It is not contended that a contravention of the Traffic Act may not be committed in that way. But a contravention of the Railway Clauses Act may also be committed in that way. The 2d section of the Traffic Act is so comprehensive as to include and reach things prohibited by the Railway Clauses Act; and it would not be a good objection to a petition and complaint, rested solely on the Traffic Act, that the facts there alleged were also prohibited by the 83d section of the Railway Clauses Act. On the contrary, in considering whether the particular advantage or preference complained of was an undue or unreasonable one, some light might be derived legitimately enough from the circumstance, that it was the very thing prohibited by the Railway Clauses Act. The Railway Clauses Act itself does not attach any particular consequence to the doing of the thing which it prohibits, nor does it prescribe any particular form of proceeding against contraveners. But the Traffic Act is more perfect. It does attach certain consequences to contraventions, and does prescribe the course of proceeding by summary petition in reference to all modes that may be resorted to of giving undue or unreasonable preference, not excluding that particular mode specially prohibited by the Railway Clauses Act. If that be so, then the statement in the petition, that the thing complained of has been done in contravention of the express prohibition contained in the 83d section of the Railway Clauses Act, as well as in contravention of the Railway Traffic Act, does not make the petition incompetent. The operative part of the prayer of the petition is founded truly on the Traffic Act. It prays the Court to find that the preference or advantage complained of, "is a contravention and violation of the said statutes, and, in particular, of the said Railway and Canal Traffic Act, 1854, by the said Edinburgh and Glasgow Railway Company, and to interdict the said Company from continuing such violation or contravention of the said Act (*i. e.* the Railway and Canal Traffic Act), and to enjoin obedience to the same," &c. All this would have been unobjectionable, if the Railway Clauses Act had not been recited in the petition; and I do not think that the recital of it raises any good objection to the competency of the petition. The conduct prohibited by the Railway Clauses Act may be also a violation of the Traffic Act; and the form of proceeding prescribed by that Act is the same in regard to all violations or contraventions of it—none other can be adopted.

Lords Ivory and Curriehill concurred.

Lord Deas.—I should have had no objection to the statute 8 & 9 Vict. cap. 33, being quoted *narrativè* in a petition and complaint under the statute 17 & 18 Vict. cap. 31. But it appears to me that this petition is laid upon both these statutes as expressly as any petition well can be. It is made matter of statement that the Railway Company "have violated the provisions of the statutes now recited"—that is *both* the statutes recited—and that "the petitioner makes the present complaint under the statutes"—that is to say, under *both* statutes. Then the prayer craves the Court to find that the preference complained of is "a contravention and

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violation of the said statutes." Such being the terms of the petition and prayer, I see no reason to doubt, that although the second statute were altogether struck out of the petition, the petitioners might, if the petition were otherwise unobjectionable, stand upon their petition as a petition and complaint under the first statute. This directly raises the question, whether a petition and complaint of this kind be competent under the first statute? I am not able to see that it is so. I think this petition and complaint is liable to a twofold objection. In the first place, I agree with the Dean of Faculty that the remedy of summary application, in this Court, is limited to certain well defined classes of cases, which I need not enumerate, and of which this admittedly is not one, unless the terms of these statutes have made it so. Summary applications to the Judge Ordinary are competent, by usage and express Act of Sederunt, in all cases requiring extraordinary dispatch. But in this Court even an interdict cannot be obtained, in the ordinary case, by summary petition, but only by note of suspension and interdict in the Bill-Chamber. The statute 8 & 9 Vict. c. 33, contains no provision as to the remedy; and I cannot apply the forms provided by the second statute to an offence complained of under the first statute. The applicability of these forms is, by the second statute, expressly limited to complaints laid upon that statute; and I am not prepared to say that an offence under the one statute must necessarily be, in all cases, an offence under the other statute. I think the enactments in the two statutes are different. Whether the difference may be substantial, as affecting the merits of the present case, I do not wish to say, or even to allow myself seriously to consider; because I can easily see that this may be made the subject of important argument. It is enough for the present purpose that there is a difference.

2. Wherever a finding, such as is asked in the prayer of this petition and complaint, is competent in a summary form at all, it is as being introductory to some petitory conclusion. But here (so far as relates to the first statute) the finding prayed for is introductory to nothing. The interdict (as your Lordship in the chair has observed) is asked under the second statute only; and the penalty is exigible under the second statute only. There is no penalty attached to the enactment in the first statute. The abstract finding prayed for, under the first statute, is therefore incompetent, except in a regular action of declarator.

On these grounds I think the petition and complaint should be found to be incompetent, in so far as laid on the statute 8 & 9 Vict. c. 33.

The Court pronounced the following interlocutor:—"Repel the first plea in law for the respondents: Sustain, of consent, the fourth plea in law for the respondents: *Quoad ultra* allow a proof to both parties: Grant commission," &c.

John Cosens, W.S.—Smith & Kinnear, W.S.—Agents.

No. 16.

John James Hope Johnston, Petitioner.—*Boyle.*

Entail—Act 10 Geo. III. cap. 5 (Montgomery Act)—Act 11 & 12 Vict. cap. 36 (Rutherfurd Act).—Procedure under entail petition for authority to grant bonds and dispositions in security where the improvement debt is constituted by a decree of declarator, not yet final, under the Montgomery Act, and the consenting heirs are minors.

Entail.—New roofs to existing buildings are not "permanent improvements."

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The petitioner was heir of entail in possession of the entailed estate of Annandale. The present application was presented for authority to charge the fee of the estate with L.5013, 14s. 2d. of improvement debt. The expenditure was made partly prior and partly subsequent to the passing of the Rutherfurd Act. The improvement debt had been constituted by decrees of declarator under the Montgomery Act. The decrees were obtained in 1849, 1853, and on 20th March 1856. All the decrees passed in absence, and the last, which was for L.3144, 1s. 11d., was not yet final under the 26th section of the Montgomery Act—twelve months from its date not yet having elapsed.

The three nearest heirs of entail were the pupil children of the petitioner's

eldest son, now deceased. Their brother, Sir Graham Montgomery, and Mr Hope Scott of Abbotsford, were their tutors nominate. The Court, on 18th July 1856, appointed a tutor *ad litem* to the pupils. Intimation and advertisement were duly made, and service was also made edictally upon the pupils and their mother. No answers were lodged. No. 16. Nov. 21, 1856. Johnston.

On a remit to Mr Duncan, W.S., he reported that, to account of the sums contained in the decree of 1840, a sum of L.1683, 16s. of consigned railway money was paid in 1849, under the authority of the Court, in terms of the Lands Clauses Act. In accordance, however, with the recent case of Fleeming,[1] the improvement debt so extinguished did not require to be taken into account in estimating the amount of improvement debt of which the heir in possession was entitled to repayment under the Montgomery Act. With regard to the decrees of declarator, the Reporter suggested that the procedure in this case might be regulated by the procedure in the case of Murray Stewart,* where, in circumstances similar to the present, a minute by the tutor superseded the necessity of an inspection of the improvements by a practical man, or any examination of the vouchers by a professional man. Here the decrees of 1849 and 1853 being final, such minute might apply merely to the improvement debt constituted by the decree of 20th March 1856.

On 7th November 1856, the Lord Ordinary pronounced the following interlocutor:—"Before answer, appoints Mr James Adam, S.S.C., tutor *ad litem* to the three next heirs of entail mentioned in the petition, who are all in pupillarity, to lodge a minute in process stating whether he is satisfied that the sums contained in the decree of declarator of 20th March 1856 have been *bona fide* expended by the petitioner in permanent improvements upon the entailed estate, of the nature, and to not more than the extent contemplated by the Act 10 Geo. III. cap. 51, and whether such expenditure has been duly and properly vouched."

The tutor lodged a minute stating that he was satisfied that the sums had

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[1] Fleeming, 17th Feb. 1855, ante, vol. xvii. p. 451.

* HORATIO GRANVILLE MURRAY STEWART, Petitioner.—*Ross.* Nov. 21, 1856. Stewart.

Entail—Act 10 *Geo. III. cap.* 5, *and Act* 11 *and* 12 *Vict. cap.* 36.

1st Division. Ld. Mackenzie L.

THE petitioner was heir in possession of the entailed estate of Broughton, and on 5th March 1856 presented this petition for authority to grant improvements. One of the three next heirs of entail being a minor, a *tutor ad litem* was appointed to him.

The decree of declarator which was obtained under the Montgomery Act was dated 23d January 1856, so that the twelve months under which no appeal was competent had not yet elapsed. The Lord Ordinary reported the case to the 1st Division, and on 20th June 1856 pronounced the following interlocutor:—"The Lord Ordinary having advised with the 1st Division of the Court, appoints Mr Jameson, the curator *ad litem* appointed by the Court, to give in a minute stating whether he is satisfied that the sums mentioned in the petition have been *bona fide* expended by the petitioner in permanent improvements upon the entailed estate, of the nature and not more than the extent contemplated and provided for by the Act 10 Geo. III. cap 51, and whether the expenditure in said improvements has been duly and properly vouched."

The Lord Ordinary also of same date remitted to Mr Duncan, W.S. to inquire and report.

The tutor and reporter both expressed themselves in their reports satisfied in all respects—certain doubtful charges having been withdrawn by the petitioner to avoid discussion.

On 15th July 1856 the Lord Ordinary again reported the case, and the Court pronounced an interlocutor interponing their authority in usual terms.

RUSSELL & NICOLSON, C.S.—Agents.

No. 16. — Nov. 21, 1856. Watson v. Crawcour.

been duly expended, and to not more than the extent contemplated by the Act, and also that the whole of the sums had been duly and properly vouched; but that a sum of L.17, 18s. 6d., expended in erecting new roofs upon already existing buildings, appeared to him rather of the nature of repairs than of permanent improvements contemplated by the Act of Parliament.

On the report of the Lord Ordinary, the Court sustained the tutor's objection, and pronounced an interlocutor interponing their authority to the petitioner to charge the fee and rents of the estate with the sums contained in the decrees, and remitting to the Lord Ordinary to see the bond and disposition in security executed.

HOPE & MACKAY, W.S.—Agents.

No. 17.

HENRY GEORGE WATSON, Petitioner.—*Penney*—*G. Dickson.*
JOHN ISAAC CRAWCOUR, Compearer.—*A. Mure.*

Judicial factor—Authority—Division of Heritage—Expenses.—A judicial factor was appointed on the declinature of testamentary trustees to accept. One purpose of the trust was to convey to two children, on their attaining majority, their proportion of certain heritage. On the eldest attaining majority, the factor, in whose person the title stood, applied to the Court for authority to divide the heritable subjects, and convey the share to the child who was of age;—*Held* (1), that it was incompetent so to divide heritable subjects, but the prayer having been amended, authority to convey the *pro indiviso* share under the trust-settlement was granted; (2), that the expenses of amending the application formed a good charge against the trust-estate.

Nov. 21, 1856. — 1st Division. Ld. Mackenzie L.

THE petitioner was appointed judicial factor on the trust-estate of the late Mr Buchanan, the trustees having declined to act. By the trust-deed, Mr Buchanan directed his trustees "to convey and make over to the children of my said deceased sister respectively, on their respectively attaining the age of majority, the proportion of my means and estate, or of the prices and produce thereof, provided to the said children as aforesaid, with the interest accruing on the said proportion."

The children of the truster's sister were the compearer, John Isaac Crawcour, who was now of age, and his sister, Simina Helen Crawcour. An affidavit of the compearer's majority by his father, Edward Crawcour, was produced. This petition, after setting forth the facts, stated, "that since the title to the heritable property stood at present in the petitioner's name for the joint behoof of John Isaac Crawcour and his sister, it was necessary to obtain the authority of your Lordships to have it divided; and as the subjects to be divided consisted of four houses of different values, the petitioner was desirous of having the concurrence in the proposed division of Edward Crawcour, as administrator-in-law to his daughter, who was still a minor, and of Mrs Cooke, for any interest her children might have in their late uncle's estate."

The petition prayed for approval of the petitioner's accounts, and thereafter to authorise him "to divide the heritable subjects held by him in trust for the joint behoof of the said John Isaac Crawcour and Simina Helen Crawcour; and to make over, assign, dispone, and convey to the said John Isaac Crawcour (on his producing evidence to the satisfaction of your Lordships that he has attained majority), the share of the said heritable subjects, and to pay to him the share of the moveable estate to which he is entitled under the trust-disposition of the said James Buchanan—the said John Isaac Crawcour granting the necessary discharge."

On 16th July 1856, the Lord Ordinary reported in favour of the prayer of the petition.

LORD IVORY objected that the prayer was not applicable to the circumstances of the case, and that it was incompetent to divide heritable subjects, and dispone part of them in terms of the prayer of the petition.

No. 18.

Nov. 25, 1856.
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roperty hereby conveyed to them shall devolve upon and belong to the hildren of my cousins-german, Sarah Gee, Barbara, and Catherine War-ochs above designed, in the manner following, viz:—That to the number f persons remaining in life at the time there shall be added one, in order to estow upon Sarah Hunter, my second cousin, of whom I have a high pinion, and entertain a deep regard, a portion double to that of any of the thers. For example, suppose the number remaining in life to be seventeen, y adding one it is made eighteen, into which number of parts my whole state shall be divided, and the said Sarah Hunter be entitled to two ighteenth parts or shares, leaving one eighteenth share to each of the other ersons, without distinction of sex; and in regard that great doubts and ifficulties might arise between my heirs above described and the legal heirs f my said nephew and niece by their father's side, in the event of their eaths at a distant period without leaving legitimate children, which to prevent, I do hereby order, direct, and oblige my said nephew and niece, and the survivor of them, to preserve my account-book in the order it shall happen to be at the time of my death, in order to ascertain the amount of my ersonal estate, which shall be estimated at the value put on it by me at my ast balance, after deduction of my lawful debts, funeral expenses, and the everal sums above disponed or assigned by me, but in which none of the annuities are meant to be comprehended."

Some years afterwards he executed a codicil, which commenced thus:—"I, James Warroch, author of the foregoing deed, having taken the same under my revisal, and considering that my niece, Catharine Paxton Pursell, now Gowan, has, since the date thereof, been comfortably married, but without issue, under which circumstance that part of my fortune destined to her ... is by said deed to devolve ultimately upon my heirs-at-law upon her decease, but in consideration of the bountiful provision made for her by her husband, in the event of his death, and his tender affection towards her, I reverse that clause, and hereby commit to her discretion alone, as she may hereafter see cause, the sole and ultimate disposal of L.2000 sterling, as by the foresaid deed provided, but subject to the payment of L.10 sterling yearly to Barbara Gowan, my second cousin, and aunt to my niece and her husband (in consequence of their marriage), to be paid out of or from the interest arising from said L.2000 sterling, during all the days of the said Barbara Gowan's natural life."

Dr John Warroch Pursell, on the death of the truster, accepted and acted as trustee down to his death, which took place in 1835. Before which time, though several of the annuitants had died, the annuities were never reduced to L.20; nor did this event happen till the death of Euphemia Warroch in February 1839.

Dr Pursell, who died without issue, left a trust-settlement; and to his trustees a deed of factory was granted by Mrs Gowan, on the narrative that the management of James Warroch's estate had devolved upon her. During her life all the other annuitants died; finally she herself died intestate, and without issue, in 1849.

On her death a variety of claims were made upon the estate, and tried in conjoined actions of multiplepoinding, declarator, and exoneration, at the instance of Dr Pursell's trustees, and of exhibition, count, reckoning, and payment against them.

These claims depended upon the different views taken as to the vesting of the different portions of the estate. 1. One view was that the residue had vested in Dr Pursell, and fell to be regulated by his settlement. 2. A second, that the condition on which it was to have vested in Dr Pursell not having emerged during his life, it had vested in Catherine Paxton Pursell, who had become Mrs Gowan, and therefore fell to her heirs and representatives. 3. A third, that it had never vested in either of these parties, and so the destina-

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The purposes of the trust were—I. Payment of debts and funeral expenses; "II. For payment of L.50 sterling to Marion Paterson, . . . to John Menzies, L.27, 15s. 7d., . . . and L.200 sterling to be set aside" and paid to the managers of the Trades' Maiden Hospital; "III. For payment of the following annuities, viz.—L.50 sterling yearly to Ann Warroch, my eldest sister, spouse to John Pursell, during all the days of her life, and L.30 sterling yearly to the said John Pursell during all the days of his life; to my sister, Euphemia Warroch, L.50 yearly during all the days of her life; to Catharine Paxton Pursell, my niece, L.50 sterling yearly while unmarried, and if married with the approbation of her parents and brother, to be paid L.1000 sterling of dowry, and L100 for clothing and trinkets, and the annuity above granted to cease and terminate, but reserving to her such other provision as may hereafter be directed by this deed; to Dr John Warroch Pursell, my nephew and trustee, L.130 sterling yearly during the existence of the annuities hereby granted; as also, to Sarah Gee Warroch, relict of Mr Thomas Hunter, and Sarah Hunter, their daughter, jointly, and to the survivor of them, during all the days of her life, L.10 sterling yearly; to Barbara Warroch, relict of James Steel, and Margaret Steel, their daughter, jointly, and to the survivor of them, during all the days of her life, L.10 sterling yearly; to Elizabeth Warroch, my cousin-german, L.10 sterling yearly; to Catharine Warroch, spouse to Maxwell Strang, in the event of her husband's death, L.10 sterling yearly, to commence on the day of her widowhood, and to endure all the days of her life thereafter; and upon the decease of Ann and Euphemia Warroch, my sisters, and of John Pursell, my brother-in-law, I hereby give and grant to Catharine Paxton Pursell, my niece, an increase of L.50 annually, making her annuity thereafter L.100 sterling annually, if not married, but if cloathed with a husband, she shall remain in the precise situation in which she is placed by a prior clause of this deed, until the deaths of Sarah Gee, Barbara, Elizabeth, and Catharine Warrochs, my cousins-german, when the annuities will be reduced to L.20 sterling annually at the utmost, by the survivancy of Sarah Hunter and Margaret Steel, my second cousins: Therefore, upon that event, I hereby dispone and make over my whole real and personal estate to my nephew, Dr John Warroch Pursell, physician in Liverpool, under burden of the remaining L.20 annually of annuities, or of such sum as it may happen to be at the time, together with payment to Catherine Paxton Pursell, his sister, my niece, of the legal interest on L.3000 sterling annually, at two terms in the year, if unmarried, or if married, and that no dowry was given with her, but if L.1000 has been paid, as allowed by a former clause in this deed, then and in that case, she is only to receive the interest of L.2000 sterling, or such other sum as shall, with the money given with her, amount to L.3000 sterling as here destined to her use, and for the benefit of her offspring; but declaring hereby, and excluding herefrom, the *jus mariti* of any husband the said Catherine Paxton Pursell may marry, from any concern with the said money, or with the interest arising therefrom, hereby providing and declaring that the same shall not be attachable for the debts of her husband or otherways than for her own particular debts, debts contracted for her support and clothing, the same being destined by me to secure to her the necessaries of life, under proper management on her part; and for that purpose it is hereby declared that no other receipt than one by herself singly shall be a sufficient acquittance for the interest of the money hereby assigned to her for her necessary subsistence during her life, and at her death the principal sum shall devolve upon her children in wedlock, share and share alike; whom failing, it shall fall to and belong to the said Dr John Warroch Pursell; and in regard his legal heirs are not my natural heirs, it is hereby provided and declared, that failing the said Dr John Warroch Pursell and Catherine Paxton Pursell, who are equally near to me, without leaving legitimate children by one or other of them, the

property hereby conveyed to them shall devolve upon and belong to the children of my cousins-german, Sarah Gee, Barbara, and Catherine Warrochs above designed, in the manner following, viz:—That to the number of persons remaining in life at the time there shall be added one, in order to bestow upon Sarah Hunter, my second cousin, of whom I have a high opinion, and entertain a deep regard, a portion double to that of any of the others. For example, suppose the number remaining in life to be seventeen, by adding one it is made eighteen, into which number of parts my whole estate shall be divided, and the said Sarah Hunter be entitled to two eighteenth parts or shares, leaving one eighteenth share to each of the other persons, without distinction of sex; and in regard that great doubts and difficulties might arise between my heirs above described and the legal heirs of my said nephew and niece by their father's side, in the event of their deaths at a distant period without leaving legitimate children, which to prevent, I do hereby order, direct, and oblige my said nephew and niece, and the survivor of them, to preserve my account-book in the order it shall happen to be at the time of my death, in order to ascertain the amount of my personal estate, which shall be estimated at the value put on it by me at my last balance, after deduction of my lawful debts, funeral expenses, and the several sums above disponed or assigned by me, but in which none of the annuities are meant to be comprehended."

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Some years afterwards he executed a codicil, which commenced thus:—"I, James Warroch, author of the foregoing deed, having taken the same under my revisal, and considering that my niece, Catharine Paxton Pursell, now Gowan, has, since the date thereof, been comfortably married, but without issue, under which circumstance that part of my fortune destined to her use is by said deed to devolve ultimately upon my heirs-at-law upon her decease, but in consideration of the bountiful provision made for her by her husband, in the event of his death, and his tender affection towards her, I reverse that clause, and hereby commit to her discretion alone, as she may hereafter see cause, the sole and ultimate disposal of L.2000 sterling, as by the foresaid deed provided, but subject to the payment of L.10 sterling yearly to Barbara Gowan, my second cousin, and aunt to my niece and her husband (in consequence of their marriage), to be paid out of or from the interest arising from said L.2000 sterling, during all the days of the said Barbara Gowan's natural life."

Dr John Warroch Pursell, on the death of the truster, accepted and acted as trustee down to his death, which took place in 1835. Before which time, though several of the annuitants had died, the annuities were never reduced to L.20; nor did this event happen till the death of Euphemia Warroch in February 1839.

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On her death a variety of claims were made upon the estate, and tried in conjoined actions of multiplepoinding, declarator, and exoneration, at the instance of Dr Pursell's trustees, and of exhibition, count, reckoning, and payment against them.

These claims depended upon the different views taken as to the vesting of the different portions of the estate. 1. One view was that the residue had vested in Dr Pursell, and fell to be regulated by his settlement. 2. A second, that the condition on which it was to have vested in Dr Pursell not having emerged during his life, it had vested in Catherine Paxton Pursell, who had become Mrs Gowan, and therefore fell to her heirs and representatives. 3. A third, that it had never vested in either of these parties, and so the destina-

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tion in James Warroch's settlement came into operation. Other points were also raised as, 4. Whether Mrs Gowan's interest in the L.2000, of which the settlement gave her the liferent, was by the codicil converted into a fee? and 5. Whether the free income of the trust-estate, after payment of the legacies and annuities, from the date of the death to the date of the vesting of the residue, ought to be considered as part of the residue? or whether, as regards this James Warroch, he was to be treated as having died intestate? 6. Whether the period when the residue had vested was not the death of Euphemia Warroch?

Taking one or other of these views,—

I. John Pursell, as heir-at-law of Mrs Gowan, in whom he contended that the estate had vested, claimed the heritage, while

Mrs Agnes Pursell or Hislop and others, as executors *qua* next of kin and representatives of Mrs Gowan, claimed *inter alia* arrears of her annuity due at her death, and the legacy of L.2000, as well as the residue of James Warroch's personal estate.

In the event of its being held that the residue had not vested in Mrs Gowan, they claimed *ab intestato*, as the testator's next of kin, the arrears of the free income after satisfying the trust, which they maintained did not fall to be considered as part of the residue. Among the pleas which they stated were:—"6, There was no disposal by James Warroch's settlement of the free income of his trust-estate from the date of his death until the vesting of the fee of the residue, which free income fell to his next of kin, Euphemia Warroch and Ann Warroch or Pursell, and the claimants are now entitled to Euphemia Warroch's half, as in right of her and Mrs Gowan. 7, If it should be held that the residue of James Warroch's estate did not vest in Mrs Gowan, the L.2000 mentioned in the settlement vested in her as a special legacy, and now belongs, with interest since the death of the testator, to the claimants as her next in kin."

II. Mrs Barbara Steel or Newbigging and others, as representing Barbara and Catherine Warroch, and as being the only children of James Warroch's cousins-german alive at the death of Mrs Gowan, when they contended that the destination in the trust-deed took effect, claimed to have the whole estate divided among them.

III. William Elder and others, as grandchildren of Sarah Gee Warroch or Hunter—Mrs Margaret Browning or Smith and others, as grandchildren of Barbara Warroch—James Maxwell Strange and others, as grandchildren of Catherine Warroch (although in each of these cases their parents had predeceased Mrs Gowan)—claimed proportions of the estate of James Warroch, on the footing of its never having vested in Dr Pursell, and of their being entitled to share with the other representatives of the testator's cousins-german.

The Lord Ordinary pronounced the following interlocutors:—

"Finds that according to the sound construction and true meaning of the trust-disposition and settlement of James Warroch, of date 6th April 1805 and codicil annexed, of date 30th May 1812, the late Dr John Warroch Pursell had, at the period of his death, obtained no vested interest in the residue of the trust-estate: Finds that Catharine Paxton Pursell or Gowan whether by survivance of her brother, the said Dr John Warroch Pursell and of the annuitants under the trust-disposition, or otherwise, did not possess or obtain any beneficial interest in the residue, heritable or moveable of said trust-estate: Finds that Dr John Warroch Pursell and Catharine Paxton Pursell or Gowan having died leaving no legitimate issue, and the residue not having vested in Dr Pursell, the beneficial interest in the residue of the trust-estate devolved upon and belonged to and became vested in the children of the testator's cousins-german, Sarah Gee and Barbara and Catharine Warroch, in terms of the substitution in their favour in th

testator's settlement; and with these findings, orders the cause to the roll, in order to further procedure."* No. 18.

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* "NOTE.—Though a plea is put upon record for more than one set of claimants, that the fee of the trust-estate had vested in Dr Pursell, it was not seriously in-sisted in by any, and was abandoned by the counsel for one of the parties. The Lord Ordinary has had no difficulty in holding that Dr Pursell had taken no vested interest in the residue of the trust-estate. The matter of contention at this stage has been, and the only point debated before the Lord Ordinary was, whether Mrs Gowan, by her survivance of her brother and of the annuitants, had right to the residue, which had become vested in her as conditional institute, and now belongs to her representatives; or, whether the children of the cousins of the testator, under the substitution in their favour, took the residue upon the failure of issue, not only of Dr Pursell, but also of Mrs Gowan? The Lord Ordinary is of opinion that the beneficial interest in the residue of the trust-estate has devolved upon these parties, under the clause of substitution, or of conditional institution, as it may perhaps be thought to come up to.

"The parties claiming through Mrs Gowan, who died intestate, are, John Pur-sell, who has expede a general service as her nearest and lawful heir, and Mrs Hislop and others, who have been decerned her executors-dative, *qua* nearest of kin. These parties are also the representatives of the testator, in so far as any part of his estate might be held to have been undisposed of, or bequests to have lapsed, and the testator to have died intestate. There is a plea raised, that there was no disposal by the testator of the free income of his trust-estate from the date of his death until the vesting of the fee of the residue. This point was not argued, and remains undisposed of.

"It appears to the Lord Ordinary to have been the meaning and intention of the truster to limit Catharine Paxton Pursell, afterwards Mrs Gowan, to the annuity and special bequests, contingently and under conditions, bestowed upon her if she married, and upon her children, if she had any. These are, by the first part of the deed, under the third purpose of the trust, an annuity of L.50, while unmarried, and, when married with the approbation of her parents and brother, L.1000 of 'dowry,' and L.100 for clothing and trinkets, and the above annuity then to cease and terminate. In the after part of the deed, in that place where, upon a certain event, the testator makes over his whole estate to Dr Pursell, he burdens him with payment to Miss Pursell, his sister, of the legal interest of L.3000, to be paid to her if unmarried, but if married, and the previous L.1000 had been paid, then with the interest of only L.2000, or such other sum as, with the money given to her, shall amount to L.3000, and which he describes 'as here destined to her use, and for the benefit of her offspring,' excluding the *jus mariti* of her husband, and attachment for her own debts, 'the same being destined by me to secure to her the necessaries of life under proper management on her part;' and declaring 'that at her death the principal sum shall devolve upon her children in wedlock, whom failing, it shall fall and belong to the said Dr John Warroch Pursell.' The lady having been afterwards married, during her uncle's life, his codicil notices the event, and himself interpreting his settlement, stating that he had taken the same under his revisal, and considering that his niece has been com-fortably married, 'but without issue, under which circumstance, that part of my estate destined for her use is to devolve ultimately upon my heirs-at-law at her decease,' he, in consideration of the bountiful provision made for her by her hus-band, reverses that 'clause,' and commits to her discretion alone the sole and absolute disposal of L.2000 sterling as by his former deed provided, subject to the payment of a small annuity to a second cousin, to be paid out of the interest of that sum. These being the provisions in favour of Mrs Gowan, and expressed in terms so clear, both in the original deed and in the codicil, and setting forth the intentions of the testator, as well as marking the limits of the beneficial interest which he bestowed upon her, and containing a special reference to the testator's heirs-at-law as the parties who would otherwise, but for the power of disposal given, suc-ceed to that part of his fortune destined to her use, it is conceived that the meaning and intention of the truster, and the construction he put upon his settlements as regards Mrs Gowan, can, under these clauses, scarcely admit of dispute, and that to

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" Finds that the beneficial interest in the residue of the trust-estate of James Warroch, which by final interlocutor has already been found to have

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give her higher interests under other clauses of the settlement, the legal construction of them must be unequivocal and imperative.

" The representatives of Mrs Gowan found, in the first place, upon a clause which follows immediately after that part of the original deed which provides that the principal sum falling to the issue of Mrs Gowan shall, failing them, belong to Dr Pursell. It is as follows:—'And in regard his legal heirs are not my natural heirs, it is hereby provided and declared, that failing the said Dr John Warroch Pursell, and Catherine Paxton Pursell, who are equally near to me, without leaving legitimate children by one or other of them, the property hereby conveyed to them shall devolve upon and belong to the children of my cousins-german, Sarah Gee, Barbara and Catherine Warroch, above designed, in the manner following.' The contention is, that this clause amounts to a conditional institution of Catherine Paxton Pursell, failing Dr John Warroch Pursell being in a condition to take the residue; and it is said that the words 'property hereby conveyed to them' cannot be satisfied otherwise than by holding that Catherine was called to take the residue if her brother did not survive the event which would have vested it in him. In the previous part of the deed, there is, admitttedly, no words of conveyance to Catherine Pursell as regards the residue. The only disponee is Dr Pursell, to whom, upon a certain event, the truster dispones and makes over his whole real and personal estate, but under burden of the provisions already mentioned to Catherine Pursell. The words of conveyance to her brother cannot be extended to her, and to imply any inclusion of her would be repugnant to the burden under which the conveyance is made to him; but where there is confessedly no conveyance in that place, where it should be found, it would be a grave matter for consideration to allow the want to be supplied by words in an after part of the deed, though it were impossible to put a natural meaning upon them taken alone, except on the supposition of previous words of conveyance answering to them; there would be an inconsistency, but the mistake would be in the latter clause, and the words used are to be rejected as unwarranted, and incapable of receiving effect. The consequence might indeed be intestacy, but that result would violate no principle.

It appears, however, to the Lord Ordinary, that this part of the deed, though not very happily expressed, does not lead to the conclusion which the representatives of Mrs Gowan would draw from it, and that a sufficiently natural construction of an opposite kind can be given to the clause in question to satisfy its whole words,—'the property conveyed to them.' Whether by this pronoun, used relatively, i[s] meant Dr Pursell and Catherine Pursell themselves, or their children, must hav[e] its antecedent in the preceding part of the clause. The word 'property' is n[ot] there found, nor the word 'convey,' but there is disponed and made over to D[r] Pursell the whole real and personal estate, and then the sum of L.3000 sterlin[g] is destined to Catherine Pursell and her children, in the manner already explaine[d]. Now, under the rule *applicando singula singulis*, the phrase 'property conveye[d]' can legitimately be read as referring respectively to the residue made over to D[r] Pursell, and the L.3000 provided and destined to Catherine Pursell and her chi[l]dren. It will be observed that it is on the failure of both, without leaving issu[e] that the property conveyed is to devolve. The L.3000, failing Catherine havi[ng] issue, was to belong to Dr Pursell, and so that sum, as property conveyed, cou[ld] only fall and devolve under the substitution to the cousins on Dr Pursell also dyi[ng] without children. Then as to the residue given to Dr Pursell, the substitution [is] to take effect as to it if he leaves no issue; such is thought to have been the mea[n]ing of the truster, and the understanding he had as to the ultimate destination bo[th] of the residue and the principal sum of L.3000 under the expressions here used [by] him. If Catherine Pursell had left issue, it is possible that a serious question mig[ht] have arisen as to their rights in the trust-estate, and the obstacle which their ex[is]tence might present to the substitution taking effect; and it was maintained [in] argument, that had Catherine Pursell left children, they would have taken in p[re]ference to the cousins called. It is unnecessary to consider this question, [as] issue never existed. But a remark suggests itself as indicative of the truste[r's]

devolved upon, and to belong to, the children of the truster's cousins-german, No. 18.
Sarah Gee and Barbara and Catherine Warroch, became vested in them at —
the death of Euphemia Warroch, who died on or about the 15th day of Nov. 25, 1856.
February 1839: Finds that the free income of the trust-estate, from the date Pursell v. Newbigging.
of the truster's death until the said term of vesting, formed part of the resi-

meaning and intention to exclude not only Mrs Gowan, but her children (had she afterwards married and had issue) from succession to the residue. The clause of substitution of the cousins is introduced by giving as the reason, that Dr Pursell's legal heirs are not the truster's natural heirs; and so, while the truster had bestowed the residue personally on his sister's son, he excludes the succession of Dr Pursell's heirs, and prefers his own cousins-german by the father's side. While thus providing for the exclusion of Dr Pursell's heirs, of whom the nearest would have been Mrs Gowan herself, it seems impossible to put an opposite meaning upon the rest of the clause, and to hold that, by the words 'property conveyed to them,' Catherine Pursell was conditionally instituted to her brother.

"There is another clause, however, upon which the representatives of Mrs Gowan found as confirmatory of their construction of the clause just examined. This latter clause of the deed is as follows:—'And in regard that great doubts and difficulties might arise between my heirs above described and the legal heirs of my said nephew and niece by their father's side, in the event of their deaths at at a distant period without leaving legitimate children, which to prevent, I do hereby order, direct, and oblige my said nephew and niece, and the survivor of them, to preserve my account-book in the order it shall happen to be at the time of my death, in order to ascertain the amount of my personal estate, which shall be estimated,' &c. It is certainly difficult to understand the meaning of the testator introducing the niece into this clause, and what were the doubts and difficulties to arise between his heirs and those of his niece in the event of her death at a distant period without leaving children, and which were to be prevented by the direction he gives. With regard to the nephew—who was named trustee and executor, but who might never come to take the beneficial interest in the estate, and which would then fall to the truster's heirs—the purpose and object of the direction are perhaps sufficiently obvious. But as the niece was neither joint trustee nor trustee in succession, the obligation laid upon her appears inexplicable. The object is to ascertain the amount of his personal estate, which is to be estimated as he directs. This means, as he explains it, the residue of his personal estate, after paying legacies and provisions, but without deduction of the annuities. Then he contemplates the deaths of both nephew and niece at a distant period, without leaving legitimate children. The introduction of this last circumstance is startling, and must at once suggest that the existence of such children of the niece, as well as of the nephew, would remove the doubts and difficulties. Again, the direction is to the nephew and niece, and the survivor of them, indicating that at her death the doubts and difficulties might arise. The claimants opposing the representatives of Mrs Gowan were not successful in explaining this part of the deed, which, it must be acknowledged, gives some plausibility to the contention, that Mrs Gowan was conditionally instituted to her brother in the residue. It would perhaps go farther, and imply that she was to take in succession to him. Indeed, the whole of this clause, read by itself, would lead to the expectation of finding in a prior part of the deed that a life interest in the residue of the personal estate had been bestowed successively upon the nephew and niece. The Lord Ordinary will not attempt to reconcile the expressions in this clause, or search for its apparent meaning, in connnection with the previous parts of the settlement. But whatever embarrassment it may create, the preceding parts of the deed seem to him to convey distinctly enough the true meaning and intention of the testator, as being such as has been already explained, and to overcome any inference to the contrary which can be drawn from this clause. Then, in addition, the codicil is to be looked at as affording the final explanation of the testator's intentions in regard to his niece. And, as already noticed, it appears to the Lord Ordinary to be adverse to the construction put by her representatives on the principal deed. Holding, therefore, Mrs Gowan to have been excluded from any right to the residue, it must fall under the substitution to the children of the cousins; and so the interlocutor finds."

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due; and repels the sixth plea in law for the claimants Mrs Agnes Pursell or Hislop and others: Finds, in regard to the sum of L.2000, the interest of which was destined to the use of Catherine Paxton Pursell or Gowan, that as she did not exercise in any shape the faculty conferred upon her by the codicil to James Warroch's trust-settlement as to the disposal of that sum, but died intestate, the same continued to form part of the trust-estate, and is to be distributed as included in the residue; and also repels the seventh plea in law for these same claimants: And with these findings, orders the cause to the roll for farther procedure." *

* "NOTE. — The note to the former interlocutor of the Lord Ordinary (which has been acquiesced in, the reclaiming note for certain of the parties having been withdrawn) explains the grounds on which he rejected any beneficial interest in the residue having been possessed or obtained by Mrs Gowan, and also the grounds on which he would have questioned the right of her issue, if any had been born, to a beneficial interest in the residue failing her. The Lord Ordinary must follow up that view by holding that the death of Mrs Gowan cannot be taken as the period at which vesting of the residue took place in the children of the cousins, to whom, by last interlocutor, it has been finally fixed that the residue of the trust-estate devolved upon and belonged. The attempt of another set of claimants to carry the period of vesting in the children of the cousins backwards to the death of Dr Pursell, appears to the Lord Ordinary to be untenable. Holding, then, that vesting, whether at the death of Mrs Gowan without issue, or at the death of Dr Pursell, cannot be supported, the Lord Ordinary sees no period to fix on but that when the annuities were reduced to L.20, at which time, had Dr Pursell survived, he would indisputably have taken the residue and obtained a vested interest therein. The death of Euphemia Warroch fixed this period.

"An attempt was made by one set of claimants, who represent those holding the character of next of kin of the truster, during the period between his death and the term of vesting of the residue, to maintain that the free income of the trust-estate, after satisfying the annuities, was left undisposed of by the truster, and so fell to his next of kin. The Lord Ordinary is unable to see any sufficient grounds to support this construction of the trust-deed, and to admit of intestacy as to any part of the truster's estate. He apprehends that the free income, whether a surplus existing from the commencement of the trust after payment of the annuities, or becoming enlarged by the annuities successively falling in, until reduced to the amount when the residue was to become vested, must be held to have been conveyed as part of the trust-estate, and finally to become part of the residue. There is doubtless obscurity in the meaning and purpose of the direction to preserve the truster's account-book, but the clause does not appear to the Lord Ordinary to aid the plea of the next of kin. It is thought there can be doubt of the intention of the truster to convey his whole estate, after satisfying the annuities, to Dr Pursell and those substituted to him; and it is conceived that the terms of the conveyance are sufficiently broad to embrace any free income, and draw it into the residue.

"The representatives of Mrs Gowan maintained, that under the codicil the L.2000 which by the settlement was destined to her use and for the benefit of her offspring and, failing them, to Dr Pursell, aud ultimately to the truster's heirs-at-law, was by force of the terms used in the codicil, constituted a special legacy vesting in her at the truster's death, and now falling to her next of kin. They founded particularly upon the words 'reverse that clause,' as recalling the devolution upon the truster's heirs-at-law, and, coupled with 'committing to her discretion alone the sole and ultimate disposal of L.2000,' contended that such expressions were equivalent to constituting a special legacy, which vested in her on the testator's death. They relied on the omission of any words of direction as to the mode in which the disposal was to be exercised—as by deed, settlement, or writing under her hand—and remarked that the terms, power or faculty, were not used. The claim of the representatives was argued with much force, and English authorities were brought to bear in support of the construction contended for, but no Scotch authority was cited, and it appeared to be conceded that none could be shown. It humbly appear

Against both these interlocutors reclaiming notes were presented; but all were withdrawn, except those for John Pursell (in his own name, and as representing Mrs Hislop, now dead), in so far as they prayed the Court to find that "the free income of the trust-estate, from the date of the truster's death to the period of vesting of the said residue, did not form part of the residue, but that the same was not disposed of by his settlement, and fell to his next of kin; as also, to find that the sum of L.2000, provided in the settlement for Mrs Gowan, did not form part of the residue of his trust-estate, but vested in Mrs Gowan, and belongs to her next of kin, as her executors or otherwise; and to sustain the sixth and seventh pleas in law for the reclaimers."

The reclaimers maintained, that Mrs Gowan was the truster's sole next of kin from the death of Euphemia Warroch in 1839, and also the next of kin of Euphemia, while they were themselves next of kin of Mrs Gowan, and therefore they were entitled equally to whatever had vested in her under the trust-deed, and whatever she took *ab intestato*. On this last footing they were entitled to the whole accumulations which had arisen from the income of the estate being more than sufficient to meet the annuities. There was no presumption of law in favour of an intention to accumulate; and here it did not seem intended by the deed to convey accretions. The testator, by directing his account-book to be preserved, fixed the amount of his estate, and the free income was not disposed of; therefore he must be held to have died intestate *quoad* these, and that *ex proposito*. As to the L.2000, the reversal in the codicil of the previous provision, prevented the testator's heirs-at-law from taking it, and was equivalent to striking out of the original deed the destination in favour of the heirs-at-law, and amounted to giving the fee to Mrs Gowan, whereas originally she had only had the liferent. Had a power of testing been all that was granted, it was admitted that would not have conferred a fee; but here the gift was absolute, and the sum left to her sole and absolute disposal, whether she had children or not. The sum, therefore, must be held to have vested absolutely. Any other reading of the codicil would make it leave Mrs Gowan in a worse position than she had occupied previously, for the L.2000 was to be burdened with an annuity of L.10, thus reducing the annuity she herself enjoyed. This was clearly contrary to the spirit of the codicil.[1]

For the respondents it was argued;—The usual words of style, conveying the estate in trust, were wide enough to embrace everything, not excepting

to the Lord Ordinary, that, viewed as a question as to the meaning and intention of the truster, his purpose was only to confer a faculty or power on Mrs Gowan to dispose of the fee of the L.2000, and it would rather seem from the narrative of the codicil that the inductive cause was to put it in her power to leave the money to her husband in case of her predecease, though the power was given in general terms. The words 'reverse that clause,' it is thought, were used as meaning 'alter that clause,' in order to bestow the power which immediately follows. And construing the words, 'commit to her discretion alone the sole and ultimate disposal,' according to their legal significance, the Lord Ordinary conceives that they amount to nothing more than the grant of a faculty, and which must be exercised either by some direct act having reference to the power, or by some deed or testamentary writing by its character inferring an implied exercise of the faculty. But Mrs Gowan died intestate; and unless it could be held, that committing to a party's discretion the sole and ultimate disposal of a sum is tantamount to conferring a fee in it during life, the Lord Ordinary does not see how it can be carried to representatives on intestacy."

[1] Cowan v. Turnbull, 13th June 1845, ante, vol. vii. p. 872—affd. H. of L. 17th March 1848, Bell, vol. vi. p. 222; Mill v. Mill, 6th June 1826, Sh. vol. vi. p. 685; Hyslop v. Maxwell, 11th Feb. 1834, Sh. vol. xii. p. 413; Whyte v. Tawse, 21st Nov. 1829, Sh. vol. viii. p. 107; Elton v. Shepherd, Br. Chan. Cases, vol. i. p. 542.

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the free income, and to constitute residue of whatever was over at the period of vesting. Had there not been sufficient income to meet the purposes of the trust, the capital must have been taken, and those who were to enjoy the residue must have suffered; and as, on the other hand, there was free income, they were entitled to the benefit of the accumulations. The reading contended for by the reclaimers would have led to inextricable confusion; each year as the free income was ascertained, it would fall to the next of kin, who were liable to vary every year. The clause as to his account-book was not intended to limit the generality of the conveyance in trust, but merely to protect his trustee in case of disputes. As to the claim for the L.2000, it failed; for what the testator had done by his codicil had not the effect of giving Mrs Gowan the fee of that sum, but merely a power of disposing of it after her death—a faculty which, it was admitted, she had not exercised. If it had been intended that the fee should be given, that would have been said in so many words; but that could not be intended, for its alimentary nature was to continue so long as she lived; nay, the power of disposal was only to take effect if she died without children. The argument raised on the other side from the burden of the annuity of L.10 was groundless; for that was only to be imposed in the event of the power of disposal being exercised. Had the fee been conferred, the sum would have vested in her husband, and been carried off by his creditors, who had long ago attempted to attack her rights under this settlement, but had failed.[1]

Lord Justice-Clerk.—The last reclaiming note, in so far as it goes beyond the prayer of the original note, has been withdrawn, so that the question of vesting is to be taken, on the one note as on the other, as finally settled by the Lord Ordinary. The reclaiming notes therefore bring before us only two points, which are totally separate questions, and in no respect dependant the one on the other. The first is, in my opinion, a very general point, for I am persuaded that the same question might arise in the majority of trust-deeds.

The trust-deed of James Warroch conveys in the most general and unqualified terms, such as are used more or less in all similar deeds of trust-disposition, th whole heritable and moveable estate and property of whatever species or denomina- tion, belonging to the truster at the time of his death. There is great anxiety t make the specification complete and comprehensive. The property is conveyed t the trustee for the ends and purposes after mentioned—(1) for payment of all hi debts, which I mention for a particular purpose. Then a variety of annuities ar given, and as these might require a large portion of the income of the property, h does not make over the real and personal estate to the ultimate beneficiary, who the trustee himself, until the annuities are reduced to L.20 annually. Upon th event, the *whole trust-estate* is made over to the trustee for his individual benefi with the exception of a sum to the truster's niece, which must be afterwar adverted to. But it is contended, that until this event of the reduction of t annuities to L.20 yearly, nothing is said as to the surplus interest, or income the estate, accruing in the interval, after paying the annuities, which surplus, it argued, is not disposed of,—that there is no declaration that the surplus income to be accumulated, and remain to form part of the trust-estate, so as to enlarge at the time when the first beneficiary or subsequent beneficiaries are to take, a hence that the truster died intestate as to such free income.

I cannot conceive a proposition more repugnant to the objects of the truster— the presumptions applicable to such a case—or to the legal effect of the ter employed, and it was admitted that no such result was within the contemplati of the truster. What a truster is to convey, correctly and technically, is wh actually belongs to himself, and is extant at his death as subjects to be convey As to the income accruing after his death, he is entitled to give any directions regard to it which he chooses, and to regulate its employment or its enjoyment any way he chooses. But, properly speaking, he does not convey what comes i

[1] Gowan v. Pursell, 17th May 1822, Sh. vol. ii. p. 390; Weddell v. Weddell, Exch. Lammas 1848; Lord Rollo v. Rollo, 26th Jan. 1843, ante, vol. v. p. 446.

existence after his death. He only gives directions as to the income of that estate which he has conveyed to the trustees. If he does not so regulate the employment and destination of the income arising after his death, either temporarily or for a long tract of time, then the income, which is the produce of the estate conveyed, of course belongs to that which is conveyed—the estate extant at his death, and of which it is the produce. It is necessarily part of the trust-estate which is to be held in trust until a certain event. That estate bears fruit in the interval—annuities, of course, are to be paid out of that income, and if there is free income, it is of necessity part of the trust-estate held by the trustee for the ultimate purposes stated as the objects of the truster. If the trustee had not been the beneficiary in the first instance, or as he came not to be such—what is the claim of the beneficiary against the trustee?—why surely, and beyond all doubt, the estate actually conveyed with its accruing fruits and produce. This is not, properly speaking, a case of accumulation. It is the simple case that the right to the estate, when it opens, carries right to the produce of that estate, not otherwise appropriated. If the purposes of the trust did not carry such right to the surplus income, it would be more reasonable to hold that the truster should take the same for his own behoof, than that the heirs-at-law could possibly claim any benefit from the trust-estate conveyed away from them. The notion that as to such free income the testator died intestate, seems to be little better than pure nonsense. And, in point of fact, this proposition was hardly stated as a principle of construction applicable to this very common result in distribution under trust-deeds. But then it was stated that truly this free income, under the deed, would go to the next of kin of Euphemia Warrock, and so that it was not claimed on the ground of intestacy. To make out that point, the parties must shew a direct gift in the trust-deed in their favour.

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But then it was contended that a particular clause in this trust-deed made this a special case, and that the free income was excepted out of the estate held by the trustee for the purposes of the trust. No doubt such exceptions may occur, or the words employed may not be adequate for the purpose in view, and so exclude the operation of the general rule already stated; but I find no exception in this deed. The meaning of the clause referred to seems very plain and simple, and cannot be twisted into any such result as that ascribed to it. Foreseeing that the trust might last some time—that, as the trustee might become the ultimate beneficiary, or that others, if he predeceased the period when his right opened, might call his representatives to account, and that there might be some confusion and conflict of interests, the truster inserts a plain clause (quoted supra, p. 73), with one and a limited object. He says, My account-book is to be kept; that will show the amount of my personal estate at my last balance, after deducting debts and sums assigned, but of course without deducting annuities, which could not of course affect or alter the balance of his estate at his death. On the other hand, what was necessary to pay debts and legacies could not remain as any part of the balance to be held by the trustee for the other and ultimate purposes of the trust. It is said that this implies that the annuities are to be paid out of the income. To be sure; but that, as it does not contain any gift of the surplus income, so it cannot and is not intended to exempt the surplus from the purposes of the trust, or leave it not to follow, according to universal rule, the disposal of the estate of which it is the produce. I do not know what is meant by the proposition that a man dies intestate as to a portion of the future income of an estate, when the whole estate is conveyed to trustees for the purposes of the trust. Intestacy as to the future interest seems to be utterly inapplicable to the case, and it would tax the ingenuity of most laywers so to frame a trust-deed, that, after conveying the whole estate to trustees for certain purposes, with an ultimate gift to a certain person on the occurrence of a certain event, the produce of that estate not expended should be intercepted, and the individual should be held to die intestate as to such produce. I take it, if any one will try his hand at such a deed, the only way to accomplish the result will be found to be a bequest of the free income until the right to the principal opens, and that would be no case of intestacy; or by words which, in giving directions as to part of the income, leave the rest excepted from the general words of conveyance, and yet undisposed of at the proper place.

As to the sort of confusion in the man's mind that his niece might, whether as trustee or not, have a sort of management of the fund, that cannot affect the point.

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On this first question, then, I concur with the Lord Ordinary; and I must add, that the point is so very clear that I would not have said a word, if I had not thought that it depended on a very general question of construction of trust-deeds, which might extend to a great variety of cases, and if it had not been pleaded that a recent case, Cowan v. Turnbull, interfered with the general rule I have stated with this general question. That is not a correct view of that case. It is true that the party on whom, if he recovered, or on whose death the trustees were directed to execute an entail of the lands belonging to the truster, and of lands purchased with the funds he possessed, happened to be his only son, and of course his heir-at-law, for whom, being a lunatic, a provision was to be made for his comfortable maintenance. But there was no direction to invest in land the surplus income of the estate. And not unnaturally he was spoken of, in the opinions in this Court, as the heir-at-law. But the opinions both of Lord Fullerton and Lord Jeffrey show that they looked to his rights as the *beneficiary* under the trust; and the interlocutor does not put the claim on the ground of the lunatic being heir-at-law; and the same is, I think, the true result of Lord Cottenham's opinion, for he founds on the point—*quid juris*, if the funds had been invested in land within a year after the truster's death, what would then become of the rents in the intermediate period before the son's death or recovery?—clearly showing that in his opinion the ultimate right, though contingent to the lands, carried the right to the rents to the same party; but also showing, that if that party had not been heir-at-law, the intermediate rents would not have gone away from the trust to a third party not named in the deed, because he was heir-at-law. The case of Turnbull, when rightly understood, in truth, is an illustration of the general rule I have stated, that the surplus rents must go to the party interested under the deed in the meantime. The truth is, that the question in Turnbull related to the beneficiary's right to the surplus rents, because there was no direction to invest them in land; and hence, not that the party died intestate as to these, but that they necessarily went to the general bequest of the truster's property. Of course, one must look to the facts of the case and the principle of decision—not to casual expressions used because the beneficiary was the heir-at-law. It is quite clear from Lord Cottenham's opinion, that the decision would have been the same if the beneficiary had been a stranger.

On the second point, I have the misfortune to differ from the Lord Ordinary. That point relates to L.2000 in which the truster's niece was to have a certain interest.

In all such questions the important point is to ascertain the intentions of th truster. But, then, we must take care that we find words adequately expressin intention, and that we do not go on conjectures as to what the truster probabl intended or might have intended in the case which has occurred, if foreseen. W are not at liberty to interpolate conditions not expressed, or to make that con tingent which is given or directed in absolute terms. It is a great error in the con struction of such deeds, and of such provisions in trust-deeds as that which we ar now to consider, to deny effect to the truster's expressions on any view of his pro bable intentions, when there are no expressions to prove that intention.

Now, what is provided in the trust-deed?

The niece was then unmarried, and the usual directions are introduced, securin the fee to her children, and excluding the *jus mariti* both as to interest and princ pal; and then, on the death of the niece without children, this sum, as well as th residue, was to go to the children of certain cousins whom he named,—of cour distant relations compared to the niece.

The party makes a codicil seven years afterwards. By this time a great chang had taken place in regard to this niece, which most naturally led to a great chang in his purposes as to his niece. The niece had been in the meantime comfortab married, as he says. And further, her husband had made a bountiful provision f her in the event of his death. And further, she had no issue, and he plainly he that she *would have no issue*. He proceeds, then, on that state of things. An he further held that, in respect of the conduct of the husband, it was fitter to enlar the interest of the niece, and no longer to look to the interest of the children his cousins rather than to that of his niece, especially as the latter would get Dr Pursell died without children) all the residue of his estate.

The first point which presents itself in this codicil, founded on that state of things, is, that he intended a material and great change, and for the benefit of the niece.

The second point is, that he assumes that the niece would have no children. He was entitled to form his own opinion on that point. He knew the parties: we do not. He considered that he had good grounds for allotting his provision as to his niece upon the assumption that she would have no children, and he assumed the existing failure of children as the state of things on which he might proceed. And he was right. He takes the failure of issue as complete. He says, "under which circumstance"—taking the fact as certain: not circumstances, but the actual state of things—which he assumes as that condition on which he may safely proceed in making his ultimate revision.

The fourth point is, the strong and emphatic declaration in the codicil itself, which excludes all conjectural interpretation or speculation as to intention. He says that he has revised his settlement, "and considering that part of my fortune destined to her use is by said deed to devolve ultimately upon my heirs-at-law upon her decease"—that is, looking to the provision to his heirs-at-law in the case of his niece having no issue, he is resolved to make *another* arrangement.

Farther, in consideration of the generosity of the husband of the niece to her, on such grounds he "reverses *that clause*"—that is, the clause leaving the sum to his heirs at law on the death of the neice without issue. Yet it is said that the provision still subsists, and the sum is equally to go to the heirs at law. I cannot so deal with this emphatic declaration. He "reverses that clause." He puts an end to it. The Lord Ordinary says that he reads it, "he alters that clause." I must take the actual words employed. "Alter" may embrace a very small change, while the substance is to remain untouched. But the word is, "I *reverse* that clause." This is total extinction. And the maintaining of the same right and interest, and of the same result, is totally repugnant to any apprehension I can entertain of the words employed.

It is farther to be kept in view that this is a codicil, written, as was the deed itself (on which the codicil is found) by the testator himself; and that therefore the terms used by him are to be taken in their plain and ordinary meaning, and full effect to be given to them in all circumstances, not being dependent on any technical interpretation, nor limited by any conventional understanding as to the objects supposed to be in view by their use. Now, "I reverse that claim," having recited its purport, viz. that as the niece had no issue, the sum was to go to his heirs-at-law. "Reverse" it. What other view can be taken than this—that as she had before only the liferent, so now she was to have the fee, and not the heirs-at-law? This is a very natural and reasonable view of the words employed, when the sequel of the sentence is looked to—"I reverse that clause, and *hereby*," &c. Thus the clause, the former provision, is reversed, and then the favoured niece is brought in, in lieu of the former provision of the fee.

Farther, as the former clause is reversed, it is to be presumed, surely, that that which is substituted is to be as comprehensive and exhausting as that which is repealed, and so that it carries the full right to and interest in the sum provided for the niece. The words are not formal and technical, but the expression of the man's own kind feeling to his niece, and are chosen plainly to mark his opinion of her, but not to limit her right. Can this, in such a codicil, be reasonably read as a mere faculty or power which must be specially exercised, else her interest in the sum is lost, and her next of kin take nothing, and after all the heirs-at-law take, as if the clause had not been reversed? I cannot so read this. I think it is truly a kind and affectionate way of giving her full right to that sum, of which before she had only the liferent, and the fee of which, by the original clause, was to go to his heirs-at-law. But that clause being reversed, which extinguishes the interest of the heirs-at-law, the subsequent words practically and truly give the full and final interest in the sum to the daughters. It would be much too technical and unnatural, as well as a very forced construction of that clause, to suppose that the old gentleman intended merely to give his niece a power to test after her death on the sum. Indeed, that narrow view was not truly contended for, it did not seem to be disputed that she could spend or employ the sum in any way she liked; and if that is clearly the effect of this codicil, it seems to me

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a strange inconsistency to hold that her next of kin, if she happened to die intestate, were not to take the sum.

No difficulty arises out of the condition, not very artificially or skilfully added, as to the annuity to Barbara Gowan. On the contrary, I think that only the more proves that the fee was intended for his niece.

Various remarks were made on the clause in the original deed excluding the *jus mariti* or debts of the husband. I attach no importance to these remarks. It is very likely that the old gentleman entirely forgot this part of the clause, in consequence of the generous conduct of the husband—or believing that it would be required to be repeated before it could apply to his new provision, he purposely omitted it. But no difficulty on that point can interfere in my judgment with the plain and strong terms of the codicil.

In a word, that clause being reversed, which gave the heirs-at-law an interest in the fee of the sum in question, I cannot hold that it remains still operative against the next of kin of the niece, or to narrow and restrain the interest of the niece in the new bequest to her.

No doubt, it was said that the words are to be read, with such and such conditions implied, as restrictions or declarations as to the extent or nature of the bequest bestowed. I cannot invent, or imply, or import, in point of meaning, any such conditions.

For instance, to avoid such a result as that which might have happened, although not anticipated by the granter, viz., of the niece having children after all, and of the fee going to his cousins, away from the children, it is said that the destination of the fee to the niece's children must be held to subsist. This seems to me neither more nor less than making a will. The granter, if he foresaw such a case, had no difficulty in giving the fee to the niece, satisfied that her children might safely be left to their own parents, the kindness of one of whom, the father, he so emphatically refers to. To interpolate the destination to them, when the whole clause is reversed, appears to me to be unwarranted on any rule of construction.

It is said that the exclusion of the *jus mariti* would, on the view maintained by the reclaimers, be recalled. If that should be the result, I think the confidence which he found he had reason to place in the husband, would render that a probable result in point of intention. Perhaps he overlooked this point. But whatever might be the result, I cannot hold these, and other minor difficulties, to have the effect of counteracting the express reversal of the clause he refers to, or to exclude the benefit which I think he clearly intended for the niece.

On these grounds, I am unable to concur in the view taken by the Lord Ordinary as to the sum of L.2000.

Lord Murray.—I concur in thinking that the interlocutor of the Lord Ordinary should be adhered to as to the point raised regarding the free income arising from the trust-estate. Any other view would have disturbed the administration of many trusts, and, therefore, I am glad that no doubt whatever has been thrown upon it.

I pass, therefore, at once to the other point, which is one of difficulty, as to whether or no the L.2000 vested absolutely in the niece. The testator seems to have acted as his own conveyancer, and those who do this always produce nice cases—sometimes of extraordinary difficulty. In the deed he provided that his niece should receive the interest only of this sum, excluding the *jus mariti* of any husband, and that the principal should go to her children, whom failing, to his heirs-at-law. Then he executed a long codicil, in which, with reference to that provision, he says, considering that his niece is comfortably married, and has no children, in which case the L.2000 would devolve upon his heirs-at-law on her decease—"I reverse that clause, and commit the sum to her sole and ultimate disposal." Now, there is clearly the reversal of a clause—but what clause? There is great difficulty; but I take the last clause which has gone before, namely, that of devolution upon his heirs-at-law. The clause giving her only the liferent is more remote. Therefore, I assume he refers to the other, and that he did not intend to do more than change the destination and give her faculty to dispose, a right quite well known to the law of Scotland,—and what follows the words of reversal confirms this view,—"I commit to her discretion alone the sole and ultimate disposal of L.2000." What is this but faculty according to the civil law? "*Facultas est libera quædam et plena potestas rerumque pro*

arbitrio gerendarum facilitas, nullis aliunde impedimentis interturbata." The words of the codicil are merely a free translation of that definition. No. 18.

The niece was to have the sole power of disposing—almost the very words of the civil law. The testator had it in his power to have given her the fee if he liked, but he has not done so by the words of this codicil. Am I to supply that effect on the supposition that he intended to do so? Am I to do more than he has himself done? We have a strongly marked distinction between faculties and fees recognised in a long line of decisions from the time of Lord Hardwick down to the recent case of Morris v. Tennant, and we must here give effect to it. The provision actually made is a most reasonable one. The income is secured to his niece, and the power of disposal enables her to show her affection to her husband if she pleases. In short, as the sum before went to his heirs, he, in consideration of the provisions made by her husband, reverses "that clause," viz. the destination. Moreover, the term interest occurs in the codicil, proceeding, as I imagine, upon the impression in the testator's mind of the liferent continuing. This testator wrote his own will, and if he has not expressed what he intended, I cannot help that. I cannot go beyond the words he has used, and, in my opinion, they have the effect of conferring a faculty, but no fee.

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LORD WOOD.—1st, Upon the first point which we have to decide, I concur in the view taken by the Lord Ordinary and your Lordships, and have nothing to add.

2d, The second point to be disposed of is the question raised in regard to the L.2000. It appears to me to be essentially necessary, in the first place, to attend particularly to the terms of the bequest of that sum as contained in the trust-deed of 1805, in order to ascertain the true import and effect of the provision in relation to it in the codicil of May 1812.

Without reciting the first portion of the original bequest, I think it may be stated to be clear, that although the term liferent is not used, there is, in the words there mentioned, a settlement of the L.2000 upon Catherine Paxton Pursell (afterwards Mrs Gowan), the niece of the truster, in liferent only, with a careful exclusion of the *jus mariti* of any husband she might marry, and with other protecting clauses, whereby her interest is limited in the strictest manner to a bare liferent for her individual use, while the fee is given to her children if she any had; the express provision being, that the principal sum shall, at her death, devolve upon them, share and share alike.

But then there is a further destination of the L.2000 in the event of the failure of children, it being provided—1st, That it shall, in that event, fall and belong to Dr Pursell; and, 2d, By a separate and distinct clause—which also embraces other property—that, failing both Miss Pursell and Dr Pursell without having legitimate children by one or other of them, the L.2000 shall devolve upon and belong to the children of the truster's cousins-german, Sarah Gee and Barbara and Catherine Murdoch, in the manner there set out. Now, it may be true, that had there not been such special destination of the L.2000, it would, in the event referred to, have sunk into the general residue of the estate, and fallen under the distribution appointed for it, which would have given it to the same parties in whose favour the destination was made. It may be so, but nevertheless, the *fact*, that by a settlement of the L.2000 itself the truster does make a *special* ultimate destination of it to the persons there named, failing issue of Mrs Gowan—which destination it was beyond the power of Mr Gowan to touch or interfere with,—is of importance to be kept in view in the question of the intention of the truster in what he afterwards did by the codicil. It is upon that footing that the portion of the codicil of 12th May 1812 which relates to the L.2000 is to be read.

Now by that codicil an alteration was admittedly made upon the bequest of the L.2000, as settled by the trust-deed, and the question is, what was that alteration? Did it absolutely recall the destination in the trust-deed to the children of Mrs Gowan, if she should afterwards have any; and did it alter her right from one of liferent only, exclusive of the *jus mariti*, to one of fee in the capital sum itself, which, by surviving the truster, came to be vested in her, so as during her life to be at her absolute command, and on her death, without any act of disposal by will or testament, to belong to her representatives *ab intestato*? That was the effect of the codicil in the plea of the claimants Mrs Gowan's representatives. Gathering the truster's meaning and intention as I best can from the writings he has left, I cannot arrive at that result.

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The narrative of the codicil shows that the terms of the prior settlement of the L.2000 were before the truster, and then it goes on in the terms which have been already read by your Lordship, and which I shall not repeat.

It will be observed, that in the outset there is a distinct reference to the right of the truster's heirs-at-law to the L.2000, as one given them by the special ultimate destination in their favour in the trust-deed; and the terms of the codicil show that it was *the clause providing that ultimate destination* which it was the truster's intention to deal with. And accordingly what he does is to declare that he reverses that clause. Now I think that by this reversal alone (and assuming there were nothing else to mark a different intention), the liferent of the L.2000 to Mrs Gowan, and the fee to her children, are left untouched, and remain operative parts of the truster's settlement.

No doubt the truster, after stating in the codicil that Mrs Gowan had been married, but without issue, uses the words "In which circumstance," and then goes on to assign the reason for inducing him to make an alteration in the original bequest. But that, I apprehend, cannot afford any ground for inferring, that by reversing the clause of ultimate destination the truster meant to recall to any extent those provisions to which that destination was postponed, or intended to do more than simply to recall the destination itself in that event, wherein alone it would have operated in terms of the original bequest in the trust-deed, which the codicil bears he was revising, and which event he must therefore at the time have been perfectly aware, was the termination of Mrs Gowan's liferent, and the failure of her issue.

The ultimate destination of the L.2000, and the provisions by which it is preceded, are things quite separate and distinct. The subsistence of the one does not depend on the subsistence of the other. The recall or reversal of the ultimate destination is perfectly consistent with there being no intention to alter the prior provisions, and of the reversal being meant to be confined—as it certainly is, in words—to a recall of the ultimate destination alone. The reversal of the clause may, indeed, extinguish the destination it contains, so that no one can take any interest under it. But I cannot see how it follows that the extinction of that destination is to be read as an extinction of that which forms no part of the destination which is reversed. And as little can I see that the cause assigned for the reversal can afford any ground for giving a more extended effect to it, the reversal itself being in express terms applied to the clause of destination. This distinctly marks the extent to which, according to the mind and opinion of the truster, the clause of reversal was to operate, which, unless a will is to be made for him, must be conclusive, however clear it might be that the cause was sufficient in itself to have led to, and might naturally have induced a greater alteration of the original bequest.

Therefore, as I construe the reversal, I read it as introductory to, and made for the purpose not of doing away the original settlement of the anxiously limited and protected liferent to Mrs Gowan, and converting it into an absolute fee in her person, or taking from her children, should she have any, the fee given to them, but of making an alteration consistent with the continuance of the rights of liferent and fee, as originally constituted, and which was to affect only the ultimate destination of the L.2000 in favour (in the event there mentioned) of the truster's heir-at-law.

But, no doubt, although this were the sound construction to be put on the declaration of reversal, looking only to the portion of the codicil which precedes it, it may be that what follows may show that the object of the truster in reversing the clause was to give a fee in the L.2000 to Mrs Gowan instead of a liferent, and absolutely and out and out to recall the destination in favour of the children. It may be inconsistent with anything else. I have not been able to arrive at that result. Having reversed the clause, what the truster does is to commit to her (Mrs Gowan's) discretion alone, "as she may afterwards see cause, the sole and ultimate disposal of the L.2000," as by the foresaid deed provided. How that sum was there provided, we have seen.

The truster had himself, in the trust-deed, made an ultimate destination of the L.2000, to take effect on the expiry of Mrs Gowan's liferent, and in the event of the failure of her issue, as previously constituted—that is, the provision or clause

which the first part of the codicil professes to deal with, and which the truster accordingly reverses; and having done so, that is—having reversed the ultimate destination which he had himself made, he then goes on, in the latter part of the codicil, to commit to Mrs Gowan's discretion alone the sole and ultimate disposal of the L.2000. I have already ventured to submit, that the first part of the codicil, with the reversal of the clause of destination, do not either express or imply an alteration of the original settlement of liferent and fee; and it seems to me, that the latter part of the codicil just gives Mrs Gowan the power, and nothing more, which she did not not before possess (it being previously excluded by the ultimate destination, which was reversed), of making an ultimate destination of the L.2000, in room and place of, and in the case for which the ultimate destination of it so reversed had originally been made by the truster himself. He displaces his own ultimate destination, and he commits to Mrs Gowan's discretion alone, as she may afterwards see cause, the sole and ultimate disposal of the L.2000 as by the trust-deed provided,—in other words, he gives her the power to make an ultimate destination, instead of that which he had originally made, and which he had recalled. Is this in any degree opposed to its being the intention of the truster to leave in force the provision of liferent and fee as made by the trust-deed? I think it is not. On the contrary, the whole tenor of the codicil appears to me to exclude the construction, that by the alteration in the original bequest thereby made, a fee was given to Mrs Gowan in the L.2000 vesting in her at the death of the truster, so as to be at her immediate command during her life, attachable by her creditors, or those of her husband, and descendible to her heirs *ab intestato*.

The case is not one of such a right of disposal as is given being conferred where no prior right of liferent, or of liferent and fee, had been established. Upon a case so circumstanced I am not called upon to give any opinion, or to say whether or not the right would have amounted to more than a mere power or faculty. The present is a case where, by the original deed, upon which the alteration by the codicil is made, giving the right of disposal of the sum in dispute, rights of liferent and fee in that sum had been established, and which rights had not been expressly recalled. Now, in that state of case, I hold that neither in the words by which the right of ultimate disposal is conferred, nor in these words taken together, with the terms of the prior reversal of the original ultimate destination, and the whole context of the codicil, including the reasons assigned for bestowing the right of disposal on Mrs Gowan, is there anything on which an inference can be legitimately founded, or from which it can, by any sound construction, be justly concluded, that the right so conferred amounts, not to a mere power or faculty, but to one of absolute fee in the sum to which the right relates. On the contrary, I think that, in the circumstances, the language used, instead of being adverse to a purpose of conferring only a mere power or faculty of ultimate disposal, if Mrs Gowan should see cause to exercise it, and importing a right of fee, that is the fitting and appropriate language to have been adopted, where all that was intended to be conferred was a mere power or faculty of disposal, requiring to be exercised in order to have any operative effect.

In short, the sound reading of the codicil as it stands is, in my opinion, exactly the same as if the truster had repeated the whole original provision in the trust-deed, down to the ultimate destination, in the event there stated, of the L.2000 to his heir-at-law, and in place thereof had, in the same event, committed to Mrs Gowan's discretion the sole and ultimate disposal of that sum, which, I conceive, must have been held to be clearly limited to a power or faculty only.

I shall only add with regard to the burden of an annuity of L.10 to Barbara Gowan, which, by the codicil, is attached to the power of disposal given to Mrs Gowan, and which was founded on in support of her plea that Mrs Gowan's right had been changed from a liferent into a fee, that it seems to me that the imposition of that burden was not at all inconsistent with Mrs Gowan's own personal enjoyable use of the L.2000 being limited to a liferent, and that, on the contrary, the manner in which the imposition of it is expressed, so far as it goes, is suggestive of its having been in the mind of the truster that the annuity was to be paid out of the interest of the L.2000 payable to Mrs Gowan as liferenter, although, no doubt, in point of fact, the annuity was not made dependent on her life, and it might have

No. 18. so happened, that had she exercised the power given her, it would have continued to be payable after her death.

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LORD COWAN.—On the two points argued, I am of opinion that the interlocutor of the Lord Ordinary ought to be adhered to.

1. The first point depends on the view taken of the intention of the testator as appearing from his deed of settlement.

The conveyance to Dr Pursell in trust for the purposes of the deed, was of the whole estate, heritable and moveable, of which the granter died possessed; and it appears to me that the words "my whole real and personal estate," are sufficient to carry to the truster's nephew the whole trust-estate with its accumulations, in so far as not specially applied in terms of the truster's directions. The deed provides annuities to the relatives of the testator, including his sisters Ann and Euphemia Warroch, who were his next of kin, and to Dr Pursell, his nephew and trustee (viz. "L.130 yearly during the existence of the annuities hereby granted"), and to his neice Catherine, afterwards Mrs Gowan. These annuities, it is plain enough from the clause on page 96, it was the testator's intention should be paid out of the proceeds annually of the estate. This is not expressly declared, however, and the right and power of the trustee to deal at all with the proceeds of the testator's property, conveyed to him in trust, must be gathered from the general structure and purposes of the deed. As trustee, he was entitled and bound to uplift the proceeds of the estate during the subsistence of the trust, and to apply them in payment of the annuities, including his own. The surplus annually accumulating necessarily remained with him, as part and parcel of the estate conveyed by the deed. Hence, when the event occurred, which was declared to fix the vesting, it appears to me impossible to read the words "my whole real and personal estate," "under burden," and so forth, in any other sense than this, that it was the whole of the trust-estate, as it then stood vested in the trustee, with the accumulations.

Taking this view of the more general clauses of this settlement, I think it would have required some limiting declaration or provision in the deed to give to the words any other construction. There is no such clause in this deed. That which relates to the accounting cannot have that effect. It is confined to the personal estate, and to the estimate put upon it in the testatator's account-book at his last balance. Moreover, the avowed object of the clause is merely to regulate questions that might arise between the legal heirs of the testator and the legal heirs of his nephew and niece on their father's side. Had the argument been that the clause gave to Dr Pursell *destinatione* the surplus proceeds of the estate, there would have been more plausibility in it. But when the contention is that the surplus income was left undisposed of, and is to be taken as intestacy, this clause becomes quite inoperative, for this plain reason, that the nephew and niece were not the testator's next of kin, and that it was his two sisters who could alone, in that view, have claimed *ab intestato* any portion of the surplus of the personal estate undisposed of by the will.

Every case of this kind depends upon the terms of the particular deed. In this respect, the case of Turnbull does not afford any authority, for the proposition contended for, depending, as it did, entirely upon the terms of the peculiar deed then under consideration. The principle on which that case was decided is very clearly brought out in the opinions delivered in the House of Lords; and if we had had in this case to construe a deed with the peculiar provisions which there occurred, it humbly appears to me that the principle of that decision would have supported the claim made in this case by the heir *ab intestato*. But, as I said, we have a very different deed to deal with, no part of this trust estate being left undisposed of according to the correct reading of its terms.

2. The second and more material point relates to the L.2000 provided to the testator's niece Catherine (Mrs Gowan), with which the conveyance in trust to Dr Pursell was burdened, for behoof of her lawful children in the first place, with the ultimate destination set forth in the deed, but altered by the codicil. The question is, whether that alteration had the effect of enlarging Catherine's right from liferentrix to that of fiar or legatee of the principal sum?

By the deed, which bears to be written by the testator himself, Catherine was to receive the interest of the L.2000, which is declared to be "destined to her use.

and for the benefit of her offspring;" it is provided that the *jus mariti* of any husband she might marry should be excluded "from any concern with the said money, or with the interest arising therefrom," as to which it is declared, "that the same shall not be attachable for the debts of her husband, or otherwise, than for her own particular debts, debts contracted for her support and clothing—the same being destined by me to secure to her the necessaries of life;" her own receipt is to be a sufficient acquittance for the interest of the money "assigned to her for her necessary subsistence during her life;" and then it is provided, that at her death the principal sum shall devolve upon her lawful children. These various conditions annexed to this bequest are important, as showing the anxiety with which the testator sought to secure to his niece during her life the interest of the L.2000, free from all control on the part of the husband, and as a strictly alimentary fund. The destination of the principal sum is to her lawful children, and failing them it is provided to fall to and belong to Dr Pursell; and in regard his legal heirs were not the testator's natural heirs, it is provided that failing Dr Pursell and Catherine Pursell without lawful issue (which happened), "the property hereby conveyed to them shall devolve upon and belong to the children" of the testator's cousin-german—that is, to his own legal heirs. This, then, it will be observed, is the "ultimate destination" of the L.2000 provided by the deed for his niece's use during her life, and in fee for her children, if any, after her death. Her position was simply that of an alimentary liferentrix.

Now, to what effect did the codicil, also written by the testator himself, alter this state of things? The settlement is dated in 1805, and the codicil in 1812. Intermediately the niece had been married. The codicil narrates the fact of her being comfortably married, but without issue, and proceeds thus, "under which circumstance that part of my fortune destined to her use is by said deed to devolve ultimately upon my heirs-at-law upon her decease." So far the words merely set forth what is provided for in the settlement; under which circumstance—that is, in the event of her having no lawful issue—the sum destined to her use was "ultimately" to devolve upon his heirs-at-law. This ultimate disposal of the sum it was that he had in view to alter, by conferring on his niece some enlarged right or power. There is not a vestige of intention in the terms of the codicil, so far as yet considered, on the part of the testator, to change the strictly alimentary character of the liferent interest he had conferred on his niece, or to recall the destination of the principal sum to her lawful issue, if she should have issue, whether of her existing or of any subsequent marriage. What was in the testator's view by his own declaration, was simply that part of his settlement which provided for the ultimate disposal of the L.2000 to his own heirs; and the words which follow seem to me clearly to indicate his intention to alter the deed in that particular alone—"but in consideration of the bountiful provision made for her by her husband in the event of his death, and his tender affection towards her, I reverse that clause." This could be no other clause or provision than that which he had just narrated, providing for the ultimate devolution upon his heirs. This it is that he reverses or alters with the view and for the purpose of giving effect to what he declares to be now his intention in this matter in these words:—"I hereby commit to her discretion alone, as she may hereafter see cause, the sole and ultimate disposal of L.2000 sterling, as by the foresaid deed provided." These words do not purport a present gift or legacy to his niece. To my mind, they very plainly exclude that view of the testator's intention. If, upon the death of the testator, the L.2000 were to be taken as an unconditional legacy by his niece, the testator would not have so carefully committed the disposal of the money to her discretion, as she might at any time thereafter see cause. And he would never, as I think, have so studiously said that it was only the ultimate disposal of that was committed to her discretion. The words employed are such as in their obvious import leave intact the alimentary liferent to her, and the primary destination of the principal sum to her issue, as by the deed provided. They seem to me irreconcileable with any other view of the testator's intention than that he meant to confer on his niece only a power or faculty to dispose of the money as she might see cause upon her death without issue. The opposite construction necessarily leads, not to the alteration merely of the clause of ultimate destination of the L.2000, but to the recall of the whole of the anxious provisions in the deed regard-

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ing the liferent interest of the niece, and the destination of the principal sum to her issue.

The expression "reverse that clause" is thought to be hostile to the idea of the ultimate destination in the deed being left entire, should the faculty not be exercised, and therefore inconsistent with the construction limiting the right conferred on the niece to a faculty. But, were this true, it would only leave the heirs-at-law to take the L.2000 as a lapsed legacy, and part of the general residue under the residuary bequest to them in the deed of settlement. The words, however, "I reverse that clause," are to be construed with reference to the context—both to that which precedes and that which follows. So construed as already said, it appears to me that the expression has necessarily a limited import, applying only to the ultimate destination of the fee contained in the deed, which it was his intention to modify or alter, so as to give the power and faculty conferred by the codicil upon his niece.

Then, as to the testator having mentioned the bountiful provision for his niece by her husband as an inducing cause of the alteration, it is obvious, first, that if, as contended, the *jus mariti* was excluded, both as to the principal sum and the liferent (which, however, as I have said, does not appear to me to be the true construction), the husband would not benefit from this gift to his wife without some act or deed on her part; and, second, that the inductive cause is fully satisfied by holding the niece to have got power under this alteration to leave the money to her husband in case of her predecease without issue, should she at any time afterwards see cause to provide for its ultimate disposal in that manner.

Nor is there anything in the argument that the word faculty or power does not occur in the clause. No particular words are necessary to confer a faculty, provided the substance of the thing be clearly conferred, and the intention to do so, from the words used, be unambiguous. But, in truth, to commit to one's discretion is nothing else than to intrust the party with power, at his or her discretion to do the thing contemplated. To every substantial effect, the words give powe to do the thing committed at discretion. But, if the discretion is not acted on and there is no exercise of the power given, the clause conferring it becomes inoperative. On the party's decease, his or her heirs take nothing. The destination i the deed remains and takes effect as if no such power or faculty had been conferred, by the exercise of which (but by such exercise alone) it could be altered.

This view of the alteration effected by the codicil is strengthened by the provision as to the L.10 annuity to Barbara Gowan in the words which immediatel follow. The provision to Mrs Gowan and the accompanying powers are con ferred subject to that payment, whether to take effect at the death of the testato or afterwards when the power was exercised, is of no consequence: and th sum is to be paid yearly "out of or from the interest arising from the said L.200 sterling." This is certainly not favourable to that view which would hold th codicil to have given over the sum as an absolute legacy to Mrs Gowan from tl death of the testator. On the contrary, it implies that the amount was to be ke subject to the trust created in liferent for the niece and in fee to the children, an failing them, to the parties to whom, through the exercise of the power, it mig be given by Mrs Gowan.

As I read this deed, the expressions are of much the same import as if the wor "disposal after her death, or by a *mortis causa* deed," had been employed in pla of the word "ultimate." The context gives that meaning to the word. Tl to all substantial effects brings the clause under the operation of other cases whi have occurred, and are reported in the books. All of these I had occasion ve minutely to consider and explain, in deciding, as Lord Ordinary, the case of Mor v. Tennant, reported in this Court 7th June 1853, and in the House of Lords Ju 1855. Into the particulars of those cases I will not here enter, but I wou especially refer to that of Sommerville v. Geddie, and to the notice of its final d posal by Lord Monboddo in the 5th vol. of the supplement, p. 736. In the case Morris, "full power and faculty" was committed "to the granter's daughters, settle, destine, and convey the fee of the share of the residue of my esta liferented by them, to such person or persons, and in such way and manner as th think fit;" and failing their exercising the power and faculty, the property was descend to parties specially named. No right of fee, but a mere faculty or pow

was held to be conferred on the daughters by these words. The question, however, in every such case, is always one of intention to be judged of on the special terms of the deed, which is for construction. No. 18.

Nov. 25, 1856.
Kirkpatrick v. Murray.

The Court pronounced the following interlocutor :—" Adhere to the interlocutors reclaimed against, and refuse the desire of the said reclaiming notes : Find the respondents entitled to the expenses of opposing the reclaiming notes advised by the Court, but only to the effect of the expense of one agent and two counsel being allowed."

James Carnegie, Jun., W.S.—Robert Oliphant, S.S.C.—Hugh Rollo, W.S.—Robert Smith, S.S.C.—L. M. Macara, W.S.—Agents.

No. 19.

Thomas Kirkpatrick and Others, Advocators.—*Penney—Moir.*
Horatio Granville Stewart Murray, Respondent.—*D. F. Inglis—Sol.-Gen. Maitland.*

Road—Interdict—Expenses.—A right of way was claimed by the public through the private park of a proprietor, who admitted that at one time it had existed, but averred that latterly it had existed only by tolerance. There had always been gates at each entrance, but such as easily to permit ingress and egress. For these the proprietor substituted locked gates, and the public destroyed them,—whereupon he applied to the Sheriff for interdict, and for authority to restore the gates to the state they were in prior to their destruction;—*Held* (1), that he was entitled to restore them pending an action of declarator at his instance, but not so as to obstruct access by the public to the roadway claimed by them, and interdict granted against all interference with the gates; (2), that it was unnecessary to decide as to the legality or illegality of the destruction of the gates, but that, in the meantime, access being secured to the public, the judgment was substantially in their favour; therefore, that the proprietor was liable in expenses.

Nov. 26, 1856.
1st Division.
Lord Neaves.
C.
Sheriff-court of Kirkcudbright.

The advocators claimed a right of way through the park of Cally, belonging to the respondent, Mr Murray of Broughton, and on 1st June 1854, knocked down certain gates and a wall which he had erected to obstruct them. Mr Murray thereupon presented an application to the Steward of Kirkcudbright, complaining of these proceedings, and praying for authority "to erect a new gateway at the lockup-house near Gatehouse-of-Fleet, in the room of that which has been destroyed, and to restore matters as nearly as possible to the state in which they were previously to the operations complained of, and that, in the first instance, at the expense of the petitioner, and, if thought necessary, at the sight of a person or persons of skill to be named by the Court; and also to grant warrant and authority to erect a wooden gate across the site of the old parish road near the clachan of Girthon, with a stile or steps for foot passengers at the same place where the former gate and steps stood for many years subsequent to 1828; or otherwise to grant warrant and authority to make such erections or fences at the places in dispute as may appear to the Court to be proper and necessary to regulate the possession pending the discussion in the declarator raised or about to be raised in the Court of Session by the petitioner, and that, in the first instance, at his expense, and at the sight of persons of skill to be named by the Court as aforesaid; and further, to grant interdict against the respondents and all other persons from obstructing the petitioner, or the persons who may be employed by him in carrying out the said operations, and from destroying or interfering with the said gates or works, after the same shall have been constructed, reserving all claims competent to the petitioner against the respondents for damages and expenses, to be made effectual in an action to be afterwards raised at his instance, and all defences thereto, as accords; to find the respondents liable in the expenses of this process," &c.

A record was made up. Proof was allowed, and on 7th December 1854, the Steward-substitute (Dunbar) pronounced the following interlocutor, to

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which, on appeal, the Steward adhered:—"Finds it established that the late Alexander Murray, Esquire, of Broughton, was proprietor duly infeft of the entailed estate of Cally, including the mansion-house and park surrounding the same, and superiority of the adjoining village or burgh of Gatehouse-of-Fleet: Finds it admitted, that previous to 1806, a parish road from Kirk-Andrews of Borgue to Gatehouse, by the kirk and clachan of Girthon, passed through the park of Cally, between the mansion-house and gardens thereof: Finds it admitted, that about 1805 and 1806, when a new line of turnpike road from Dumfries to Newton-Stewart, and passing through part of what is now the park of Cally to Gatehouse, was formed by the Road Trustees, Mr Murray was desirous, and took measures to shut up the said parish road, as superseded and rendered unnecessary by the new line of turnpike road in that neighbourhood: Finds it not admitted that the said parish road was ever effectually shut up by the said measures, or its use as a parish road relinquished by the public: Finds it admitted, that about the year 1818, the said Mr Murray extended the park surrounding the mansion-house of Cally, and erected, exclusively at his own expense, a new wall round part of it, and placed a wooden gate across the site of the foresaid parish road, where it entered the park of Cally, near the clachan of Girthon: Finds it proved, and substantially admitted, that this gate was for sometime after its erection kept locked, and keys furnished by the said Mr Murray to some of his friends, and the adjoining farmers, to enable them to pass through it: Finds it admitted, that about 1828 Mr Murray erected a wooden ladder or steps over the wall into Cally park close to the said gate: Finds it admitted, that about 1823 Mr Murray completed the wall surrounding the mansion-house and park of Cally, and at that part of the wall where the foresaid old parish road from Gatehouse to Kirk-Andrews enters Cally park at the lockup, he erected across the site of the said parish road, at his own expense, a large gate, with a postern door for foot passengers, and porter's lodge attached to it; which gate was secured by one or more padlocks, and an iron bolt which went into the ground: Finds it proved that the petitioner Mr Stewart Murray succeeded, on the death of the foresaid Mr Alexander Murray in July 1845, to the estate of Cally, including the mansion-house and park, and was duly infeft in the same in 1846: Finds it admitted and proved, that from the period of the erection of the said gate at the lockup, or soon thereafter, a person was placed by the proprietor of Cally in the porter's lodge there, as his servant and gatekeeper, to take charge of the gate at a fixed wage, and ever since a gatekeeper has been stationed there by the proprietor of Cally as his hired servant: Finds it proved, that during the last seven years a number of persons from Gatehouse and other places have been in the practice of passing through the said gates at the lockup, and near the clachan, into Cally park, and along the foresaid old parish road, without interruption or objection, and in the exercise of an alleged right in the public to do so: Finds it proved, that upwards of four years ago the said gate at the lockup having fallen into disrepair, was removed by the petitioner: and a new gate of stronger construction secured by a mortise lock instead of a padlock, and by some additional bolts, was substituted at the petitioner's expense for the old one: Finds, that a short time previous to June 1854, the petitioners removed the foresaid gate and stile across the old parish road near the clachan, and built up the space with a wall of the same height as the adjoining park wall: Finds it admitted, that on the 1st June 1854, a number of persons proceeded through the said lockup gate and Cally park, and without the petitioner's consent or a legal warrant, knocked down and removed the said piece of wall recently erected by the petitioner in place of the gate near the clachan, on the ground now alleged by the respondents in defence of the said act, that it was an erection in violation of the immemorial rights of the public: Finds, that the said piece

of wall being immediately thereafter re-erected by orders of the petitioner, No. 19.
with the addition of a stone stile with a hand rail in it, an assemblage of
persons again proceeded, on 22d June 1854, to the lockup gate, and with- Nov. 26, 1856.
out the petitioner's consent, or any legal warrant, first wrenched from its Kirkpatrick v. Murray.
hinges and demolished the said lockup gate, and then marching through Cally park, pulled down and destroyed the piece of wall which had been re-erected by the petitioner on the site of the gate near the clachan, as aforesaid: Finds, that whatever right of way the public may possess over the foresaid old parish road, the destruction of the said gate at the lockup, by the persons and in the manner above described, was an illegal invasion of the petitioner's rights of property, and an act of lawless violence, calculated to provoke a breach of the public peace: Finds the petitioner's title and interest to raise and insist in the present action sufficiently instructed by the titles produced, and the admissions in the record: Finds, that the petitioner has been for more than seven years previous to the demolition of the gate at the lockup, in the undisturbed possession of a gate of the same or a similar nature there, and in the undisturbed possession of a gate at the place where the foresaid old parish road enters Cally park, near the clachan of Girthon, for more than seven years previous to the recent removal of the said gate by the petitioner: Finds, that the prayer of the present petition, in so far as it seeks to have these or similar gates replaced until the rights of parties regarding the foresaid old parish road through Cally park shall be judicially determined, is reasonable, both with reference to the interests of parties and the vindication of the authority of the law; therefore repels the preliminary defences, grants warrant and authority to erect a new gate at the lockup house near Gatehouse, of the same nature and in the room of that which has been destroyed, and that, in the first instance, at the petitioner's expense, and at the sight of Mr James M'Candlish, architect, Kirkcudbright: Further, grants warrant and authority to erect a wooden gate across the site of the old parish road near the clachan of Girthon, with a stile or steps for foot passengers, at the same place and of the same nature as the former gate and steps there, at the sight of the said James M'Candlish, and at the petitioner's expense, in the first instance: Interdicts and prohibits the respondents and all other persons from obstructing the petitioner, or the persons who may be employed by him in carrying out the said operations, and from destroying or interfering with the said gates, when erected, until the rights of parties connected with the access by these gates to the foresaid old parish road shall be judicially determined; but without prejudice to the alleged right of way claimed by the respondents for behoof of the public over the said old parish road: In the meantime, repels to the extent above mentioned the defences stated: And in respect of the respondents' opposition to the prayer of the petition, as now granted, and their attempted defence, in this process, of the violent and lawless demolition of the gate at the lockup above mentioned, finds them liable in expenses, as the same shall be taxed by the Auditor of Court, and subject to some modification, on account of the unsuccessful attempt of the petitioner to prove, in terms of his averments in the record, the exclusion of the public from access to Cally park by these gates during the last seven years; and decerns."

The defenders advocated, and pleaded;—That the prayer of the petition for restoration of the recently erected gate as it stood when it was removed could not be granted, inasmuch as that erection was itself an illegal encroachment on the public right, and the petitioner would thereby be enabled to exclude the public entirely from the use of the road pending the processes of declarator which had been brought *hinc inde*, and under which the question as to the legal right of way will fall to be determined.[1]

[1] *Defenders' and Advocators' Authorities.*—Neilson v. Vallance, 10th Dec. 1828, S. & D. p. 182, Tait, p. 151, Blair, p. 122, Hutcheson, vol. ii. p. 576 (and autho-

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The respondent pleaded his right to have things restored to the state they were in at the date when the gates and wall were destroyed; and he also pleaded the incompetency of putting any qualification whatever in this process upon the authority and interdict asked by him.

At advising on 21st November—

Lord President.—The respondent, Mr Murray, contends that this road, which passes through his property, was shut up long ago by the authority of the justices, a new road having been opened in its stead; and the respondents contend, that whatever may have been done by the justices, this road never was *de facto* shut up, and that, at all events, they and the public have been in use to pass through it for a period of seven years, and the question whether it is a public road or not is in Court in the form of a declarator. The Steward allowod inquiry into the state of the facts, and the result of the inquiry as to the condition of things for the last seven years appears to be this: It is made out that Mr Murray had a gate at each end of this road. He had a gate at the end next the village called the clachan of Girthon, and there was a stile for foot-passengers close to the gate. He had also a gate at the other end, near the village of Gatehouse-of-Fleet, and that gate he was in the habit of shutting, and occasionally locking with a padlock, and sometimes securing it by a pin put into the ground—not much of a security, for the pin was on the outside of the gate. But in point of fact that made very little difference, for it was on the opposite side as parties were passing the one way or the other. But some time ago Mr Murray erected a wall, and also a new gate, to which he attached locks of a different kind, and made it secure. During the last seven years it appears that there has been a passage through these gates from either end without interruption; at least there does not appear to have been any substantial hindrance to such of the public as chose to pass that way. The gates have not been so used as to obstruct foot-passengers in the use of the road. There is no question brought before us directly as to the use of the road. The question presented to us is for authority to re-erect the gates, and for interdict against all interference with them. And if the question were simply as to the erection of the gates, there could not be much difficulty or room for difference of opinion between the parties, for I think that Mr Murray was entitled to have gates there; and gates, though not locked, may be a great security to the road—for example, in preventing straying cattle going in. Unquestionably gates were there, but they were not used as obstructions; and although the right to the road is not the question now before us, still access to the road is the question, and that gives a legitimate right to the parties now to object to the erection of the gates, if it is proposed to use them as obstructions to the right of way which the advocators say they possess. Now is it proposed so to use them? The prayer of the petition is to restore matters as nearly as possible to the state in which they were previously to the operations complained of. Now that is equivocal, because the situation in which matters were immediately prior to the operations complained of was this, that Mr Murray had stopped the use of the gates: he had completely shut them up. Therefore, if that is the meaning of the prayer, it amounts to this, that the Sheriff shall grant authority to the respondent to obstruct the public in going through these gates. If, again, it means that matters are to be restored to what was their legal condition generally at that time, there appears to be no objection at all to that, and on the first reading I thought that was what was meant. But from the way in which the case has been argued before us, it is impossible to hold that. The Sheriff and Sheriff-substitute have practically found that; for the Sheriff-substitute has found that Mr Murray is entitled to erect a gate, with a stile or steps for passengers, and so on, "but without prejudice to the alleged right of way claimed by the respondents for behoof of the public over the said old parish road." That is practically what he has found. But the advocators say that the judgment may be

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rities there referred to); Cuthbertson v. Young, 1st Feb. 1852, ante, vol. xiv. p. 465; Rodger v. Harvey, 10th July 1827, 5 S. & D. (2d ed.), 851; M'Donald v. Watson, 23d February 1830, 8 S. & D. p. 584; Calder, &c. v. Learmonth, 27th Feb. 1851, ante, vol. xiii. p. 343; Moir, 16th Nov. 1832.

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so construed as to exclude their access altogether, and the respondent, when it was put to him, would not bring himself under any restraint at all as to the use he was to make of these gates. On the contrary, he seemed to contend that he was entitled to lock them, and he disputed that the advocators had established in evidence a right of passage there during the last seven years. Therefore, being of opinion that the advocators have established such a right, we cannot allow the respondent to have things restored to the condition in which he says they were previous to the operations complained of—that is, into a condition in which he may be allowed to obstruct the passage. He may be allowed to have gates there, and if so, I think that the advocators ought to be interdicted from taking them down; but he shall not be allowed to use these gates so as to exclude the public pending the action of declarator, and therefore I am disposed to pronounce an interlocutor to that effect.

Lord Ivory.—I am very much of the same opinion, and have nothing to add.

Lord Curriehill.—I am exactly of the same opinion. I think that the Sheriff really meant nothing else than the meaning your Lordship has put on the interlocutor; but it is capable of being otherwise construed, and it is as well to remove all ambiguity.

Lord Deas.—I am of the same opinion. The Dean of Faculty's objection to the competency of any such qualification as is now proposed upon the authority to re-erect the gates, and upon the interdict to be granted, was rested upon the fact that no counter application for a possessory judgment had been presented by any member of the public. Now, observe the terms of the proprietor's application. He sets forth expressly that "no carriage, cart, or other vehicle, or passengers on foot, have been allowed to enter the said park, or to pass along the foresaid old parish road, except by tolerance, since it was so shut up and suppressed by the authority of the road trustees in 1806." Upon this footing he came into Court, asking a warrant to restore matters to the state in which they were before the public removed the gate and demolished the wall—meaning, avowedly, a state which would entirely exclude the public. Accordingly, the proprietor's own proof is directed to the support of his proposition that the public had not used the road during, at all events, the possessory period, and he cannot now ask that the case shall be disposed of as if no proof on that subject had been asked for or led. Moreover, his petition contains an alternative prayer for interim regulation of the possession; and here, again, he cannot now object to the competency of such regulation. Besides, and apart from all this, I see no incompetency in the proposed qualification, the necessity for which naturally arises out of the very nature of an application of this kind. In June 1854 the proprietor built up the wall at the clachan, and for the first time, within the possessory period, absolutely refused access to the public through the lockup gate; the consequence of which was, that the advocators forced their way through that gate, in order to reach the newly-erected wall at the other (the clachan) end of the road, which they demolished. Now, before we can authorise the proprietor to re-erect his gates and obstructions for the avowed purpose of excluding the public, must we not inquire whether he was entitled, in this summary manner, so to exclude them? I have read the proof, and I think he was not so entitled, without in the first instance establishing his right in a declarator. His proceedings for the exclusion of the public were just as much taken *vi et facti* as those of the public for the maintenance of their possession. And what the Court have to do is to restore and preserve the former state of possession as nearly as may be till the result of the depending declarator.

The case was again put to the roll, of this date, to pronounce the interlocutor. Both parties contended that they had been substantially successful, and were entitled to expenses—the respondent pleading that the judgment did not go beyond what he was all along willing to concede, and that the whole litigation originated in a lawless act on the part of the public, which amounted to a crime.

Lord President.—The question originated in the knocking down of the gates erected by the respondent across this parish road, which is stated to have been a violent and unlawful proceeding. It may be so. There is not much evidence of that

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before us; and we are not now called on to state how far it was violent and unlawful. But it is stated by the respondent that the gates had been, prior to the date of 1st June, locked up, and access to the public denied, so as to change the nature of the possession. The proof shows that the nature of the possession was changed at that time. Mr Murray then applied to the Sheriff to have the gates restored. He has succeeded in getting judgment for the restoration of the gates; but in dealing with the question of expenses of the application, we are to look to the nature of the application, and to the manner in which the proceedings have been conducted here, as well as in the Court below. The act complained of may have been unlawful; but that is not the important question to be considered in regard to the expenses of this proceeding. If the parties who have been guilty of a violent and unreasonable act—I do not say to what extent this is unlawful—make no resistance to the application to have the gate restored, there would be little question about expenses. But Mr Murray's application was to have matters restored to their condition before the gates and wall were knocked down; and what was the meaning of that part of the prayer of the petition? It did not come out very clearly in any positive statement in the Inferior Court. It did here, and the contention was, that matters were to be restored to the condition they were in immediately prior to 1st June—not to the condition in which they were seven years before. It is now contended on the part of Mr Murray, that, of course, he would have put the other construction on the interlocutor of the Sheriff. But it was put from the bench whether this was the meaning he attached to the judgment; and the whole argument proceeded on the footing that it was not. The respondent farther contended that the condition immediately preceding the 1st June was the condition in which it had been for seven years before—viz. that the gates had always been kept locked, and the public excluded, except when the respondent's gatekeeper allowed passengers to pass. Proof was allowed, and it is that which forms the great expense in this case. Proof was allowed—of what? Of the respondent Mr Murray's averment that there had been no passage through these gates since 1836, except by tolerance. No doubt a great many pleas of the advocators were maintained, which were not entitled to much consideration. But such was the contention of the respondent. The Sheriff-substitute found against Mr Murray upon that matter; and when the case came here, we, on considering it, were also of opinion that a passage through these gates for seven years by the public had been established, and it being in that state of matters contended that the respondent was entitled to have things restored to the locked up condition in which they were immediately before the 1st June, it was impossible to listen to his plea. In these circumstances, I think that the subject of dispute is decided not in favour of Mr Murray, but against him; and I see that in the Inferior Court, after proof was led, a minute was put in by the advocators substantially to the effect of our judgment, which would not be agreed to, but which shows very clearly the construction which Mr Murray meant to put on the interlocutor of the Sheriff. He would make no kind of terms at all. The respondents have really and substantially gained their case, and are entitled to expenses.

Lord Ivory.—I am of the same opinion.

Lord Curriehill.—I concur.

Lord Deas.—I entirely agree with your Lordships. The Solicitor-General puts the matter on two grounds. He says, 1st, That we have done nothing by our interlocutor beyond what Mr Murray was all along willing to concede; 2d, That the whole litigation originated in a lawless act on the part of the public, which amounted to a crime. But, 1st, Your Lordship has distinctly pointed out that Mr Murray came into Court asking authority to do that which would have absolutely excluded the public; and the Dean of Faculty's argument, to the end, was, that, no matter what had been proved about possession, it was totally incompetent, in this process, to put any qualification whatever upon the authority and interdict asked by Mr Murray. Mr Murray declined at the same time all concession; and he had previously objected to allow this case to await the result of the declarator. 2d, As to whether the demolition of the wall and gate was a crime or not, I say nothing. I shall only say, that it would be far wiser and better for parties to come into Court on such occasions than to proceed *vi et facti;* but, if there was a crime at all, it would be difficult to say that Mr Murray was not art and part in it. He did the

first lawless act. In place of applying to the Court, he took the law into his own hands. He inverted the possession, which had existed during the possessory period, by absolutely excluding the public from a right we have found they were entitled to exercise. Now, if I fire the first shot into a crowd, and the crowd then fire in return, and a riot ensues, am I not art and part in that riot? I could certainly not be said to be blameless, nor can Mr Murray be held to be so here. On the whole, I have no doubt that the advocators, who have substantially gained their cause, ought to be found entitled to their expenses.

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Nov. 26, 1856.
Cumine v. Bayley.

THE COURT pronounced the following interlocutor:—"Recall the interlocutors of the Steward-substitute and Steward of the Stewartry of Kirkcudbright complained of: Find that it is established as matter of fact—1st, That for more than seven years preceding the 1st day of June 1854, the petitioner was in possession of a gate across the road referred to in the proceedings, near the clachan of Girthon, with a stile or steps for foot passengers near the said gate; and was also in possession of a gate across the said road at the lock-up house, near Gatehouse of Fleet, and a side-door or wicket near the same place; 2d, That during the said period the said road was used by the public without hindrance, and in using the same the public had access thereto at all times by the said stile and through the said gates; 3d, That during the said period the gate at the clachan of Girthon was not locked, and the gate at the lock-up house was occasionally locked, but was always opened by the gatekeeper to passengers when required; 4th, That in June 1854, the gate at the lock-up house, and a wall which had been erected by the petitioner at the place where the gate was, near the clachan of Girthon, were forcibly broken down and destroyed: Find, in point of law, that, pending the discussion of the question of right in the process of declarator referred to, the petitioner is entitled to have gates and a stile at the places above mentioned, as formerly, but is not entitled to use the same so as to exclude the public from access thereby to the said road: Therefore grant warrant and authority to the petitioner to erect a gate at the lock-up house, near Gatehouse of Fleet, and also to erect a gate near the clachan of Girthon, with a stile or steps for foot passengers, at the sight of Mr James M'Candlish, architect, Kirkcudbright, whom failing, at the sight of such person as the Steward shall, on the application of either party, appoint, and at the expense, in the first instance, of the petitioner Mr Murray; but always subject to the qualification that the gates shall not be used or kept so as to exclude the public from access thereby to and from the said road: And farther interdict and prohibit the respondents and all others from obstructing the petitioner, or the persons who may be employed by him, in carrying out the said operations, and from destroying or injuring the said gates when erected, until the rights of the parties connected with the access by these gates to the said road shall be judicially determined, and to that extent and effect repel in the meantime the defences stated: Find the advocators entitled to expenses in this Court and in the Inferior Court," &c.

JOHN COBBNS, W.S.—RUSSELL & NICOLSON, C.S.—Agents.

No. 20.

PETER CUMINE, Pursuer.—*Penney—Mure.*
SIR JOHN BAYLEY, Defender.—*Baillie.*

Process—Summons—Landlord and tenant.—An action for ameliorations was directed by a tenant at the expiry of his lease against the trustee and executor of his late landlord, who had died a few years before the lease expired;—*Held*

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Cumine v. Bayley.
Watson.
1st Division.
Ld. Handyside
L.

(affirming judgment of Lord Handyside), that it was unnecessary to call the landlord in possession at the date of the expiry of the lease as a party to the action.

This action was directed against Sir John Bayley, Baronet, as sole accepting and acting trustee and executor of the deceased Lord Saltoun, the conclusions being "to implement the obligation undertaken by the said Right Honourable Alexander George Fraser, Lord Saltoun, to the pursuer, under the missives of lease, offer, and acceptance entered into on the 6th day of November 1835 between the pursuer and Lewis Chalmers, Esq., Fraserburgh, factor for, and acting on behalf of, the said Alexander George Fraser, Lord Saltoun, and relative minutes thereon endorsed." The allegation of the pursuer was that he had right to certain meliorations under the lease which expired in November 1855. The late Lord Saltoun died in August 1853.

The defender's first plea in law was—"All parties interested are not called; and in particular, the present Lord Saltoun, as the proprietor of the subjects to which this action relates, is not, and ought to be, called as a defender therein."

The Lord Ordinary pronounced the following interlocutor:—"Having heard parties' procurators on the dilatory defence contained in the defender's first plea in law—Repels the said plea, and decerns: And in respect that the defender states that he is not to acquiesce in this interlocutor, finds him liable in the expenses of discussing said plea," &c.*

The defender reclaimed.

The Court, without calling on the respondent (pursuer), adhered.

W. & J. Cook, W.S.—Pearson & Robertson, W.S.—Agents.

No. 21. Charles Watson, Petitioner.—*Ritchie.*

Judicial factor — Authority refused to sell heritage. — Authority refused to a judicial factor to make up titles to heritable property, and thereafter to sell it,—the beneficiaries concurring,—there being no urgent necessity nor difficulty of administration alleged.

Nov. 28, 1856.
1st Division.
Ld Mackenzie.
L.

House property of small value in the town of Dunse was conveyed by the trust-disposition and settlement of Mr John White to his second son and his wife in liferent, and at their death to their children in fee. The testator's son died in 1852, and his widow in October 1853, leaving two sons of the ages of twenty and sixteen respectively, and a daughter aged thirteen years. The petitioner was in December 1853 appointed judicial factor upon the estate.

The present application was presented by the judicial factor in June 1856, "for authority to complete the title to the property, and thereafter to sell it." At the date of the petition the eldest son was of age; the other two children were minors *puberes*, and resident in New York. Along with the petition a power of attorney was produced from them in favour of their eldest brother, authorising him to take steps for selling the subjects in question,

* "Note.—The pursuer is entitled to subsume the liability of the party he has called, taking the risk of his failure to subject the defender, should the latter make out that no liability attaches to him. The defender may, if he thinks fitting, bring an action of relief against the party who he alleges ought, in law, to satisfy the pursuer's claim. But the Lord Ordinary does not see that the pursuer can be required to raise a supplementary action against that party, even with a reservation, as proposed by the defender, of relieving the pursuer of the consequences of bringing such action, should the defender so called in it be ultimately assoilzied."

"and for that purpose to take any and all proceedings in any and all courts that may be necessary in the premises." No. 21.

The petition set forth that the property was in a ruinous state, and unproductive, the present rental being only L.8, 7s. 10d. A builder and also a joiner had reported that it would require at least L.100 to put the property into tenantable repair, and that even then, exclusive of a garden, it would not produce more than L.17 per annum; while, in its present state, no respectable tenant would occupy it. Nov. 28, 1856. Williamson.

The Lord Ordinary remitted to Mr James Duncan, W.S., who reported that there appeared to him no room for doubt of the expediency of having the subjects in question sold. At the same time, he doubted the propriety, in point of form, of authorising the factor either to complete titles or to sell. The disposition and settlement did not convey the property in question to trustees for behoof of the fiars. The destination was, "I dispone to Thomas White, my second son, and Ann Rutherford, his wife, in liferent for their liferent use allenarly, and at their death to their children in fee, all and whole," &c. It appeared to the reporter, therefore, that, as the three children were themselves the fiars, and were under no incapacity from making up a title themselves by the use of the ordinary forms of law, the Court were not called on to put its *nobile officium* in exercise in order to make up a title in the person of their own officer. "On explaining this to the petitioner's agent he states to the reporter that the petitioner will be quite satisfied if the Court grant special power to the factor to concur with the fiars in selling and disposing without making up any title in the factor's person. It is stated to the reporter that the fiars intend completing a title in their own person, and that the state of the title admits of their doing so by a simple service and infeftment upon it and an unexecuted procuratory."

Ritchie, for the petitioner, now contended that the power of sale prayed for was not inconsistent with the duties of the factor, and was also a most expedient act of management. The Court had been in use to grant similar powers of sale where house property was exposed to immediate deterioration.[1]

Lord Ivory.—In the case of Fergusson there were involved the interests of creditors, and the case appeared to the Court one of urgent necessity. Here there are three fiars, and the question is, whether, there being no competition of creditors, and no difficulty of administration, we are to take the administration out of their hands?

Lord President.—The petition prays for authority to sell, and states that the whole of the parties interested urge and desire the petitioner to apply for authority to complete a title to the subjects and sell them, as being more for their interest. But, if the factor gets rid of his factory, is not that better for him than getting power to concur? I do not think this is a case for the interference of the Court.

Lord Ivory.—The reporter also states that the fiars are completing titles in their own persons. Why should we embarrass them in doing so?

The Court "Refuse the prayer of the petition."

John Davidson, S.S.C.—Agent.

Margaret Williamson or Hare and Others, Petitioners.—*Sol.-Gen. Maitland—Thoms.* No. 22.

Judicial factor.—A judicial factor was appointed on the estate of a person who died intestate, for the purpose of preserving the estate for behoof of the legal representatives, who were unknown. Thereafter, parties administered, and applied

[1] Fergusson and Others, petitioners, 14th January 1836, 14 S. and D. p. 213.

No. 22.
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Nov. 28, 1856.
Williamson.

to the Court for warrant upon the factor to pay them certain specified sums, and the balance upon his accounts, and also for recall of the factory, and discharge of the cautioner. The factor was called as a party to the application;—Judgment delayed until the factor should present an application in his own name for discharge.

1st Division.
Ld. Mackenzie
L.

At the late Miss Williamson's death it was not known who was her heir and next of kin, and, on the petition of her agent, Mr Wood, Accountant, was appointed judicial factor upon her estate. She was possessed, *inter alia*, of a sum of L.2500, invested on heritable security. Sometime before her death, intimation of payment at the term of Martinmas 1853 had been given, but, as Miss Williamson predeceased that term, the amount was consigned in bank, and afterwards uplifted by the judicial factor. The petitioners having administered as the nearest and lawful heirs in general of Miss Williamson, the prayer of the present petition was for "interim warrant to the judicial factor to make payment to the petitioners of the L.2500, and interest thereon; to ordain the factor to lodge his accounts of intromissions, and to remit to the junior Lord Ordinary, in order that they may be examined, audited, and settled." "As also to recall the appointment of the said William Wood as judicial factor foresaid, and to exoner him and his cautioner of the said factory, and to grant warrant to and ordain the Accountant-General of the Court of Session, or other custodier thereof, to deliver up the said William Wood's bond of caution."

The Lord Ordinary, of this date, reported that the factor's accounts had been audited and found correct, and therefore that he might now receive his discharge.

Lord Ivory.—My difficulty is, that this is engrafting something on the original factory, which does not belong to it. The ground of the factory was, that there was nobody to take the management of the estate, with the view of preserving it for Miss Williamson's legal representatives. But there is nothing in the prayer of the petition under which Mr Wood was appointed which entitles him to do more than administer, and it is in an incidental way that we are now to declare the right of certain parties, without any assistance from the factor, or any report from him. I hesitate to take such a step to acknowledge the right of parties who are not parties to the original proceeding, without knowing something more of the case. Truly, to give effect to the prayer of these parties is to declare their right.

Sol.-Gen, for the petitioners—No doubt the application proceeds in the name of parties who have shewn themselves to have right to the character of Miss Williamson's nearest and lawful heirs, and also her next of kin. But they have called the factor as a party to this application, and the prayer is to recall his appointment, and to exoner him and his cautioner of the factory, so that this is truly an application for putting an end to the factory. Undoubtedly this cannot be afterwards founded on as *res judicata* between the petitioners and parties who are not here. The only question is, whether the Court will grant a discharge to the factor, who has produced all the necessary documents. In point of principle that is all.

Lord Ivory.—My difficulty is to do this incidentally. We are relieving him and his cautioner of that which is the security of the estate, though the prayer is not by them, but by other parties.

The Court delayed pronouncing an interlocutor, until an application should be presented by the factor himself for discharge.

Dalmahoy & Wood, W.S.—Agents.

WILLIAM LOSH, THOMAS WILSON, THOMAS BELL, AND OTHERS, Pursuers.— *D. F. Inglis—Young.* No. 23.

ALEXANDER MARTIN, Defender.—*Penney—Mackenzie.* Nov. 28, 1856. Losh, Wilson, and Bell v. Martin.

Ship—Insurance.—A ship broker effected an insurance on a vessel, without disclosing the name of his principal. A loss ensued, and the underwriters objected to the validity of the policy, on the ground of misrepresentation. They afterwards wrote off a loss. Their brokers communicated this to the insured, and offered to settle on condition of the insured getting authority from the trustee of their broker (who had become bankrupt) to receive the insurance, but under deduction of certain premiums due by him personally on transactions with which the insured had no concern. This condition was refused by the insured. It was not proved that the underwriters had impressed funds into the hands of their brokers to settle the loss, nor that they had authorised their brokers to waive the objection of misrepresentation;—*Held* that the underwriters were not barred by this adjustment from shewing that the policy was *ab initio* void.

1st Division. Ld. Benholme. C.

THE pursuers, Losh, Wilson, and Bell, were iron manufacturers in Northumberland. In June 1852, they applied to William Henry Brockett, ship and insurance broker at Newcastle, and secretary and principal director of the Marine Insurance Company there, to effect an insurance for L.1300 on a cargo of iron rails to Quebec, by a vessel called the "Maidstone," then lying at, and about to sail from Newcastle-on-Tyne. The amount to be insured was L.1300; but this sum exceeded the amount which was insurable by the company, and it was therefore agreed that Mr Brockett should get the insurance effected in Glasgow.

On 14th June 1852, Mr Brockett addressed the following letter to Thomas D. Douglas and Company, underwriters and brokers in Glasgow :—" Please insure L.1300 on iron rails, valued at sum insured, per 'Maidstone,' AE 1 (No. 57 in Lloyd's Register), Captain Hayman, from hence to Quebec. The remainder of the cargo is coke. Vessel not sailed. The quotation from Glasgow is L.3, 3s. per cent, at which rate please effect this order."

On 15th June 1852, Douglas and Company replied :—" We are duly in receipt of your favour of the 14th, and have insured L.1300 on iron rails, warranted free from particular average, unless stranded, by the 'Maidstone,' from the Tyne to Quebec. We have not been able to succeed with the risk under your limit of 3 guineas per cent, iron laden vessels not being much in favour in our room, and the previous inquiries, through one of our neighbours, having in a manner fixed the premium at above rate.

" Copy of policy shall be sent you to-morrow."

And on the following day, 16th June 1852,—" We had this pleasure yesterday, and now wait upon you with copy of policy for L.1300 on iron rails, per 'Maidstone,' which we trust will be found in order."

The copy of the policy bore to be effected in the name of " W. H. Brockett, as well in his own name as for and in the name or names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance," &c. The sum insured was L.1300, " lost or not lost, at and from the Tyne to Quebec, upon any kind of goods and merchandises; and also upon the body, tackle, apparel, &c., of and in the good ship or vessel called the 'Maidstone.'" The risk was declared to commence from the loading, and to continue until 24 hours after the vessel should be moored in good safety at the port of discharge. Upon this policy the defender Martin was an underwriter to the extent of L.100.

The premium, at the rate of three guineas per cent, amounted to L.49, 19s., and along with the duty and the expense of the policy, was paid by the pursuers, Losh, Wilson, and Bell, to their broker, Mr Brockett.

The vessel sailed, but was forced to put back to Queenstown, Cork, where it was found, upon a survey, that she had suffered some damage. She was

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however repaired, and again sailed, but was lost off Cape Breton, North America, together with her cargo, including the iron rails on which the insurance had been effected.

On 28th December 1852, Mr Brockett communicated the loss of the ship to Douglas and Company, and on the 30th December 1852, Douglas and Company wrote to Mr Brockett as follows :—" We duly received your favour of 28th inst., with copies of the correspondence relative to the loss of the cargo of rails, per 'Maidstone,' insured by us in June last, and which we have laid before the underwriters on the policy. Our attention has been called to the fact, that the vessel was without character when she sailed. In your letter, ordering the insurance, you describe her as Æ 1, whereas we find, upon reference to the supplement which appeared subsequently, that her character had been still withheld upon survey. We regret this exceedingly, as the underwriters say that, but for the representation that the vessel was Æ 1, they would not have taken the risk on any terms. And we fear, therefore, they will object to pay the loss. We shall, however, be glad to see them again on the subject, on hearing from you, with any explanations you may have to make as to this discrepancy."

Mr Brockett replied as follows, on 3d January 1853 :—" I duly received your favour of the 30th ult., which I shewed to Messrs Losh, Wilson, and Bell, the shippers and insurers of the cargo. They, of course, immediately referred to Lloyd's books, and found the vessel there precisely as represented in my order to you. They could know nothing of what was to be in a supplement, which is not dated until the 17th June, and was delivered long afterwards with the new book. Besides, it appears to me that the omission of character must be an error, as the vessel, in a subsequent supplement (No. 6), appears as of the class represented. I hope this explanation will be satisfactory, and that there will be no difficulty about the settlement."

On 5th January 1853, Douglas and Company replied, that the explanations given by Brockett had not altered the views of the underwriters, and after recapitulating some of the facts above given, and referring to the regulations at Lloyds, they stated :—" In any view of the case, therefore, the underwriters maintain that the vessel could not be considered Æ 1, and they insist that the misrepresentation, made on this point, invalidates the policy, as, but for this, they would not have been induced to underwrite the vessel with cargo of iron at any rate of premium. The circumstances of her having to put back to Cork for repairs, they look upon as proof of her unseaworthy condition : and the fact of her having been there repaired and restored to the letter in Lloyd's, they do not consider in any way affects the case. By the delay thus occasioned, the voyage was also thrown late in the season, and to this circumstance may be attributed the ultimate loss of the vessel. From what we have stated, you will see that the grounds upon which settlement of the loss has been objected to is, that of misrepresentation,—the vessel having been represented in the order for insurance, 14th June, as Æ 1, when actually surveyed by Lloyd's in May and found unworthy of character."

A lengthened correspondence ensued, consisting wholly of letters from Douglas and Company, wanting information, and letters from Brockett, giving information and sending documents relative to the unseaworthiness of the vessel and her position at Lloyds. At last, on 5th April 1853, Losh, Wilson, and Bell wrote direct to Douglas and Company for a settlement, but the answer was that the underwriters still required further documents.

In the meantime Brockett stopped payment; and on 13th May 1856, Losh, Wilson, and Bell wrote to Douglas and Company as follows ;—(after referring to various documents then sent)—" We refer you to the copy of letter from Mr Bourinot, for the amount realised by the sale of the iron

saved. We regret we cannot ascertain who holds the proceeds, having inquired at every quarter without effect. However, the agent at Sydney is no agent of our appointing, and we fear the nett proceeds will be a mere trifle. We think you must now admit that we have had great patience in this matter, and have done everything in our power to produce the documents required. It seems that the information, as to the survey, can only be got by an inspection at Lloyd's. See Lloyd's book, section 19, page 7. The underwriters on the ship have settled, as well as those on the freight and coke shipped by the 'Maidstone.' Is it not, then, very unreasonable that we are still refused a settlement after a period of so many months? We have only now to request that you will inform us whether the underwriters mean to pay or not, as we are not disposed to sit quiet any longer."

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In reply, Douglas and Company wrote the following letter, dated 17th May 1853:—"We duly received your favour of 13th inst., with enclosures, and have placed these, along with the other papers relating to loss per 'Maidstone,' in the hands of the underwriters, who, we have every reason to expect, will now put us in possession of an early adjustment of this claim. As it rests with the assured, however, to recover the salvage proceeds, they will doubtless deduct the amount of same, in conformity with Mr Bourinot's letter, until you are able to show that you have used every reasonable endeavour to recover without success. The insurance having been effected by us on account of Mr W. H. Brockett, we cannot recognise you in the matter, or make any settlement, without authority of Mr Brockett's trustees; and there will fall to be deducted from the loss the sum of L.240, owing by Mr Brockett for premiums of insurance. The underwriters on the hull of the ship, having apparently sent their own surveyor to inspect her previous to taking in cargo, they certainly could have no good pretext for disputing or questioning the claim; but our underwriters would not have taken the risk on any terms had they been aware of the fact that the vessel had just been examined by the surveyor for Lloyd's, and found unworthy of character, when, on the contrary, they were led to believe from the letter ordering the insurance that she was Æ 1, and they considered, therefore, that the circumstances justified them in requiring the very fullest information."

Losh, Wilson, and Bell's answer was as follows:—"21st May, 1853.—We beg to acknowledge the receipt of your communication of the 17th inst., the contents of which surprise us very much. In the correspondence which has already taken place, you have admitted us to be the parties entitled to the money, and it is only now, after a lapse of many months, and under altered circumstances, that you appear to find it convenient to repudiate our title, and claim to pay the amount of the insurance to Mr Brockett, first deducting therefrom a debt due to yourselves. We have, we think, manifested a sincere desire throughout the whole of this business, to comply with any reasonable requisition, but, when you attempt to pay the debt of Mr Brockett with our money, it is necessary that all further correspondence should close, and the matter be placed in the hands of our solicitors. In conclusion, we have only to add that we have no objections to receive the amount of insurance, less the salvage proceeds, leaving the latter claim to be adjusted hereafter."

On 9th June 1853, Douglas and Company wrote to Losh, Wilson, and Bell as follows:—"For your information, we beg to say that the underwriters, per 'Maidstone,' have written off a loss upon the policy of L.87, 8s. 6d. per cent., for settlement on the 15th instant. We have no objection to hand over to you any balance of Mr Brockett's account, to which you may be legally entitled, on receiving a proper authority to do so from Mr Brockett's trustees." And of same date, 9th June 1853, Douglas and Company wrote to Mr Lockey Harle, as representing Brockett, as follows:—"We beg to advise that the underwriters, upon policy for L.1300, on

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iron rails, per the 'Maidstone,' from the Tyne to Quebec, effected by us, on account of Mr W. H. Brockett, have now written off a loss of L.87, 8s. 6d. per cent., for settlement on the 15th instant. A claim has been made for this loss by Messrs Losh, Wilson, and Bell of Newcastle, but the policy being in name of Mr Brockett, we cannot part with the money without consent of the trustees on his estate. If we are to pay the loss to these gentlemen, you will oblige us by furnishing us with the necessary authority from the trustees."

On 13th June 1853, Messrs Chater, solicitors in Newcastle, wrote to Douglas and Company as follows :—" In reply to your letter, addressed to Messrs Losh and Company, we beg to say that our clients are disposed to accept L.87, 8s. 6d. per cent., on their loss on account, leaving the balance to be adjusted hereafter; but with reference to any claim against Mr Brockett being deducted, they cannot sanction it. Should the underwriters not feel disposed to settle upon these terms, be pleased to refer us to their solicitor."

On 21st June 1853, Douglas and Company wrote to Mr Lockey Harle as follows :—" Being now in possession of a settlement from the underwriters, per 'Maidstone,' your early reply to the subject of our letter of 9th instant will oblige." And on 1st July 1853, Messrs Chater again wrote to Douglas and Company as follows :—" We beg to say that we have received positive instructions from Messrs Losh, Wilson, and Bell, of this town, to institute legal proceedings against you, unless their claims upon the underwriters of the 'Maidstone's' cargo be arranged forthwith. Unless we receive a satisfactory reply to this communication within three days, we shall issue process." Douglas and Company replied on 2d July 1853, as follows :—" In reply to your communication of yesterday's date, we beg to say that we cannot in any way recognise Messrs Losh, Wilson, and Bell's claim to loss, per 'Maidstone,' without consent and authority from Mr Brockett's trustees. This determination we intimated to these gentlemen, as well as to the solicitor for the trustees, some time ago."

In these circumstances, the present action was raised. It was directed against Alexander Martin, one of the underwriters, and concluded for payment by him of L.100, as his proportion of the total valued sum of L.1300 stated in the policy, " under deduction of a proportion of the value of any iron which may have been saved and realised from the wreck."

The pursuers pleaded;—1. As the goods insured were lost in consequence of the perils of the seas occurring in the course of the voyage insured, the same constituted a loss under the policy; and the defender is, in law and justice, liable to make good his proportion thereof, in terms of the conclusions of the summons. 2. It was no way necessary for the pursuers to make any representation regarding the state or condition of the ship, because every circumstance of that nature is covered by and included in the implied warranty of seaworthiness; and therefore, while the defender does not insist upon any plea of unseaworthiness, his statements as to alleged representations are irrelevant. 3. The pretended misrepresentation imputed to Mr Brockett in the order of insurance is entirely without foundation, in respect that it referred merely to the description of the vessel contained in Lloyd's Register at the date of the said order, which description was both substantially and literally true; and farther, that the same was made by Mr Brockett, in the *bona fide* belief of its truth, and that he neither knew nor had cause of knowledge of any circumstances or latent proceedings of Lloyd's committee having a different tendency, nor, as far as the pursuers yet know, were there any such existing at the date of the order of insurance or the policy. 4. The underwriters, including the defender, having already admitted their liability for a loss of L.87, 8s. 6d. per cent. under the policy, and written off the same as loss, are now barred from objecting to the validity of the

insurance. 5. According to the terms of the policy, the insurance was effected in the name of Brockett, for behoof of the party having the real interest, and that the real interest is in the pursuers is both proved and admitted by the correspondence. 6. There are no *termini habiles* for the plea of compensation attempted to be set up by the defender, in respect that Brockett, who is said to be debtor for an account of premiums due to the defender, is not creditor in the amount of the loss claimed, and that the pursuers, who are creditors in the said loss, are not debtors for the pretended account of premiums, so that the parties between whom the compensation is pleaded are not reciprocally debtors and creditors in the claims attempted to be set off.

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Similar actions had been directed against the other underwriters.

The defender founded on the circumstances contained in the above correspondence as amounting to misrepresentation *in essentialibus*, and pleaded;—1. The accumulation of actions at the pursuers' instance is unwarrantable. 2. The pursuers have no right or title to sue, without production of a stamped policy. 3. The policy libelled not having been a delivered instrument, cannot be sued on, at least cannot be sued on till the pursuers pay the premiums, and otherwise put themselves in the position of parties to whom constructively it has been delivered. 4. The pursuers have no right to claim under the policy libelled, which is in name of Mr Brockett; and, at all events, they cannot put themselves in a better position than Mr Brockett himself, and are liable to all exceptions and defences pleadable against that gentleman. 5. The policy libelled on is void from misrepresentation. 6. The policy is further void, in respect of unseaworthiness of the vessel. 7. No claim lies on the policy libelled, in respect of the loss occurring on a different voyage, and in different circumstances from those to which the policy is applicable. The claim is excluded by deviation and change of risk. 8. In any event, the claim for loss under the policy is subject to the set off by way of compensation of the premiums due, both on this and other vessels, by Mr Brockett; and, at all events, of the premiums due on this policy itself. 9. The claim for loss is also, in any event, subject to deduction of the amount of salvage.

On 6th December 1854, the Lord Ordinary pronounced the following interlocutor:—" Repels the first plea in law for the defenders: Further, in respect of the correspondence produced previous to the 9th of June 1853, and of the announcement made of that date by the defender's brokers, Messrs T. D. Douglas and Company in their letters to the pursuers, and to Mr Harle, finds that the defenders are not now entitled to dispute the validity of the policy libelled; and therefore repels the second, third, fourth, fifth, sixth, seventh, and tenth pleas for the defenders, in so far as they involve this ground of defence: Sustains the ninth plea in law for the defenders; and in reference to their eighth plea, finds that the policy libelled was done in name of Mr Brockett alone, and not in the name of any of the pursuers: But finds that it is alleged by the pursuers that Messrs Douglas and Company, the brokers, knew that Mr Brockett was acting, not on his own account, but as an agent, which is denied by the defenders: Finds, that whilst this allegation is relevant to elide the defenders' eighth plea, so far as their claim upon the broker's general lien is concerned, the *onus probandi* lies upon the pursuers: Allows them within ten days to put in an issue applicable to their statement as to this matter on record, and reserves in the meantime the question of expenses." *

* " Note.—The defences founded on misrepresentation, unseaworthiness, and deviation, having formed the subject of a lengthened correspondence, and detailed explanations between the parties, the Lord Ordinary cannot but consider Messrs Douglas' letters of 9th June 1853, confirmed as they are by the markings on the

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Both parties reclaimed; and on 18th January 1856 the Court pronounced the following interlocutor:—"Recall *in hoc statu* the interlocutor of the Lord Ordinary complained of, in so far as it finds that the defenders are not entitled to dispute the validity of the policy libelled; and, in respect that both parties have expressed a desire that this ground of defence should be disposed of in the first instance, and should be investigated by a proof on commission, and have renounced probation on this part of the cause, except on the question of fact whether the underwriters put the brokers, Messrs Douglas, in possession of funds to pay the insurance: Therefore, before farther answer, allow both parties a proof as to that matter of fact: Grant commission; and, in the meantime, supersede consideration of the other part of the case, and grant diligence."

Under this interlocutor a mass of documentary evidence was recovered, including the accounts current, or states, rendered by Douglas and Company to the underwriters. The result of the whole was, that Douglas and Company did not appear to have been specially authorised, on the part of the underwriters, to pass from any objections by them to the policy. The question remained, therefore, whether the defenders were now entitled to show that the policy was void *ab initio* in regard to unseaworthiness? and (2) assuming that they were so entitled, whether the contract under the policy was converted into a different transaction, whereby the underwriters had arranged a settlement on a different footing?

The case was argued at great length on the 11th and 18th November 1856, the underwriters contending, chiefly on the authority of the English cases of Herbert v. Champion, and Buller v. Harrison,[1] that nothing but actual payment would bar a challenge of a policy of insurance.

Of this date the case was advised.

Lord President.—This is an action brought by Messrs Losh, Wilson, and Bell, against Alexander Martin, as one of the underwriters on a certain policy of insurance on the barque "Maidstone;" and the action, being rested on that policy, concludes against Mr Martin for payment of the sum of L.100 underwritten by him on that policy, as his share of L.1300 insured on the vessel, but under deduction of the value of any iron saved from the wreck. The policy was effected upon a quantity of iron, and it appears that a certain portion of the iron had been saved. It is not expressly stated what the amount of that deduction is to be. It is not put specifically in the summons, nor on the record, but it is stated by the pursuers, in answer to one of the articles of the defenders' statement, that they are ready and willing to make any deduction that may be reasonable under the circumstances; and I sup-

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policy, as a final abandonment of their objections to the validity of the policy, and an admission of the liability of the defenders for the valued loss under deduction of the salvage.

"The pursuers had by their letter of 21st May 1853, intimated their willingness that the amount of the salvage should be deducted in the meantime. The Lord Ordinary cannot, therefore, consider these letters as mere offers of compromise, which required an acceptance of the insured in order to bind the underwriters.

"It is a totally different question whether the defenders are not entitled to settle the loss thus admitted on the principle proposed in one of their letters, whereby Mr Brockett's debt to Messrs Douglas for premiums was to be set off against part of the loss; the Lord Ordinary thinks that the defenders are entitled to the benefit of the general lien competent to their brokers, unless the insurers can prove that the brokers knew that Mr Brockett was acting, not as a principal, but as an agent. Such seems to be the doctrine of the English law as laid down by Arnold, p. 140."

[1] Herbert v. Champion, 1 Campbell, p. 134; Buller v. Harrison, 4th February 1777, 2 Cooper, 565. See also Sheppard v. Chewter, 1 Camp., N. P. 274.

pose, if the case turned upon that matter, there would be little difficulty in having it adjusted. In defence Mr Martin has stated various pleas.

In particular, the fifth plea in law is this—" The policy libelled on is void from misrepresentation." The sixth plea is—" The policy is further void, in respect of unseaworthiness of the vessel."

There are various other pleas; but with reference to these two, which are the pleas we have more immediately to consider at present, the pursuers have framed their fourth plea in law as follows:—" The underwriters, including the defender, having already admitted their liability for a loss of L.87, 8s. 6d. per cent under the policy, and written off the same as loss, are now barred from objecting to the validity of the insurance."

The Lord Ordinary, by an interlocutor of 6th December 1854, found that the defenders were not now entitled to dispute the validity of the policy. And his Lordship's reasons for that were shortly stated in a note appended to his interlocutor, to which I shall afterwards advert. The defender reclaimed against that judgment, and the pursuers also reclaimed against it on other grounds; but both parties were desirous that the objection to the policy should be first disposed of. We heard them on that point, and they renounced probation except as to one matter of fact—namely, whether the underwriters had put funds in the hands of the brokers, Messrs Douglas and Company, to settle the loss under the policy. Accordingly we pronounced the interlocutor of 18th January 1856, which is perhaps not correctly expressed in its language, but the meaning of which is abundantly obvious.

I do not know whether the parties desired to have the whole grounds of defence applicable to the validity of the policy disposed of before they went into the other point. But what we wished to dispose of was the reply to that ground of defence. Probation was renounced as to that part of the claim, not as to any other part; and the question was, whether the defenders were barred by that plea from now objecting to the validity of the insurance? I wish to notice that this last interlocutor was misunderstood at a further stage of the case. By recalling the interlocutor of the Lord Ordinary, we did not mean to pronounce any opinion on the question whether the interlocutor of the Lord Ordinary was well founded or not. We merely wished, before we could adhere to it, to have some further investigation into the facts. The allegation of the defender is, that this policy was void; that there was misrepresentation in essential matters at the time of entering into the policy, more especially in regard to the seaworthiness of the vessel; and therefore that he never was under any valid legal obligation in this risk. There can be no doubt of the legal effect of this defence, if it is properly supported by statement, and if the statement is properly supported by evidence. Therefore the question is, whether the defender is precluded from entering into it?

The ground upon which it is said that the defender is precluded from entering into that defence, is embodied in the fifth plea in law for the pursuers.

And in support of that objection to the defence, reference has been made to the correspondence which passed betwixt the parties, and also to the writing off of the loss by the underwriters. Further proof has been led by the examination of parties, and by the production of documents. The matter which was brought under our notice at the former discussion, had reference, as I understood it, to the contention on the part of the pursuers, that in regard to this loss, and to the adjustment of it on the policy, the underwriters had impressed funds into the hands of the brokers, Messrs Douglas and Company, to pay it. It rather appears that some of the underwriters have settled their loss, and so far these parties are out of the present question. In regard to an averment of specific impressment of funds into the broker's hands to pay this loss, it struck us as a matter that might be of importance, if made out; but it is not necessary to consider its legal import, because I am satisfied that it is not made out. It does not signify that the brokers had funds in their hands at the time belonging to the underwriters. The important fact to be made out is, that the funds were transmitted to them for the purpose of settling that loss. But that was not the state of the fact, and therefore the case comes very much before us as before the Lord Ordinary, except that there are now some additional documents. The Lord Ordinary was of opinion that the defenders were not entitled—the plea is, that they were barred—but the Lord Ordinary's expression is,

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they were not entitled to dispute the validity of the policy libelled, and he repels the defences, so far as they involve this ground of defence.

In order to appreciate the import of the correspondence and documents produced to us, it is necessary to keep in mind the relative position of the parties to each other. The pursuers were owners of the iron, but they entered into the transaction without their names being disclosed. Whether Brockett's position with reference to Messrs Losh, Wilson, and Bell, was known to Messrs Douglas and Company or not, is a matter not ascertained in this question. Probation has been renounced, and no evidence on either side has been adduced in regard to that matter. Brockett applied to Messrs Douglas and Company to effect that insurance. Douglas and Company were the brokers for these underwriters, of whom the present defender, Alexander Martin, is one. After the loss was known, a correspondence took place betwixt Messrs Douglas and Company and Brockett with reference to a settlement of that loss, and at that time, at the outset of the correspondence, Messrs Douglas and Company stated that an objection had occurred to the underwriters in regard to the validity of the policy. That objection was an alleged misrepresentation as to the class of the vessel at the time the policy was entered into. A good deal of correspondence passed on this subject, and explanations were given as to the cause of the discrepancy between Brockett's representations of her class and her position at Lloyds. It appears that she was classed A 1 in Lloyd's Register, but that she had lost her class, as appeared from a supplement of Lloyd's Register that had not then come to the knowledge of the pursuers. They were not aware of that at the time of entering into the policy. It does not appear for some time that Messrs Douglas and Company were satisfied with that explanation.

Another matter of explanation and ascertainment was the value of the iron saved. A good deal of correspondence took place on that subject. At length it was proposed to be settled in this way: A certain sum, L.12, 10s. per cent, was to be taken off the amount of the insurance, and to be retained in the meantime as the estimated value of the saved iron. That is the fair inference of the correspondence, and the parties came to be satisfied with that proposal as being a fair arrangement in the circumstances. With reference to the alleged misrepresentation, it does not appear that the underwriters, or Messrs Douglas and Company, communicating the views of the underwriters, ever expressed themselves perfectly satisfied with the explanations of the pursuers, or said that their objections were altogether removed. It may be, however, that by their conduct they waived the objection. It does not appear from that correspondence that any notice was taken of another matter afterwards brought under notice, namely, an occurrence at Newcastle, whereby it was alleged that the vessel was damaged, and unseaworthiness created. The word unseaworthiness is made use of, but only in reference to the displacing of her position at Lloyd's. That was not brought forward till a later period, but undoubtedly the matter of misrepresentation was brought forward at an early stage of the correspondence.

The correspondence comes to the point founded on mainly by the pursuer at the end of May and beginning of June 1853. In the meantime Mr Brockett, with whom the correspondence had previously taken place, stopped payment. It was known before that date to Messrs Douglas and Company that Messrs Losh, Wilson, and Bell were the parties interested in the insurance, and it appears that the failure of Brockett had suggested to Messrs Douglas and Company, that, as Brockett was owing them certain premiums on other policies, it would be a good opportunity to recover payment by withholding a portion of this loss as due to Brockett. The premiums for which they proposed so to withhold payment appear to have been owing to the underwriters, and some who were underwriters in this vessel. This was as to one half of the sum. The other half to be deducted was money due to Messrs Douglas and Company, either for themselves or for other underwriters, but not generally for the underwriters of this vessel. However, Messrs Douglas and Company desired to withhold both. On 13th May, Messrs Losh, Wilson, and Bell, addressed a letter direct to Messrs Douglas and Company, and in which the pursuers complain that they had not yet got a settlement. They say that the underwriters in the ship had settled their loss, and ask why the underwriters on the iron had not settled theirs. Messrs Douglas and Company write on the 17th May, that they had placed the letter of the pursuers in the hands of the underwriters, "who, we have every reason

to expect, will now put us in possession of an early adjustment of this claim." That does not state that they were yet in possession of an adjustment of the claim, but only that there was reason to expect that they would soon be so, and in announcing that expectation they say that the salvage proceeds will doubtless be deducted, and also that "the insurance having been effected by us on account of Mr W. H. Brockett, we cannot recognise you in the matter, or make any settlement without authority of Mr Brockett's trustees; and there will fall to be deducted from the loss the sum of L.240, owing by Mr Brockett for premiums of insurance."

Now this is the first intimation, so far as I remember, by Douglas and Company, of the expectation of being soon in a condition to settle the loss on the policy, and it conveys the intimation of an intention to deduct those premiums of insurance owing by Mr Brockett. It is also the first communication direct from Douglas and Company to Messrs Losh, Wilson, and Bell. Whether Messrs Douglas and Company were entitled to make such a deduction as regards the portion of the premiums relating to the underwriters of this policy, or of the other portion not relating to these underwriters, is a matter on which I do not desire to indicate any opinion. It is not a question before us at present. The Lord Ordinary has indicated an opinion favourable to deducting these, but I do not form any opinion upon it. But Messrs Douglas and Company, whether entitled to do so or not, advanced the pretension; and, stimulated by the failure of Brockett, they insisted upon it as a condition. Messrs Losh, Wilson, and Bell repudiated this view of the matter altogether. They instantly did so. On the 21st May, they wrote that they were surprised at the proposal "to pay the amount of the insurance to Mr Brockett, first deducting therefrom a debt due to yourselves. We have, we think, manifested a sincere desire throughout the whole of this business to comply with any reasonable requisition; but when you attempt to pay the debt of Mr Brockett with our money, it is necessary that all further correspondence should close, and the matter be placed in the hands of our solicitors."

Douglas and Company now knew that Brockett had made the insurance for Losh, Wilson, and Bell. They had been told so by that time; but I do not see that they departed from the statement that Brockett was the party they had to deal with. In short, this letter of the 21st May, is a distinct, express, and clear refusal to admit the mode of settlement proposed by Messrs Douglas and Company.

Then the next letter from Messrs Douglas and Company is dated 9th June, to Messrs Losh, Wilson, and Bell. On that day also they wrote to Mr Lockey Harle, the agent for Brockett, who had informed them of his failure. To Messrs Losh, Wilson, and Bell, they say, that "the underwriters have written off a loss upon the policy of L.87, 8s. 6d. per cent, for settlement on the 15th instant. We have no objection to hand over to you any balance of Mr Brockett's account to which you may be legally entitled, on receiving a proper authority to do so from Mr Brockett's trustees."

That advances us a step further. The underwriters had written off a loss on the policy. Now, that L.87, 8s. 6d. is the L.100, minus the estimated value of the iron saved. Therefore what they had written off on the policy is the loss on the "Maidstone" tentatively, because the difference betwixt the L.87 and the L.100 was a matter for future consideration, being what I have stated, the L.100 minus the value of the iron saved. That last passage admits of more than one construction. In writing to Brockett's agent on 9th June, of same date with the letter I have last alluded to, the terms of their letter is perfectly consistent with their language to Messrs Losh, Wilson, and Bell, for in their letter to these parties they say they will not settle with them without first getting authority from Brockett's trustee to do so. At the same time, they write to the trustee, to say that they require their authority to settle with Messrs Losh, Wilson, and Bell. They do not say anything in that letter to Lockey Harle as to retaining the insurance to pay the debt due by Brockett. But if they held that Brockett was the insurer, they did not require to do so, for they would do so in settling with him as a matter of course.

I have said that in the last paragraph of the letter from Douglas and Company to Messrs Losh, Wilson, and Bell, there is room for observation. They say, "We have no objection to hand over to you any balance of Mr Brockett's account to which

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you may be legally entitled, on receiving a proper authority to do so from Mr Brockett's trustees."

"Any balance to which you may be legally entitled." That might raise the question whether the meaning was not, We will settle with you, and hand over any balance to which you may be legally entitled, after settling the question of our right of retention on account of Brockett. And if that letter had been accepted in that sense by Messrs Losh, Wilson, and Bell, the question might have come to be one of nicety, and different from what it now is. There was not a clear and distinct waiver of the objection on the other ground. But I do not think it was so accepted by Messrs Losh, Wilson, and Bell, because their answer, which is made through their attornies—not the most conciliatory way of answering a proposal—is that they are disposed to accept of the L.87, 8s. 6d. per cent on their loss on account, leaving the balance to be adjusted hereafter; but with reference to any claim against Mr Brockett being deducted, they cannot sanction it. Should the underwriters not feel disposed to settle upon these terms, be pleased to refer us to their solicitor. That is, if you do not agree to pass from that claim altogether, refer us to your solicitor. That was the correspondence at that date—and that was quite consistent with the tone taken by Messrs Losh, Wilson, and Bell, that they would not allow any deduction of the kind to be made. They say, if you insist on any such deduction, the matter must go to law. The next communication of any importance is from Messrs Douglas and Company to Lockey Harle, on 21st June, in which they say, "Being now in possession of a settlement from the underwriters, per 'Maidstone,' your early reply to the subject of our letter of 9th instant will oblige."

Messrs Chater again write on 1st July, to the effect that they have received positive instructions to institute legal proceedings unless a settlement be made within three days; and Douglas and Company reply that they cannot recognise Messrs Losh, Wilson, and Bell's claim, without consent and authority from Mr Brockett's trustees.

That letter of the 21st June, in which Douglas and Company state that they are in possession of a settlement from the underwiters, was a repetition of the request made on 9th June, to know whether Brockett's trustees consented to their making a settlement with Messrs Losh, Wilson, and Bell.

Looking to this correspondence, it does not appear to me that it resulted in any transaction. Asssuming that under the policy the defenders were in a condition with reference to the claim under it, to show that the policy was void *ab initio* in regard to the alleged unseaworthiness of the vessel—the question is, whether the contract which can be set aside on that ground is converted into a different transaction, whereby the underwriters had arranged a settlement on a different footing? It does not appear to me to amount to that. There is a proposal by Messrs Douglas and Company to settle on the footing that certain premiums shall be deducted from the amount of the claim, but which proposal is all along repudiated by Messrs Losh, Wilson, and Bell. Whether Messrs Douglas and Company were right or wrong in insisting on that, is not the question. They may be right, or they may be wrong; I do not say which. But if Messrs Douglas and Company had authority from the underwriters to attach this condition as a consideration for giving up their objection to the validity of the policy—and I see nothing illegal in the brokers making a stipulation on behalf of the parties for whom they acted—then the condition was attached, and was never accepted. If there was no condition authorised by the underwriters, then I do not see that Messrs Douglas and Company had any right to pass from the objection in regard to the policy. So, then, the only proposal was one with a certain condition attached to it, which was never accepted. But independently of that, there is the writing off of the policy. But I doubt if that carried matters much beyond what I have said, for that was done when the parties were in the position I have referred to, and must be construed with reference to their situation at the time. Besides, it was only tentative, for certain deductions were to be made. Then it does not appear to have been signed by all the underwriters, nor to have been settled by express special authority to abandon all their claims in regard to the policy. Therefore this cannot be founded upon as a concluded bargain betwixt the parties to settle the loss without reference to this claim; nor do I think that the concluded proof makes much difference. There is nothing in it that is not in perfect consistency with these letters.

Therefore I do not think this fourth plea is a reply to the objections to the policy, or that it has been made out. I do not mean to say there was a disposition to pass from it. I do not mean to give any opinion as to that, or whether this may not be an element in considering the other parts of the case, especially if they fail on the facts, with reference to the expenses. But, in the meantime, I am of opinion that there is not sufficient to prevent the parties from showing that this policy was *ab initio* void, by reason of the objections taken to it.

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Lord Ivory.—The only question now before the Court is, whether the defenders are barred from pleading the invalidity of the policy, or, in other words, are they excluded from challenging it, first, on the ground of misrepresentation; and, second, on the ground of unseaworthiness? There is another ground taken in the defence, that of deviation, but that does not go so much to the invalidity of the policy as to its binding effect. It is unnecessary to consider that distinction, for in the other two matters there is enough to raise all the questions of law betwixt the parties. The Lord Ordinary has sustained this plea in bar in regard to the loss, on the ground of adjustment referred to in the correspondence. The letters, of dates from 9th May to the last date, raise an important general question, and all the more important if rested on English law and practice. It seems pretty clear, from all the authorities, that such would not be the effect of such an adjustment, even if the parties knew every circumstance of knowledge, still less when there is any room to maintain that the parties afterwards came to know things which, at the date of the policy, they did not know. Now, unless I am fairly driven to it by the rules of our own law, I think that, in construing documents of this kind, it would be inexpedient to adopt a different rule of law in Scotland from that which is acted on in England, and the case should be at least very clear to countenance a variance between the two laws. Had the question turned merely on the want of consideration as not a separate binding quality of a gratuitous promise, I might have had less hesitation, for that is plainly not a doctrine of Scotch law, and I would not introduce such a principle as would subvert a familiar general rule, always received here, and which would make promises binding where the circumstances are not sufficient for that purpose. But the difficulty lies deeper, if I understand the decisions. With reference to such adjustments, Lord Ellenborough speaks of the necessity of blazoning the whole circumstances on which challenge must lie, so that no shadow of suspicion as to the want of knowledge shall exist. And Lord Campbell, in a valuable note appended to the case of Sheppard, while resting English doctrine mainly on the want of consideration, also refers to considerations of public policy and general law, apart from mere abstract want of consideration. Indeed, want of consideration, if *per se* sufficient, would operate independently of all circumstances connected with the party's knowledge or ignorance of the supposed grounds of challenge. It would lead to an unbending general rule, applicable to every gratuitous obligation, instead of being limited to the solitary case of a contract of insurance.

Now this, without more, weighs with me in inducing unwillingness to disturb here the application of English rules of law. But when one goes a step further, why does the want of consideration, if the matter is left there, affect the question? The want of consideration has been held to affect the question, because it has been assumed that, apart from that new and gratuitous obligation, there would be nothing to bind the parties. The want of consideration arises from this, according to Lord Ellenborough, that there is no liability under the original policy; and because of that, there is no consideration for the subsequent settlement apart from the policy. It assumes that the policy, in respect of the grounds of challenge, not being binding in *se*, any obligation must rest entirely on the adjustment as constituting a new and independent agreement, and to this, want of consideration—inferred from the extinction of the policy—comes to be fatal.

In this point of view, and assuming here that the policy would otherwise be void, there arises important matter for consideration—(1), who are the parties to the new contract? Can the broker bind the underwriters to discharge their right of challenge? Can the broker—even if entitled to represent underwriters—make out with the express concurrence of the insured, any contract which departs ever so little from the precise terms of the policy? I have great doubts on all these points. In the first place, in adjustment of the loss, it is the underwriter's, not the broker's

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act and subscription that is operative, if no special authority to that effect be given to the brokers. It is, in short, the express will of the underwriters that is operative. In the next place, the adjustment must be of mutual consent discharging all claims apart from the adjustment, and binding both parties to something that is to supersede the policy. But here we have—(1), no act of the underwriters; (2), there is no special authority given to enter into this special matter from the underwriters to the broker; (3), then, so far as the adjustment on the back of the policy is concerned, we have, so far as I can see, no interposition of the insured. Whether, in the correspondence, there is adoption of what had been done in the letters, is a different question. I am speaking of that which is called adjustment of the loss on the policy, and, so far as that is concerned, it seems to have been done without consultation with the insured, and totally without their knowledge.

It was said there had been payment made by the underwriters to the brokers for the settlement of this loss. But if that had been the case, there would have been no question either with reference to English or Scotch law, for if there was payment by the underwriters to the brokers, then the brokers held that only for the insured, and the settlement in either country could only be set aside on the ground of fraud. But there is no evidence of any such thing, and so there is no such specialty here. Therefore, that consideration does not apply to the present defender. But as to the four other underwriters, it may have effect in the separate action. But I hold the evidence here to disprove that there was payment or impressment of funds into the broker's hands for behoof of the insured.

It is said there was what is equivalent to payment, and I do not deny that such might be the case. Where authority was given to apply certain funds lying in the broker's hands, or where the brokers were debtors to the underwriters, it might be done without impressing any funds into their hands. But here also the proof fails. So far as I see, the underwriters were wholly ignorant of what was passing. As between them and the brokers, there was nothing but general and usual powers given by them to the brokers. There was no special authority given them to enter into the settlement, or to break down the original liability.

This seems enough for the case. Had it not been so: had I held there was not enough for deciding the case, I might have had more difficulty in that view on which your Lordship has mainly rested your opinion as to the effect of the correspondence, as showing that the settlement had been conditional. These are concurrent views, and may stand together. In the first place, the adjustment of the loss is betwixt the debtor and creditor in that loss. The broker is neither. He is creditor for the premium of insurance, and debtor for the same to the underwriters, but not for the loss. The important effect of that particularly comes to bear on the receipt of the policy. The broker is not the debtor to the insured for the loss. In that question it is the underwriters who are the debtors, and the insured who are the creditors. There is no *concursus* beyond. There is no interest to entitle the broker to bargain on his own account, and in his own favour. Any condition so made by him would be extrinsic as between the proper parties to the adjustment of the loss. That adjustment having nothing to do with reference to the matter more or less connected with the insurance of policy, I shall require clear and positive evidence to let in a condition of this nature, to affect the relations of the underwriters and the insured. The adjustment may be effected through the medium of the broker, but it is a transaction in law betwixt the insurers and the insured; and I would be slow to allow effect to a condition extrinsic to that transaction, in order that the broker may have a security for a debt in which his principals are not concerned. I should be more disposed to hold, with reference to that shape of the question, (1) that an adjustment was concluded betwixt the underwriters and the insured only; but (2) that the broker in carrying out that adjustment raised a claim of set-off as between himself and the insured. There is nothing said at first of this set-off. It comes in in the month of May, after there had been a great deal of correspondence about the adjustment of loss; and, so far as regards the uuderwriters, there is nothing said with reference to this settlement of loss, with a condition in favour of the broker, for payment of their own debt. Accordingly, in these later letters, I should think the true construction is, that now having got everything settled as betwixt you and the underwriters, and brought to a bearing, when we

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get the money, when the underwriters pay us, on the footing of a settlement with you. we have our claim of retention as against Brockett, the party in whose name the insurance was effected; and we would not recognise you, unless with the sanction of his trustees, and only so far as regards him. That is the construction which I would be disposed to put on the letters.

There is something, however, to be said—and therein I recognise the remark of your Lordship—that all and sundry dealt with the matter as conditional. On this footing it was rejected by the insured. Their agent, when he came to answer the proposal, speaks of it as a matter that disturbed the whole previous arrangement. It was on this footing he took measures to enforce payment. Surely there is a great deal to be said with reference to that—that there never was, on the understanding of parties, a concluded agreement at all. These parties never had got the length of a concluded agreement, with or without conditions. They were disturbed before they came to a final settlement. Now, no doubt, whether the brokers were entitled or not to make a condition, if both parties treated on the footing of the agreement being conditional, the bargain would be incomplete unless that condition were accepted and purified. It is nothing that it was a condition beyond the power of the broker to impose, if it was the only condition on which a settlement was to be made; and if the insured resisted the condition, you could not separate the two things. Because if there was a conditional agreement, and the condition was not purified, the agreement falls to the ground altogether.

If the Court are prepared to adopt that view of the case, I have no great objection to it. I have heard a great deal said for it. It would be corroboratory of, and so far perhaps concurrent with, the considerations to which I have adverted as resting on more fundamental grounds in the law of insurance as affecting the adjustment of loss. If I am driven to deal with it as on a policy in itself operative, I confess I shall have greater difficulty. And in this view it is perhaps not unimportant to observe, that the correspondence and adjustment of loss deals with two parties. (1) They deal not only with the insured, but with Brockett and his trustees; and (2) as with Brockett, there is no room for alleging condition.

The adjustment of loss with Brockett is completely separated from that talked of with Losh, Wilson, and Bell, because there is no condition made with Brockett. There is no arrangement except as to the amount of the loss to be adjusted. There may be a right of retention as to Brockett, but that is left by them to the operation of the principle of law. Therefore the settlement of loss stands out as a substantive arrangement, and as regards the insured, it is not to become a different arrangement; only they say, If we are to deal with you, we must have the authority to do so from Brockett's trustees. But if the set-off against him did not imply any condition as to the policy, it is unnecessary to say anything as to the validity of this claim of set-off, which made the subject of the condition as regards these parties. And as little need we consider the effect of the adjustment of loss, if otherwise free from this condition, in rearing up a *prima facie* case against and throwing the *onus* on the underwriters. The present question has not raised these points; it has alone to do with the alleged bar to the challenge of the policy; and on the whole, it seems to me the safest course to hold that there is no such bar at all, leaving its effect *aliunde* to be dealt with as accords.

Lord Curriehill.—The defenders are sued to perform their part of a contract of insurance entered into by them as underwriters. The policy of insurance is libelled as the ground of the action, and they are called upon to pay the loss incurred on that policy. They make two defences among others—one that the ship was unseaworthy, and the other that there was misrepresentation. These pleas, or either of them, if well founded, would be fatal to the policy. Therefore what they maintain is, that there was no valid policy: that they never undertook the obligation which they are required to perform. That is met first by a plea in bar. It is said that the defenders are excluded from maintaining such pleas, by certain proceedings which took place subsequent to the loss. And as, according to our mode of pleading, the discussion of such a plea of exclusion proceeds on an assumption that the pleas sought to be excluded would, on their own merits, be good, the question now raised must be considered on the assumption that this policy was a nullity in respect of unseaworthiness of the vessel, and misrepresentation by

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the insured. And what we have to inquire is, whether the defenders, assuming them not to have been bound to pay this sum in virtue of the policy of insurance, did undertake to do so by an agreement made subsequent to the loss. The question is, whether the defenders in the action undertook this new obligation to pay what by law they were not bound to pay? In this inquiry it is not of material importance that there was no value or consideration for the alleged undertaking, for by the law of Scotland a contract of this kind is good, without value or consideration, although this is said to be necessary in England. And therefore I look to the question in that view, whether the defenders undertook an obligation, even gratuitously, to pay the sum now demanded. It is not alleged that directly or personally they entered into any such transaction with the pursuer. There was no direct communication betwixt them. It was said they entered into this contract with Brockett, who was the broker through whom the insurance had been effected. Now, Douglas and Company either had authority to enter into the contract, or they had not. If they had authority from the underwriters to enter into such a contract, then every condition annexed to the contract with their authority is a condition made by themselves through their authorised agent. If, on the other hand, Douglas and Company acted without their authority, then, whatever the nature of the transaction, that was not binding upon them. They may go against Douglas and Company for entering into the transaction without authority, and that is the best answer to this point.

But it is said they had authority. Let us assume they had authority, then, in all the transaction. Instead of reading "Douglas and Company," read "the defenders in the action." Where is the proof that they undertook to pay the sum sued for without any condition? I think the result of the evidence is this—that undoubtedly a proposal was made by the defenders, acting through Messrs Douglas and Company. There was a proposal to pay the sum in this policy on two conditions. One was, that authority from Brockett or his assignees should be obtained first; the other was, that what should be paid should not be the whole sum, but the sum under deduction of a specific amount of L.240 said to be owing by Brockett to Douglas and Company. It was made an express condition in this proposal, that if such a settlement took place, it should be under deduction of L.240. This comes clearly out in the correspondence. Till the month of May 1853, there was no such agreement, nor even proposal for it, nor anything but a demand by the defenders for documents, in order that the parties might make up their minds in respect of the unseaworthiness of the vessel and misrepresentation. On 13th May a letter was written by Messrs Losh, Wilson, and Bell, who had made their appearance on the failure of Brockett, and in that letter they conclude by saying—"We have only now to request that you will inform us whether the underwriters mean to pay or or not, as we are not disposed to sit quiet any longer."

Undoubtedly in this there was no agreement. There was a demand for a settlement, and a threat that if it was not made, they would resort to legal proceedings to enforce it. Now how is this demand and threat met? It is met by an answer from Messrs Douglas and Company, stating not that anything was agreed to, but that there was reason to expect a settlement, and making this express announcement as the footing on which this settlement would be made—"The insurance having been effected by us on account of Mr W. H. Brockett, we cannot recognise you in the matter, or make any settlement without Mr Brockett's trustee; *and there will fall to be deducted from the loss the sum of* L.240, *owing by Mr Brockett* for premiums of insurance."

Now it is impossible to read that letter in any other way than this, that "we announced to you at the outset, and as a condition of the proposal, that we will not pay you the sum in the policy except *minus* L.240." That is a distinct announcement that they would not recognise Losh, Wilson, and Bell, on any other footing than that the sum should be *minus* L.240. Now they may have been legally entitled to make this condition or qualification of their proposal, or they may not, but so it was, that it was only under that qualification they made any such proposal. And it was quite within the power of the pursuers to agree to this qualification, or to dissent from it. They exercised their option by writing that answer expressly dissenting from it. They said they would not agree to it, and they stated that all correspondence would terminate since it was insisted on. The next letter, of 9th

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June, was written by Messrs Douglas and Company, following upon that announcement, stating that they would on the 15th pay any *balance* the pursuers were legally entitled to. This meant the balance after deducting the L.240. And so this was understood by Messrs Losh, Wilson, and Bell. There was no misunderstanding on the subject, for they immediately put the matter into the hands of their man-of-business to enforce not the settlement proposed, but to enforce the claim under the policy. And accordingly that was the understanding of themselves and Mr Chater, and there is a letter of 2d July by Messrs Douglas and Company ratifying that, and referring to their intimation to Brockett. There the matter stops, and the action is raised. It is an action for what? Not for implement of an alleged agreement entered into betwixt Brockett, acting for Losh, Wilson, and Bell, and Messrs Douglas and Company. It is an action for implement of the policy of insurance, and nothing else, thereby shewing that, at the time the action was raised, the pursuers held that no such agreement as that now founded on had been entered into—and that accordingly is the only action now before us. If the defenders are right in their contention that this policy, as the foundation of the action, is a nullity, what has taken place to bar them from stating this plea? I can see nothing of the kind. All that I can see in the correspondence is, that there was a proposal which was made under a qualification; and that that proposal, as so qualified, was not accepted, and never was made into a contract in any way whatever.

As for the other evidence, the writing on the back of the policy, it was only made under the proposal as to which the parties were in correspondence at the time, and under the qualifications of that correspondence, and accordingly it was so understood by both parties.

The parole evidence is entirely in conformity with that. Mr Rose, who carried on the whole of that correspondence, expressly states it was a condition of the proposal, and that that condition was never complied with. Therefore I hold, as this is an action for payment of the policy, and as it is a relevant allegation that that policy was void by unseaworthiness and misrepresentation, there is nothing to bar the parties from proving that allegation.

Lord Deas.—I agree with your Lordship in the chair—particularly in your Lordship's concluding observations. It appears to me that, even assuming the knowledge of the material facts by the underwriters, and assuming the authority of the brokers to settle, there was no concluded settlement binding upon either party. The case is not one of an unqualified admission upon one point coupled with a reservation of another point—whatever might have been the effect of such an admission and reservation—nor was the case so put at the bar. On the contrary, the Dean of Faculty put it, and could only put it, as *a transaction* by which the insured agreed to a certain interim deduction of the salvage on the one part, and the underwriters agreed to hold the amount of loss to be fixed at a given sum on the other. Now such a transaction cannot be instructed by markings on the policy made outwith the knowledge of the insured, and not relied on by them, although such markings may be material in construing the correspondence,—the important part of which is, that from 13th May to 2d July, both inclusive,—to your Lordship's observations on which I have really nothing to add. I think both parties remained free, under that correspondence, and this action accordingly appears to me to proceed on the footing that they did so.

The Court pronounced the following interlocutor:—"Recall the interlocutor of the Lord Ordinary of 6th December 1854: Find that the defenders are not barred from insisting in their defences in the cause: Repel the fourth plea urged for the pursuers in the record; and *quoad ultra* remit to the Lord Ordinary to proceed in the cause as shall be just; reserving all questions of expenses.

John Cullen, W.S.—W. A. G. & R. Ellis, W.S.—Agents.

No. 24. — Dec. 2, 1856. Chisholm v. Paterson. — Gillanders v. Craig. — 1st Division. L.

ROBERT CHISHOLM, Pursuer.—*Forman.*
JANET DENHOLM OR PATERSON AND OTHERS, Defenders.—*E. S. Gordon.*

Cessio—Aliment.—Held, that a party whose principal debt consisted of by-past aliment for an illegitimate child, was entitled to the benefit of a *cessio*, on finding caution for future aliment.

CHISHOLM, a labourer, was incarcerated at the instance of Janet Denholm or Paterson for aliment for a bastard child, born on 17th June 1853. He thereupon applied for *cessio.* His debts amounted to L.15, 18s. 7d., of which L.9, 11s. was due to Paterson. She had obtained decree against him for three years' aliment, at the rate of L.4 a-year. He had paid to account L.6, 10s., and agreed to take the child and pay the balance by instalments, but this offer was refused, and the pursuer was incarcerated on 14th July 1856, and alimented by the mother. He was still willing to take the child and relieve the mother of it. He himself had to support a wife and child, who lived with his father.

Gordon, for Paterson, opposed the *cessio*, on the ground that if the pursuer was not able to pay the aliment, he was at least bound to find caution for it.[1]

The pursuer thereupon offered to find caution, and

THE COURT pronounced the following interlocutor:—"Find the pursuer entitled to the benefit of the process of *cessio*, on caution for future aliment of his natural child, and remit," &c.

JOHN DAVIDSON, S.S.C.—JAMES WALLACE, S.S.C.—Agents.

No. 25.

JAMES FALCONER GILLANDERS, Pursuer.—*D. F. Inglis—Pyper.*
HUGH CRAIG, Defender.—*Sol.-Gen. Maitland—A Mure.*

Lease—Landlord and Tenant.—By an agricultural lease, written by the landlord, a piece of land was let for twenty years, a specified portion thereof to be improved by the end of the lease, under a penalty. Two additions were made to the lease, and of same date with it, by the first of which the landlord let the land at the same rent to the tenant's son at the expiry of the twenty years, and by the second of which he let "to the said Hugh Craig (the elder) his liferent, and then to the said Hugh Craig (the younger) after his death (the elder)." *Held* (*aff.* judgment of Lord Ardmillan), that the penalty was not exigible at the expiry of the twenty years, nor till the death of the father, who had a liferent lease of the lands.

Dec. 2, 1856. — 1st Division. Ld. Ardmillan. C.

THE pursuer, Gillanders, proprietor of the estate of Highfield, brought this action against Craig, his tenant, for payment of L.27 sterling, "being the stipulated and agreed upon penalty due by the defender to the pursuer, on account of the defender's failure to improve 6 acres, 2 roods, and 10 perches, imperial measure, of the subjects let to him by the pursuer's father, in terms of the obligation contained in his lease to that effect."

The obligation was as follows:—"3d, That he shall be bound to have at least one-half of his lot completely improved before the termination of the first ten years of his lease, and the whole improved before the termination of the lease, under the penalty of L.4 for each imperial acre which remains in an unimproved state."

By the terms of the tack, the lease was originally contemplated to endure for twenty years from and after the term of Whitsunday 1830. The following additions, however, were made to the lease by the pursuer's father:—

"I, the said John Gillanders, hereby bind and oblige myself, my heirs and successors, to let to Hugh Craig, son of the said Hugh Craig by his present wife Mary Matheson, the lots above specified, and at the rent, and upon

[1] Cassels v. Keddie and Melville, 27th Nov. 1852, ante, vol. xv. p. 124.

the conditions foresaid, from and after the expiry of twenty years, during which they are let as above to his father Hugh Craig, and that for the period of his, the said Hugh Craig's (the younger) natural life. These presents signed by me place and date foresaid, before these witnesses. No. 25. — Dec. 2, 1856. Gillanders v. Craig.

"*N.B.*—I, the said John Gillanders, pass from the clause No. 4th of this lease;[1] and I, the said Hugh Craig, binds and obliges myself and his foresaids to pay to the said John Gillanders 2s. 6d. sterling per acre of this lease of twelve acres; and I, the said John Gillanders, let to the said Hugh Craig (the oldest) his liferent, and then to the said Hugh Craig (the youngest) after his death (the oldest). These presents signed by me place and date foresaid, before the said witnesses."

The defence was, that the penalty was only due on the termination of the lease, which was still current.

The Lord Ordinary pronounced the following interlocutor:—"Finds it alleged by the pursuer, but denied by the defender, that the defender failed to improve the lot of ground within the first ten years of his lease, in terms of the obligation therein, and that inquiry into the fact is necessary: Finds that the whole of the three documents constituting the lease being of one date, and in reference to the same matter, must be read together; and that the expiry of the lease, as constituted by these three documents, has not yet arrived, so as to entitle the pursuer to enforce a penalty not exigible till the expiration thereof: Appoints the cause to be enrolled, with a view to the ascertainment of the question of fact mentioned in the first finding; and reserves the question of expenses."*

The pursuer reclaimed, and pleaded;—That the contract contained in the first missive had not been cancelled by anything contained in the other document founded on. The three documents constituted separate and independent leases, under the first of which, the whole land must be improved before the expiration of the term,—that is, twenty years from Whitsunday 1830. That period had expired. The land was in large part unimproved, and the penalty was therefore exigible, as sued for. The language employed in the various missives was no doubt incorrect, but its fair import was as stated.

The defender pleaded;—That the documents together constituted the lease, which did not terminate till the death of the defender.

Lord President.—This case appears to have arisen out of the practice of parties writing legal documents for themselves, instead of getting a man of business to do so. The original lease is written by the landlord, and the two additions are also apparently written by him. It is not quite clear, upon the face of these documents, that they were all written at the same time; for, although the additions bear to be written, "time and place foresaid," still, on referring to the original deed, there is no time or place mentioned. The question is, whether the penalty claimed is now exigible? By the original lease, there was clearly a definite termination to the tack contemplated twenty years after the term of Whitsunday 1830. And, it is equally clear, that when the second condition of the lease was written, the parties had in view the term of Whitsunday 1850, as the termination of the lease. Sometime or other, in the course of the first year, and before any rent was exigible, these other conditions were made. They are, I think, very like a second and supplementary lease. This new lease is to commence when the first lease is at an end; but the matter does not stop there. A third condition is attached, which deals with the interest of both father and son, and alters the

[1] This clause had reference to service at any time and harvest, and to delivering certain custom hens.

* "Note.—The term when the penalty for non-improvement at the expiry of the lease is exigible is not at a precise term, as argued by the pursuer, but 'at the termination of the lease,' and whatever protracted the day of termination protracted the day of exaction. In the last writing, the words 'this lease' are used so as to bind all three writings together."

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period of the commencement of Hugh Craig junior's interest in the lease; for it is to commence from and after the death of Hugh Craig senior, at whatever period that might happen. The original lease, so far as Hugh Craig, the elder, was concerned, was only for twenty years; but the young man's interest was now to commence from the death of his father. In that view of the matter, and such being the nature of the alterations of the lease, it appears to me, that the period for the exaction of the penalty has not yet arrived; and, therefore, I think that the action cannot be maintained. As to the inquiry appointed by the Lord Ordinary, that is not wished for by either party, and besides it is not within the action. The interlocutor must therefore be recalled.

Lord Ivory.—I agree. This tack being written by the landlord, it is consequently not easy to understand it. But, in construing these documents *inter rusticos*, I construe it against the landlord. The father is acknowledged tenant. He is also liferenter; and his son, at his death, has a liferent in the succession.

Lord Curriehill.—I concur. Taking these documents together as constituting the lease, it is explicitly stated that the original lease was to terminate with the liferent of the father. That precisely specifies the *terminus a quo* of the lease to the son. It is the death of his father. Therefore, I think, that if the old man had died during the twenty years the son's right would have commenced; and alternatively, having survived the twenty years, the son's right has not yet commenced. It is clear enough to my mind, on these grounds, that the period for exacting the penalty has not arrived.

Lord Deas.—I agree that the whole writings here must be taken as constituting the existing lease, and that it is not of much moment whether they were all signed on the same date or not, although the words signed "place and date foresaid," seem naturally to import that they were so. They follow each other on the same sheet of paper; and, in so far as there is a discrepancy, the last of them must rule. Now the last of them regulates the rent, and likewise varies the endurance of the lease, which is no longer a lease to Hugh Craig the elder and his heirs for twenty years, but a liferent lease to Hugh Craig the elder, with devolution at his death in favour of Hugh Craig the younger, whether as in right of the same lease, or under a new lease, we need not at present inquire.

Now the penalty for not having the whole lands improved "before the termination of the lease," is a penalty which could not have been exacted till the expiry of the twenty years, when such was the endurance of the lease, and which cannot now be exacted till, at all events, the death of Hugh Craig the elder, which is the earliest period at which the lease to him can be alleged to terminate, even if it be not the same lease which goes to Hugh Craig the younger—a point, as I have already said, which we do not at present require to decide. There is here no action for specific implement, whatever questions *that* might have raised. The only action is for damages, under the name of penalty, not exigible till the lease terminates, and the lease has not yet terminated.

The *last* writing bears that the landlord passes "from the clause No. 4 of this lease;" that is to say, the clause in the first writing binding the tenant to perform certain services, and to deliver certain custom hens, which accordingly is deleted. But clause 3d, in the first writing, applicable to the penalty at the termination of the lease, stands as it did; and, indeed, if it did not, there would be no penalty in this liferent lease.

If the intermediate writing, keeping up the lease absolutely for twenty years, as at first, and adding a liferent right in favour of Hugh the younger, had remained operative, there would have been much more difficulty; because in that case, the lease to Hugh the elder might have been said to have terminated with the twenty years, and a separate lease to Hugh the younger then to have commenced. But, under the last writing, there is no such difficulty. There was no longer a lease for an absolute term of twenty years either to Hugh the elder or to any body else. If Hugh the elder had died within the twenty years, Hugh the younger would at once have come in, not in his father's right but in his own; and if both had died within the twenty years, there would have been no longer any lease at all. In short, by the last writing, the original term of twenty years has no longer anything to do with the endurance or termination of the lease; and so, I think, the landlord must have construed the writings; for, although the twenty years expired at Whitsunday 1850, this action was not raised till 28th November 1855, more than five

and-a-half years afterwards—a delay which might have founded a formidable plea (not stated in this record) against the claim of damages as having been waived or departed from, but to which I refer at present only as indicating how the landlord and his advisers appear to have themselves construed the lease.

No. 25. — Dec. 2, 1856. Scott v. Chalmers.

THE COURT pronounced the following interlocutor:—"It having been stated by the counsel for both parties that neither of them desired to raise in this action any question as to the failure to improve ground within the first ten years of the lease, recall the interlocutor of the Lord Ordinary reclaimed against, and in place thereof, find that the period of the termination of the defender's lease, as modified by the last of the three writings referred to, has not yet arrived: Therefore assoilzie the defender from the conclusions of the action, and decern: Find the defender entitled to expenses," &c.

ALEXANDER HAMILTON, W.S.—JOHN ROBERTSON, S.S.C.—Agents.

No. 26.

JOHN SCOTT, Pursuer.—*Pattison—Watson.*
Poor AGNES MAXWELL CHALMERS, Defender.—*Baillie—Adam.*

Proof—Parent and child—Oath in supplement—Stat. 16 *Vict. c.* 20.—In an action of filiation and aliment, *held* (adhering to the judgment of the Lord Ordinary), that the testimony of the mother of an illegitimate child, given by her in the position of a witness, is liable to be tested by cross-examination, and its credibility is to be weighed by the same rules as apply to the testimony of other witnesses, and upon a view of the whole evidence led by both parties;—*Opinion*—That the parties in such actions being admissible as witnesses under the statute 16 Vict. c. 20, it is objectionable to take judicial declarations from them, and the pursuer is not entitled to the benefit of giving her oath in supplement.

Justices of the Peace.—Opinion that Justices of the Peace have no power to grant commissions for taking proofs, and the proof ought to be taken before the justices who adjudicate in the case.

Dec. 2, 1856. — 2d DIVISION. Ld. Handyside I.

THIS case was stated in the note appended to the interlocutor of the Lord Ordinary as follows:—"This was an action of reduction (with a conjoined suspension) of judgments pronounced by a bench of Justices in Roxburghshire, and by the Courts of Quarter Sessions, under a petition at the instance of the defender against the pursuer, suing him for inlying expenses and aliment of a bastard child, of which he was alleged to be the father. The Justices, in Petty Sessions, found the paternity proved, against which an appeal was taken to the Quarter Sessions, which substantially affirmed the judgment. The proceedings before the Justices are noticeable chiefly from the petitioner, the mother of the child, having been examined as a witness under the proof allowed, in accordance with the late alteration in the law of evidence, instead of her oath being taken in supplement, after a finding that a *semiplena probatio* had been established. The proceedings, however, had also followed the old form of ordering a judicial examination, and in this case both the petitioner and the respondent were, on their several cravings, judicially examined. Thereafter the Justices allowed a proof, and both parties led evidence, the petitioner being the first witness examined in support of her case, and the defender concluding his proof by his own deposition as a witness."

The Lord Ordinary pronounced an interlocutor, finding it not proven that the pursuer was the father of the defender's child: therefore, in the reduction, reduced the judgments of the Justices of the Peace and Quarter Sessions, and assoilzied the pursuer from the conclusions of the original petition to the Justices. In the suspension, suspended the charge *simpliciter*, and found the pursuer entitled to his expenses in the Court of Session, and in the Inferior Court.*

* "NOTE.—This case is, so far as the Lord Ordinary is informed, the first since

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The defender reclaimed; and her counsel were heard on the import of the proof.

Lord Justice-Clerk.—When the pursuer in an action of filiation tenders herself as a witness, she is subject to any cross-examination, with the view of testing her credibility, that the other party may choose, under the control of the judge or commissioner.

I do not think, though it is not necessary to determine that in the present case, that the provisions of the former law are still in force, allowing to the pursuer in these actions the benefit of giving an oath in supplement, if she can make out a *semiplena* proof. Actions of filiation have not been reserved from the operation of the recent statutes on evidence. It cannot be in the option of the woman to put herself in the position either of a witness or of a party entitled to give her oath in supplement, according as she might think most for her advantage in the particular state of the case. That would now be a singular privilege. Her oath in supplement was allowed, because she could not be a witness while the nature of her case implying secret matters required that her oath should be allowed. But now she is allowed to be a witness, and what can she require more?

In this case, I think there are no facts established from which the circumstance of connection can safely be inferred. No doubt the pursuer swears that there was connection between her and the defender, but he again swears that there was no such connection; and I cannot take her statements in opposition to that

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the Evidence Act passed, in which this Court has had to consider what view shall be taken of the value and effect of the mother's deposition as a witness when her credibility is affected by her being contradicted in her answers to questions put to her by the evidence of other witnesses giving opposite statements in flat contradiction to what she had sworn. Under the former usual mode of proceeding, the question of *semiplena* was first considered, and being found to be established, the woman's oath in supplement was allowed. This was a great advantage to her, as, when affirmative, it concluded the case, unless, which rarely occurred, her answers to special questions put were in contradiction palpably to the evidence on which the *semiplena* rested, or to her own statement on record. The proof being concluded by her oath, her answers were not open to counter proof by the alleged father. But under the practice now followed, if the present case is to be taken as a specimen, the woman being examined as a witness, is open to contradiction under the proof allowed to the man, as well as by the cross-examination of her own witnesses, if she is called first in order. When her credibility is to be tested in this way, like other witnesses, it may be that her testimony shall be shaken in all its parts, and her credit break down. And the question then is,—whether her oath to the fact of connection, and to the paternity of the child, is then to be entitled to regard, although the proof otherwise led by her might be sufficient to support, under former views, a finding of *semiplena*.

"The Lord Ordinary humbly thinks, that a woman so examined as a witness must necessarily go through the ordeal of the usual tests of credibility. It is upon this principle that he has considered what credit he can attach to the deposition of the defender as a witness. Viewing her, therefore, in the same position as an ordinary witness, he conceives she must be pronounced to be unworthy of credit. Her negative answers to numerous specific questions put to her under her cross-examination, are contradicted by the persons referred to when afterwards examined, one of them being a witness called by herself. Unless the defender's own evidence is to be believed in preference to those other witnesses, her general credibility appears gone. But, without her evidence receiving credit, the case against the alleged father is imperfect.

"It is needless, after the view now expressed, to make any remarks on the general character of the evidence led in the cause. Though some part of it is unsatisfactory, and there is much to affect the character of the woman, it is rather thought there would have been enough to support a finding of *semiplena*. But, assuming that the case, in the Lord Ordinary's opinion, breaks down when the evidence of the woman herself comes to be weighed in regard to the credit due to it. Taking the proof as a whole, the Lord Ordinary is of opinion that the paternity has not been established, and has accordingly reduced the judgments brought under review."

of the man, considering particularly that her statements are not in many particulars corroborated by even her own witnesses. And, besides, she seems to have had connection with other men than the pursuer during the ten months preceding the birth of her child. Indeed, this lady seems to have had a variety of gentlemen, to either of whom she might have given the honours of paternity. In such a case, the testimony of the woman is entitled to very little credit. I therefore concur with the Lord Ordinary.

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LORD MURRAY.—I am of the same opinion. I take the same view of the proof before us, and also concur in your Lordship's remarks on the effect of the recent statutes in such cases. Actions of filiation are not excepted from the provisions of these Acts; and, unless we hold that the pursuer ought to put herself in the position of a witness, in place of being allowed to give her oath in supplement, it comes very nearly to the absurdity of holding that she would be entitled first to make out a *semiplena* by her own evidence, and then give her own oath in supplement.

LORD WOOD.—I agree with your Lordship in holding that, when the pursuer in an action of filiation puts herself in the position of a witness, she is liable to have her credibility tested by cross-examination, and her testimony is to be weighed by the same rules as the testimony of other witnesses. But there may perhaps be room to doubt whether the old law of *semiplena* has been wholly abrogated. If the pursuer does not offer herself as a witness, and the defender does not put her into the witness box, I am not sure that we might not have to proceed upon the old law, and to consider whether or not a *semiplena probatio* had been made out without her evidence, and if satisfied that it had, then to admit her oath in supplement. But upon such a state of case I give no opinion now, it not being necessary for the decision of that which is before the Court.

In the present case, the mother has put herself in the position of a witness; and testing her evidence by the usual rules, and taking it along with the testimony of the other witnesses, I do not think there has been adduced such a proof of paternity as the pursuer was bound to bring forward in support of the conclusion of her summons for finding Scott liable to aliment her child. In such a case, the proof required on the part of the pursuer is a full proof. Apart from her evidence, there is nothing of the kind. It is, on the contrary, of a very weak and unreliable description, and her own evidence is so completely contradicted in many most important particulars, as to render it unworthy of credit. I am therefore of opinion that the interlocutor of the Lord Ordinary ought to be adhered to.

LORD COWAN.—The only important point in this case is that referred to by Lord Wood. The recent statute which allows parties to be examined as witnesses, makes no exception of cases of *semiplena*. Such cases fall within the statutory provisions as much as any others. Both the pursuer and the defender may tender themselves, or may be tendered by the other party, in leading the proof respectively on either side. Where this occurs, the whole proof must be taken together, and the deposition of the pursuer be judged of along with the other evidence. The question must be, whether she has satisfactorily proved her case. There can be no room for considering whether the rest of the evidence amounts to *semiplena probatio* laying aside her oath, so as to permit of her deposition being taken as completing the proof of paternity. Her oath emitted in the cause as a witness is to be judged of and tested, like the deposition of any other witness, upon the evidence generally led by both parties. But if the pursuer does not tender herself as a witness, and is not examined on the part of the defender, it may be that in the class of cases where the oath in supplement was competent, the pursuer having led evidence amounting to *semiplena*, may still ask to be examined. The recent statute contains no enactment on the subject. The old rule may therefore be thought to remain untouched; but it is unnecessary to determine that point in this case. Here the pursuer tendered herself, and was examined as the leading witness in support of her action. She is contradicted on material points by the rest of the evidence, to such an extent as to make her statements not trustworthy, and the interlocutor of the Lord Ordinary has rightly given effect to this view. I would only farther observe, that when in such cases it is proposed to examine the pursuer or defender as witnesses in the cause on the one side or the other, it appears to me quite objectionable to take from them judicial declarations. This was usual in the former practice before the statute. But now that the evidence of both may be tendered, or at least com-

No. 26. pulsorily obtained as part of the general evidence, I think it deserves consideration whether the practice of taking declarations at the outset of the cause ought not to be discontinued.

Dec. 4, 1856. Wemyss v. Australian Co. of Edinburgh.

LORD JUSTICE-CLERK.—I wish to advert to the proceedings in this case, which it is more important to notice than any other point.

It appears that this evidence was taken on commission in Roxburghshire. Now, looking to the nature of the jurisdiction of Justices of the Peace, who have no general jurisdiction as a court of record, except in cases of aliment, and such like, limited by statute, they have no authority of an ordinary character like that of Sheriffs, nor is there granted by any statute or Act of Sederunt the power to take proofs by commission. I think it decidedly irregular that such a power should be exercised by them. And besides, I observe, that of the portion of the evidence in this case not taken on commission, important evidence was taken before Justices who had not been present at the previous stages, and did not afterwards adjudicate upon it. The result of the mode of procedure adopted has been, that this matter, begun in 1854, goes on in this way till May 1855; and expenses were incurred to the amount, I see, of L.37, while the whole case should have been gone through in two days, at a trifling expense. I think this was entirely without authority, and extremely irregular.

THE COURT pronounced this interlocutor:—"Of new find it is not proved that the pursuer is the father of the child born by the defender on 12th December 1853: Therefore adhere to the interlocutor of the Lord Ordinary, and refuse the reclaiming note: Find additional expenses due, and remit," &c.

A. H. CHALMERS, W.S.—JAMES SOMERVILLE, S.S.C.—Agents.

No. 27.

WILLIAM WEMYSS, Pursuer.—*D. F. Inglis—Gifford.*
THE AUSTRALIAN COMPANY OF EDINBURGH, Defenders.—*Sol.-Gen. Maitland—Monro.*

Process—Issues—Partnership—Foreign—Prescription—Relevancy of averments.—An action against a company having office-bearers in Scotland, and doing business in Australia, and described as general commission-agents, was founded on the averment that the pursuer, in the course of the company's ordinary dealings and course of employment, paid them through their manager certain money, to be invested by them; that through their manager they undertook to invest it, and that they did invest it in stock in the Bank of New South Wales, and received, or were entitled to receive dividends thereupon, which they had failed to account for; and therefore concluding for an accounting, or, failing that, for repayment. *Defence repelled* (affirming judgment of Lord Ordinary), (1) that the claim was prescribed by the law of Australia, by which the question of liability fell to be regulated; (2) that the transaction libelled was unauthorised by the contract of copartnery; and *held* (*diss.* Lord Deas) that there was a relevant case for issues, and form of issues to try the question of liability.

Dec. 4, 1856. 1st DIVISION. Lord Neaves. C.

THE fifth, sixth, and eighth articles of the pursuer's condescendence were as follows:—"(Art. 5.) The pursuer was for several years resident in New South Wales previous to the close of the year 1828, when he returned to this country. During his residence at Sydney, New South Wales, he had various cash transactions with the Australian Company's branch there, of which branch Ellis Martin Scott was the Company's then manager. It was part of the ordinary dealings and employment of the Australian Company, by its manager and office-bearers, to receive sums from parties wishing to invest the same, and to negotiate and procure investments therefor, according to the instructions which the employer might give, and to charge a commission and brokerage thereon. The Company acted in Australia as general commission-agents, and transacted a large business as such. They did so, acting under the instructions of the Company and of its directors, and with their full authority and approbation. The pursuer had had various cash and commission transactions with the defenders, of a similar nature with

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that immediately to be mentioned. (Art. 6.) That upon the 8th day of November 1828, being immediately prior to the pursuer's departure from New South Wales, he paid to the said Ellis Martin Scott, as the manager for the said Company at Sydney, the sum of L.150, and handed to him bills to the extent of L.250, making in all L.400, which sum of L.400 the said Ellis Martin Scott, as acting for and on behalf of the said Company, undertook to invest for the pursuer in the stock of the Bank of New South Wales. The pursuer entered into this transaction with the said Company in the ordinary course of business, and employed them therein as commission-agents in the usual way. The Company held themselves out as willing and ready to undertake such employment, and it fell within their ordinary dealings, in which they were at that time engaged. Mr Scott, the Company's manager foresaid at Sydney, granted the pursuer the following holograph acknowledgment or memorandum—'I have received from William Wemyss, Esquire, one hundred and fifty pounds, and Thomas Raine bills falling due for two hundred and fifty pounds, which I am to invest in stock of the Bank of New South Wales, and the shares to be handed over to J. T. Goodsir, Esquire, on his account. (Signed) E. M. Scott, Sydney, 8th November 1828.' Mr Goodsir was a friend of the pursuer, who had agreed to act for him in Australia, and who was to receive the transfers, and hold them for or transmit them to the pursuer. (Art. 8.) Mr Scott, as acting for the Company, undertook and bound them to have invested these two sums of L.150 and L.250, amounting together to L.400, in stock of the said bank, and to hand the shares to Mr Goodsir. Whether he did so invest the money or not, the pursuer has no means of knowing, all information on the subject having been withheld by the Company; but he did not hand over the shares to Mr Goodsir, and the pursuer has never received the same from the said Company. The Company was entitled to charge the pursuer a commission at the rate of two and one half per centum, being the usual rate of commission for agency procuring the shares for the pursuer. This upon L.400 would have amounted to L.10; but the pursuer is quite willing and ready to pay whatever may be the ordinary and reasonable rate of commission upon such transactions."

The condescendence then set forth that the defenders received or were entitled to receive large dividends from the Bank of New South Wales on the pursuer's behalf, but that they had refused to account to the pursuer for such dividends, or for their intromissions therewith, and had never enabled him to uplift the same. In art. 12 he stated that he had repeatedly required the manager and parties acting for the said Australian Company, to hand over to him the shares of the said bank of the value of L.400 as at said date of 1st March 1829, and to make payment of the whole dividends accrued and declared thereon, with colonial interest thereon from the periods at which they were respectively payable, under deduction of the reasonable and ordinary commission due to the defenders; or in the event of their failing or being unable now so to hand over to the pursuer these bank shares, and to account for the dividends thereon, then to make payment to him of such a sum as would compensate him for the loss and damage which he had sustained by the company's failure to implement their manager's engagement; but they refused to do so, and not only so, but they refused to repay to the pursuer the sum belonging to him received by their manager as aforesaid, with the colonial interest thereon. In consequence of which, the present action had become necessary. The action concluded for delivery to the pursuer of recorded transfers or certificates, or other legal evidence of right, vested in his person, to shares of the stock of the Bank of New South Wales, to the extent of the value of L.400, as at 1st March 1829, under deduction of L.10, being the amount of commission due to the defenders; and for an account of their intromissions with the dividends or other profits declared

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payable upon these shares by the bank since 1st March 1829, with interest; or in case of failure, for payment of L.3000, in name of damages or compensation; "or otherwise, and in the event of its being found that the defenders are not legally bound to deliver to the pursuer the recorded transfers or certificates, or other legal evidence of shares vested in his person in the said Bank of New South Wales, and to account for and pay the dividends and profits arising, or which might have arisen from the shares, with interest thereon, then that the defenders should pay to the pursuer the sum of L.400 sterling, together with colonial interest thereon at the rate of 8 per centum per annum, from the 1st day of January 1829 till the date of citation to follow hereon, and with the legal interest thereafter."

The defenders' third plea in law was, that the claim was prescribed and barred by the law of Australia, by which in that respect the question of liability raised by the pursuer fell to be regulated. They also pleaded, that the pursuer's statements were not relevant or sufficiently specific.

On 8th February 1855, the Lord Ordinary pronounced the following interlocutor:—"Repels the third plea in law for the defenders, and in respect it appears to the Lord Ordinary that there is no other question of law or relevancy in the case which ought at present to be determined, appoints the parties respectively, within eight days, to prepare and lodge drafts of such issues and counter-issues as they propose for trying the question between the parties; reserving all questions as to the mode of trial or investigation to be followed, or the order in which any points arising in the case may be disposed of." *

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* "NOTE.—There seems to be no doubt, on well known principles of law, that the plea of foreign limitation or prescription stated by the defenders, is not well founded in a Scotch Court, and it has been repelled accordingly. The long lapse of time that has taken place in prosecuting the pursuer's claim may influence the course of procedure to be followed, or the presumptions to be applied in the proof. But it cannot, it is thought, operate as a bar to the action.

"No other prejudicial plea is stated on record, but the defenders have contended in argument that the action should *de plano* be dismissed on these grounds:—1st, That the pursuer's averments are not relevant or sufficiently specific. 2d, That the transaction libelled was beyond the line of business fixed by the contract of copartnery. 3d, That the document quoted in the sixth article of the condescendence, and forming, it is said, the basis of the claim, is granted by E. M. Scott solely in his own name, and not as manager or on behalf of the Company, and so cannot be held or proved to bind the defenders.

"1st, The pursuer's averments seem to be relevant, and sufficiently distinct and specific to be admitted to probation.

"2d, The terms of the defenders' contract of copartnery being a private deed, cannot be conclusive against third parties, and the pursuer alleges that the transaction of commission, agency, or brokerage, founded on by him, was within the Company's ordinary dealings and course of employment. The proof of this allegation is another matter.

"3d, The document relied on is not an ordinary receipt of money lent, nor is it a *literarum obligatio*, which can be considered to exclude all liability except in the party granting it. It is merely a piece of evidence in support of the allegation that the pursuer employed the defenders, through their manager, to act as his brokers for purchasing bank stock on his behalf. That is a contract which may be proved *pro ut de jure;* and although the payment of the money may require writing, there seems no imperative rule of law to prevent the pursuer from connecting Scott's acknowledgment with the Company by means of other writing, or of facts and circumstances, or even (though no judgment is intended on this point) by parole testimony. The case of Watson (1 Dow's Rep. 40) may be a useful, and even conclusive authority in the concluded cause, but it does not seem sufficient to stop inquiry on the threshold of the proceedings.

"It does not follow that the whole or any part of the cause is to be tried by

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The defenders reclaimed; but the Court adhered, and remitted to the Lord Ordinary, who now reported the case on the adjustment of issues.

The pursuer proposed the following issues:—

"1. Whether the Australian Company, defenders, through Ellis Martin Scott, as their manager at Sydney, received from the pursuer in money and bills the sums of L.150 and L.250, mentioned in the acknowledgment No. 4 of process, and undertook to invest the same for behoof of the pursuer in stock of the Bank of New South Wales?

"2. Whether, on or about 8th November 1828, or thereafter, the Australian Company received from the pursuer the sums of money and bills mentioned in the said acknowledgment No. 4 of process, and are resting owing to the pursuer the sum of L.400, or any part thereof, with interest thereon?"

At advising,—

Lord President.—The pursuer proposes to establish two propositions—first, that the defender Scott received the pursuer's money; second, that he undertook to invest it. Although the record is not so clear as it might have been, I think it is sufficiently so to support the pursuer's case. What the pursuer avers is, that through Scott he paid this money to the Australian Company—that through Scott the Australian Company undertook to invest it in a particular way—and therefore that they must account to him for the profits or dividends; but, alternatively, if Scott went too far in investing in the Bank of New South Wales, if that was a prohibited thing, still that having paid the money to the defenders, they must repay it. That is practically the case raised in this record; and I see no reason why we should not inquire into that portion of the facts which would give effect to that alternative conclusion of the summons. It may be that this alleged investment by Scott in the stock of the Bank of New South Wales was unauthorised; and yet that the general character of the Australian Company shall be such as is set forth in this record, and certainly if they undertook to make investments, and received the pursuer's money on that footing, he is entitled to get his money back. That case appears to me to be within the record, although not so explicitly as I could have wished.

Lord Ivory.—I am of the same opinion. The three conclusions of the action all stand apart from each other, but all of them rest on the same *species facti* which, according to different views, and according as the whole case or part of it is proved or not, will result in a larger or lesser liability. If the fact be as averred, that L.400 was paid by the pursuer to the defenders, then if they have not done with it what the pursuer says they undertook to do, they must at least give it back. If they got the money, it was their duty in this action to have tendered it, but the assumption of the lesser conclusion of the action is that the pursuer shall merely get it back. I should have liked the matter to have been more satisfactorily set forth, but there being averred (1) that the defenders got the money; (2) that they undertook to invest it; (3) that they failed to do so, it would be very rigorous to say that the pursuer is excluded from his lesser conclusion—that the defenders having failed in the purpose for which they got the money, are now bound to repay it. I think the issues are supported by the record. Article 12 makes perfectly clear what the pursuer intended in the previous part of the record: but if still thought defective, a few explanatory words would make quite distinct what is wanting.

Lord Curriehill.—I agree; and think that any ambiguity that might have been raised by art 6 is entirely obviated by art. 8. Upon the whole, I am not inclined to throw out these issues on the ground that there is not sufficient averment in the record that the party who received the money was the Australian Company, and that they are bound to repay it.

Lord Deas.—I have no doubt that a claim for restitution of the L.400 is suffi-

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jury. The very lapse of time that has occurred may render this an unsafe and inexpedient course, and it may be proper to inquire into the different questions of fact separately, as, for instance, into the course of the Company's dealings first, and next into the particular transaction libelled. All this is left open for subsequent arrangement."

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ciently included under this summons and record as one of *the consequences* which may eventually follow from success in the matter now embodied in this first issue. But it is not proposed to put in issue any of these consequences. The avowed object of the second issue is, not to claim the L.400 as a consequence of success upon the first issue, but to try an alternative case of money had and received by the Company, and which they are to be held bound to repay, simply because they received it. I can find no such ground of liability averred in this record. The case set forth is a very special case. The defenders are described in the Act of Parliament libelled on, and virtually incorporated into the summons, as a company established for the purposes of trade, and for effecting the speedy maritime conveyance of goods and passengers between Leith and Australia and other places. They are not said to be bankers, nor to have acted as bankers. But it is averred that, through Scott, as their manager, they acted as commission agents in Australia, in procuring investments for third parties; and that, in this capacity, the pursuer employed them to invest L.400 in shares of the Bank of New South Wales; and, for that purpose, handed over to them, through Scott, L.150 in cash, and L.250 in bills, along with a certain security which the pursuer had himself received over a cargo of rum, from Raine the obligant from whom he had acquired the bills. The pursuer further states that he does not know whether the defenders had invested the money in bank shares or not, but that, although he had repeatedly required them to hand over to him the shares, and to account for the dividends, under deduction of their commission for making the investment, they had failed to do so, "in consequence of which this action has become necessary;" and he adds, that the dividends, with periodical interest, would amount to upwards of L.2000, and that, if the defenders have failed to make the investment, the damages will be at least L.3000. The pleas in law are framed precisely on the same footing, the second and third being connected together, and importing that, if the defenders have failed to make the investment, they are liable in damages, or, at all events, to repay the L.400 with interest. But the employment, through Scott, of the defenders as commission agents to invest the money in bank shares is, throughout, made the basis of the whole case; and I cannot hold the pursuer entitled, under this record, to put in issue some totally different case, the nature of which is nowhere disclosed. It is not pretended that the money was paid direct to the company, nor as traders or maritime carriers. Now, I do not say that the company might not be liable for money received by their manager, although for none of the purposes for which the company had been constituted. But that would be a special case, requiring great specification in the statement. If any such case was contemplated, except that of their acting as commission agents, it ought to have been so set forth. If, again, it was meant that the money had been received in the due course of the copartnery business, this ought equally to have been set forth. I could have understood an allegation that Scott borrowed the money for behoof of the defenders and applied it for their behoof, but there is no such allegation. We must recollect that the object is to attach liability to the partners of a company for money said to have been received by their manager, but not said to have been received or applied in the way of their business as a company, either under their contract or the Act of Parliament. If, then, the defenders truly received the money to be invested in bank shares, the second issue should proceed upon that footing, to which, admittedly, it is not limited. If they received the money on some other footing, it should appear what that other footing was. But, under the second issue, if allowed upon this record, the pursuer, for anything I can see, may, at the trial, prove the money to have been paid and received upon any footing he pleases, although different from that averred by himself; and without the defenders, who disclaim all privity with Scott, knowing what they are to meet. Such a course is unknown in our practice, and I am, therefore, for disallowing this second issue.

The Court pronounced the following interlocutor:—"Approve of the issues as now adjusted, and remit to the Lord Ordinary to hear parties on the mode of investigation to be adopted in the cause, and to proceed with the cause as to his Lordship shall seem just."

Miller & Craufurd, S.S.C.—William Alexander, W.S.—Agents.

No. 28.

Dec. 4, 1856.
Munro v. Baillie.

Grant v. Macleod.

JOHN MUNRO, Suspender.—*Pattison.*
JOHN BAILLIE BAILLIE, Charger.—*Sol.-Gen. Maitland—Ross.*

Interdict—Landlord and tenant.—A tenant under an agricultural lease fell into arrears of rent: His stock and implements were sold, and he executed a renunciation of the lease. Being charged to remove, he suspended, on the ground of alleged irregularity in the judicial procedure; also that he did not understand the English language, and had signed the renunciation under essential error as to its import and effect—*Note refused.*

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1ST DIVISION.
Ld Mackenzie.
Bill-Chamber.

MUNRO, the suspender, and Mr Baillie, the charger, entered into a tack in December 1849, by which Mr Baillie let to Munro the farm of Drumrossack for nineteen years. In 1854 Munro fell into arrear of rent, and on 11th June 1856 a sale took place at the landlord's instance, and under judicial authority, of the articles of stocking and implements of husbandry belonging to Munro. On 29th May 1856, Munro executed a renunciation of his lease, and bound himself to remove from the farm on 1st June thereafter. The renunciation was recorded, an extract taken, letters of horning expede, and a charge given to remove, which charge was the subject of the present note of suspension. The note set forth *ad longum* the above facts, and stated that a reduction of the whole proceedings had been brought. This, however, the respondent denied. The suspender also stated that he was a Highlander, and Gaelic his native language. He could not speak any English until he was fifteen years of age, when he could speak a little, and now when he was thirty-four years of age he could not speak English, except very imperfectly. He got but little and irregular education, and he could not readily follow or understand a deed in the English language. The renunciation above mentioned was brought to his house on the morning of 29th May, ready extended. He had not seen it before, nor had it been seen or revised by any one on his behalf. It was not read over or explained to him, and when he signed it he did not know its contents or import; and he signed it under essential ignorance and error as to its import and effect, and as to his legal rights.

He pleaded;—That the judicial procedure had been irregular, and that the renunciation had been obtained through the pressure of these proceedings. The note of suspension was presented without caution.

The respondent pleaded;—That the averments in regard to the renunciation were unfounded, and further were incapable of being entertained in a process of suspension.

The Lord Ordinary refused the note. The complainer reclaimed; but without hearing counsel for the respondent,

THE COURT adhered, with additional expenses.

JAMES BELL, S.S.C.—RUSSELL & NICOLSON, C.S.—Agents.

No. 29.

JOHN GRANT, Pursuer.—*Graham Bell Young.*
ROBERT B. ÆNEAS MACLEOD, Defender.—*D. F. Inglis—Dundas.*

Obligation—Recompense—Lease.—A tenant became bound to construct an embankment in a sufficient manner, at least equally so to one previously on the farm. He erected one of a much more costly, and he alleged more substantial, description. During the progress of the work he applied to the landlord for assistance, who replied that he did not object to the principle on which aid was asked, but refusing to condescend upon a precise sum until the work was completed. In an action concluding for the difference between the cost of the original embankment and of the new one,—*Held,* 1st, (affirming the judgment of the Sheriff of Ross,) That the letter of the landlord merely amounted to an expectation, and constituted no obli-

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gation to relieve the tenant of any part of his outlay. 2d, That in such circumstances there was no claim for recompense at the instance of the tenant.

The pursuer was tenant of the farm of Plaids, on the estate of the defender's father, the late Mr Macleod of Cadboll, under a lease for nineteen years from Whitsunday 1840. In 1851 the pursuer wished to assign his lease. The proprietor made it a condition of accepting the assignee as tenant, that the pursuer should restore an embankment which had been put up along the sea-shore on part of the farm, and had been swept away. The new embankment to be erected in a sufficient and "substantial manner, at least equally so with the original one, or to the satisfaction of some competent person to be appointed, for the purpose of drawing a specification for it." The pursuer undertook to proceed with the work immediately, and to have it completed by Whitsunday 1851, the term of the assignee's entry to the farm. On 23d April previous, Mr Garden, Mr Macleod's factor, addressed a letter to the pursuer in these terms:—"Cadboll requests me to inform you that he will signify to you his acceptance of Mr George Mackenzie as assignee to the remainder of the lease of Plaids farm, when the embankment has been reported on as completed, and sufficient as the former one, by Mr William Mackenzie, Tain, who (Cadboll says) has a thorough knowledge of such matters, and who must have been acquainted with the description of the former embankment."

On 20th May 1851, the pursuer addressed a letter to Garden, containing the following statement:—The cost of the former embankment only amounted to L.32; the pursuer had then already expended L.37 in the construction of the new embankment, which was only half completed; but though he was only bound to erect an embankment as substantial as the old one, he had thought it advisable to execute a work which would be sufficient for its purpose, and durable. As the new embankment would be so substantial as to save the necessity of repairs, and of erecting another at the conclusion of the lease, it would be of advantage to the proprietor that it should be completed on the same scale on which it had been commenced, and it would be fair that he should relieve the pursuer of further outlay. On the 23d May, the pursuer addressed another letter to Mr Garden, stating, that to complete the work as begun would cost about L.80, and asking aid to the extent of a half-year's rent, being L.32; and if that sum were allowed him, he would "proceed to complete the embankment without further trouble." In answer to both these letters, Mr Garden, on 27th May, addressed this letter to the pursuer:—"I have laid yours before Mr Macleod of Cadboll. Cadboll told me that he did not object to the principle on which you asked him to aid you to the extent of L.32 in erecting the embankment at Plaids, but said that he would not condescend to the precise sum which he might allow you, until the embankment was completed."

After the work had proceeded a little further, the pursuer was prevented by the Magistrates of Tain from taking blue clay from Tain shore, that being the only available material for the embankment; and the work was stopped till the year 1853, when proceedings to compel the pursuer to implement of his contract were taken in the Sheriff-court at the instance of the defender, who had succeeded to his father's estate. In the meantime, the pursuer had been frequently remonstrated with on the part of the defender for delay in completing the embankment, for want of which the sea was encroaching upon the farm, the soil being sandy and light.

The embankment was completed by June 1853, at an expense of L.98, and at the sight of an inspector appointed or approved of by the defender or his father.

In November the present action was raised before the Sheriff-court of Ross. It was averred by the pursuer in his condescendence that Macleod's factor stated, before the work was commenced, that if the work was done

according to specifications then prepared for an embankment of a more substantial and costly construction than the previous one, the excess of the expense over that of the previous one would be refunded to the pursuer. The summons concluded for the sum of L.67, the difference between the sum expended by him (L.98) and the cost of the former embankment (L.31). No. 29. — Dec. 4, 1856. Grant v. Macleod.

The Sheriff-substitute (Taylor) pronounced this interlocutor (after finding the facts above stated):—"Finds that in these circumstances there are no grounds for holding the late Mr Macleod, or the defender as his heir, liable for the excess of expense incurred by the pursuer in erecting said embankment beyond the cost of the former embankment, as concluded for in the libel: Therefore assoilzies the defender, and decerns: Finds the pursuer liable in the expenses," &c.*

* "Note.—As to the merits of this case, it appears to the Sheriff-substitute that the pursuer has entirely failed to establish liability on the part of the late Mr Macleod. The pursuer's original engagement was admittedly unconditional as regards the cost of the embankment; it was to be done solely at his own expense, in consideration of being relieved of the tenancy of the farm. The stipulation as to the size and solidity of the work was, that it should be made at least as sufficient and substantial as the former embankment; no more was exacted or promised, or could be enforced. The pursuer commenced his work on a scale which it is to be presumed was considered by the parties to be a fulfilment of the pursuer's engagement; but the latter found, after a short trial by day-labourers, that the cost of it would be much greater than he had contemplated. On making this discovery, he applied for aid to Mr Macleod, and Mr Macleod's answer to that application, as contained in Mr Garden's letter of 27th May 1851, is the foundation of the present claim. It does not appear to the Sheriff-substitute, however, that that letter, either in its terms, or taken in connection with the circumstances of the case, contains an actionable engagement. It certainly appears to hold out an expectation of aid when the work was finished, but its whole phraseology shews that a direct compliance with the pursuer's request for the promise of a definite sum was studiously avoided, and that whatever aid 'might' be given, was to be entirely discretionary to Mr Macleod—the object plainly being to reserve the power to himself of considering all the relative circumstances as they should appear to him at the time the work was completed. It is not for another to say what considerations might have influenced Mr Macleod's ultimate decision; but there was a failure by the pursuer in one important part of his proposal for aid which might well affect his grounds of expectation from Mr Macleod, namely, though he offered to complete the whole work without farther 'trouble,' this was not done for two years thereafter, nor until an action was raised for compelling performance. It does not appear—nor would it be material if it did—that Mr Macleod directed the preparation of the specification, or the execution of any extra work. It was for the pursuer to have rejected a specification, and refused to carry on a work which exceeded the terms of his engagement. The pursuer, however, in April 1851, proceeded to form an embankment on a scale now represented as being much larger than was contemplated by the original engagement; and in April 1852 he proceeded to complete it on that scale, simply on the faith of Mr Garden's letter of 27th May 1851, although he had been made aware, by the factor's letter of 21st May 1852, of the construction put upon Mr Garden's letter, and notwithstanding that the tenor of the whole correspondence in the intermediate period showed that Mr Macleod, though pressed by the pursuer, would not bind himself to any definite pecuniary engagement. In particular, this was a matter for the pursuer's consideration when the action was raised against him on 6th April 1853, yet it was subsequent to that date that a considerable portion of the work was done. The presumption no doubt is, from the excess of cost over that of the old embankment, that the new one was a more substantial, and perhaps more extensive work; at the same time, the pursuer's undertaking was to make the new erection 'sufficient and substantial, at least equally so with the original one;' and it would appear from his letter of 20th May 1851, that no proper or efficient embankment could be then got made at

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To this judgment the Sheriff adhered.*

The pursuer advocated, and, on his motion, the case was reported. It was pleaded for him;—The import of the correspondence was, that the pursuer undertook to make an embankment superior to what he was bound to construct, and the proprietor undertook to relieve him of a portion of the expense. Although Cadboll did not bind himself to allow a half-year's rent, or any precise sum, he was bound to allow the pursuer a fair amount. He had derived benefit from having an embankment made superior to what the pursuer was bound to erect, which had been done by the pursuer at much extra cost, and he was entitled to be relieved of it, having expended his money on the faith of the promise held out to him. The work was done to the satisfaction of the proprietor, and under the superintendence of an inspector appointed or approved of by him; and the pursuer had been frequently called on to complete it. The delay in doing so was the only ground of complaint against him, but for that delay he was not answerable.

It was answered;—On a construction of the letter of 27th May, on which the action rested, there was only a promise, and no obligation which could be enforced.[1] By the failure of the pursuer to complete the embankment before Whitsunday 1851, the defender had suffered serious injury, and the pursuer forfeited any equitable claim he might have had. The case had been pleaded as a claim for recompense, but the action was not laid on that ground.

Lord Justice-Clerk.—There is no ground for altering the judgment of the Sheriff in this action. The statements as to the promises made to the pursuer by

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the cost of the old one, which leaves it doubtful whether other circumstances than the increased solidity or size of the erection did not contribute to occasion an expense so much greater than the pursuer originally contemplated."

* "Note.—It is with considerable regret that the Sheriff feels himself obliged to adopt the strict legal view taken of this claim by the Sheriff-substitute in dismissing *in toto* the pursuer's claim, because, although under the letter written by Cadboll's factor in answer to the pursuer's application for assistance to complete the work, there was no positive obligation entered into to allow a specific sum, there cannot be any reasonable doubt that the letter implied an acquiescence in the substitution of an improved embankment for the old, and must have led the pursuer to expect some assistance from the proprietor in its completion. To refuse anything whatever, now that the work is terminated, is certainly pleading the *summum jus* against him, though the proprietor may naturally enough have been annoyed by the long delay which took place in the completion of the work. But, though the Sheriff has the feeling that there is hardship in the case, he is unable to find any solid ground on which the claim can be sustained to any specific extent. 1st, Even if the letter of Cadboll's factor were held to amount to an undertaking to pay something towards the expenses of the work, it would not follow that the pursuer was entitled to the whole excess beyond the L.32 or thereby, which was said to have been the expense of the old embankment. To execute an embankment in 1851, though no better than the old, might be far more expensive than a similar work executed in 1844, and the Sheriff finds no materials in the case for saying whether it would be so or not, or to what extent. 2d, In no view could the Sheriff have sustained the pursuer's claim beyond the sum of L.32, asked by himself in his letter of 23d May 1851; for if Cadboll had closed with that proposal, the pursuer could have asked no more, whatever the expense of completing the embankment in the new style had been, and Cadboll cannot be in a worse position by declining even to commit himself to that extent. 3d, The letter of the factor, while it holds out an expectation of aid, does not amount to an obligation for any definite sum, and appears to leave everything (legally speaking) *in arbitrio* of the landlord, more particularly if the pursuer, by his delay or refusal to execute the work, should give grounds for withholding the aid intended to be given. On these grounds, though with reluctance, the Sheriff concurs with the Sheriff-substitute in disallowing the claim."

[1] Gordon v. Cuningham, 16th June 1740, M. 9425.

Cadboll's factor before the erection of the embankment was commenced are irrelevant, and inconsistent with the terms of the letters that subsequently passed between the parties; and there is no statement that there was any authority to make such promises. There is nothing in the letter of the pursuer of the 20th May 1851 to show that he had been laying out money on the faith of any promise. That letter I take to be an appeal to Cadboll on a matter on which the pursuer had no previous assurance, but in which he depended on what Cadboll might say. The letter of 23d May repeats the appeal, and asks a half-year's rent, or L.32. Then there is the letter of the 27th May, in which Cadboll's factor states that Cadboll did not object to the "principle" proposed by the pursuer of allowing a half-year's rent; but that letter bears that Cadboll would not condescend upon the precise sum he would allow until the embankment was finished, and he required it to be completed immediately. The whole matter was thus kept open. The question comes to be—Is there an obligation contained in this letter or not? There is not. The import of the letter is, that although Cadboll creates a hope that something will be allowed to the pursuer, he will not say what sum he would allow. Many things might influence him, such as the behaviour of the pursuer, and delay or otherwise in the completion of the work. It is likely that such a letter might create expectation; but a man acting on it runs the risk of being disappointed. The pursuer did not attempt to tie down Cadboll, but took the risk of him or his son being willing to do, what it afterwards turned out his son was unwilling to do. This letter is founded on as an obligation to relieve the pursuer of part of the outlay; but it is only at best a loose promise, which the landlord kept within his own pleasure, and contains no obligation that the law can enforce.

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There is no claim of recompense in such a case. A claim of recompense arises where a party is called on to act on an emergency in circumstances which warrant a man in laying out money in the absence of the proprietor, in order to preserve his property. But here the proprietor was present, and able to protect himself; and the pursuer's only claim or pretext for laying out money for Cadboll is this,—he or his factor saw me go on with this work, and hurried on its completion. But the tenant was previously bound to make the work.

The claim, as founded on this letter, is excluded beyond the L.32, or to any sum beyond that amount; any obligation founded on it, is excluded as much for L.67 as for L.500.

We cannot go into the question, whether or not Cadboll had reason to think that on account of his delay, or his other behaviour, the tenant had forfeited all right to a favourable consideration of his claim. In cases where claims of this kind are urged, they must be measured by strict law and legal construction.

Lord Murray.—I agree in a great part of what your Lordship has stated. The intention of Cadboll is clearly stated in the letter of 27th May. He is not fixed by that letter to allow any precise sum, or any sum whatever. He may have held out an expectation to the pursuer; but that does not constitute any obligation. He may have had many reasons for disappointing these expectations. Every party takes a sanguine view of what he is entitled to expect. The pursuer may conceive that he has much to complain of, and there might be no end to allegations. We must in adjudicating confine ourselves to rules of law; and I can only say that the defender is under no legal obligation to relieve the pursuer of any part of the outlay incurred by him in the erection of the embankment.

Lord Cowan.—We cannot touch the judgment of the Sheriff. The claim of the pursuer is, that he is entitled to the difference between the cost of erecting an embankment, such as he was only bound to erect, and the cost of the one he actually did execute. The claim, as stated and maintained in the Sheriff-court, was a case entirely of law, not of equity. I am not going minutely to analyse all the letters, as that has been already done by your Lordship. But I may observe, that the letters of Cadboll's factor are cautiously expressed, so as to avoid any express agreement. The letters of the pursuer, and particularly that of the 23d May 1851, evidently desired that Cadboll should come under a precise agreement, but that was studiously avoided by the factor, whose letter in answer is tantamount to a refusal to come under any agreement. His letter of 27th May conveys to my mind the same impression as it has done to the Sheriff, and to your Lordship. The purport plainly is, merely, that when Cadboll saw the embankment com-

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pleted, which it was not at the time, he would then consider what sum he would allow the pursuer; and he was afterwards warned by the factor that this was the view of the correspondence which Cadboll took. Then there is nothing further done to the embankment; and the defender raised an action, to compel the pursuer to implement his agreement by erecting the embankment, his not having done so having occasioned injury to the farm. And, in the course of correspondence before 1853, when the work was completed, the pursuer was told that he had nothing to expect, but that he should be compelled to fulfil his engagement; and legal proceedings were resorted to for that very purpose. It was only after this that the erection was completed. As a legal demand, there is no ground for the claim. I at first thought that the case might stand some investigation as a claim of recompense, but the action is not laid on that ground. Farther, I am not aware of a claim for recompense having ever been advanced in circumstances such as here occur. The money of which repayment is sought, was expended in erecting this embankment, under the compulsitor of legal proceedings, to enforce an admitted obligation to erect such a structure. In such circumstances, I think there is no ground for a claim of recompense. There is, therefore, as I think, no room for the pursuer's claim in equity, any more than in law.

Lord Wood absent.

The Court pronounced this interlocutor (after finding the facts stated in the narrative):—Find, in point of law, that by the letter of 27th May 1851, from the factor of the late Mr Macleod of Cadboll. no obligation was undertaken to pay any sum, or any particular sum, towards the expense of the said embankment; and that while a hope was held out that Mr M'Leod might assist the tenant, the whole matter was reserved by Mr M'Leod for his own consideration when the embankment should be completed: Find, that the claim against the defender on the ground of recompense which has been attempted in this Court, cannot be competently stated under this action, and even if competent, is wholly inadmissible in the circumstances of the case, and under the circumstances in which the work was undertaken to be made by the pursuer; Therefore of new assolzie the defender: Find the defender entitled to the expenses incurred by him in this Court, and in the inferior Court, and remit," &c.

Walter Horsburgh, W.S.—W. & J. H. Mackenzie, W.S.—Agents.

No. 30.

James Morison, Petitioner.—*Gifford.*

Judicial factor—Investment in railways—Expense of unsuccessful application for audit.—A judicial factor appointed on a lapsed trust, having realised and invested the funds of the estate, applied for interim audit of his accounts, but was refused, on the ground that he had invested part of the funds in railway securities. He uplifted these funds, and invested them on heritable security, and again applied for interim approval of his accounts;—*Held*, on the second application, that he was not entitled to take credit for the business charges relating to the first application to the Court. *Opinion*, that in the circumstances they formed a good charge against the income, but not the capital of the estate. Accountant's fee for reporting under the first petition, allowed.

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The petitioner was appointed judicial factor on the trust-estate of the late Mrs Robertson in 1852, and having realised and invested the funds, he applied, on 29th June 1854, for an interim audit of his accounts. The Court then pronounced the following interlocutor:—"The Lords, on report of Lord Neaves, Ordinary, as it appears that a large portion of the funds has been invested in railway securities, refuse to approve of the accounts, and dismiss this petition, and decern."

The factor now presented this petition, stating that, in consequence of this disapproval by the Court of the investment of the trust-funds in railway securities, he had called up the funds (L.5000), and invested them on

sufficient heritable security—that by the terms of the trust-deed under which he was acting, the ultimate division of the estate might be postponed for a considerable number of years—and that he was therefore desirous that his accounts, embracing the whole realisation of the trust-estate, should be audited *ad interim*, and his commission and the balance in his hands fixed and ascertained. No. 30. Dec. 5, 1856. Macleod.

The Lord Ordinary now reported the case on the point, whether the factor was entitled to take credit for L.28, being the expense of the former unsuccessful attempt to get his accounts approved of?—and if so, whether it should be made a charge against the fee or income of the estate? By the trust-settlement, the truster's son and his wife enjoyed a liferent of the estate, their children being the ultimate fiars. The investment in railway debentures had been with consent of the liferenters, and although the former petition had been dismissed, the factor's accounts had been adjusted under it, down to 16th December 1853, and a report prepared, which saved expense under this petition.

Lord President.—I think that we cannot sanction this as a charge against the fee of the estate. On the other hand, I think that if there was any authority from the liferenters for the investment in railway debentures, it is a very fair charge against the income of the estate. The money was so invested, because the interest was large. That was for the interest of the liferenters. We objected to that, because the security was not, in our opinion, sufficient. That was for the interest of the fiars. But I think that, as in a question between the parties, equity is clearly in favour of the factor. Intimation, however, should be made to the liferenters that the sum is to be stated as against them, and let them appear for their interest if they think proper.

Lord Ivory.—It may save expense in the meantime to approve of the accounts, and find the amount of the balance now due.

The Court pronounced the following interlocutor:—"The Lords, on report of Lord Mackenzie, and subject to the exception after-mentioned, approve of the accounts of charge and discharge, referred to in the petition, from the date of the factor's appointment (16th December 1852) to 16th December 1855: Find that the balance in the factor's hands at the date last mentioned was, according to these accounts, L.404, 11s. 10d., but that to this balance there was to be added the sum of L.21, 18s., being business charges relating to the factor's former application to the Court, and not, like the Accountant's fee, available in the present application; but reserving the factor's right to claim this sum of L.21, 18s. as a charge against the revenues receivable by the liferenters, either at the next audit, or otherwise, if so advised: And the Lords declare, that in his next account the factor is to charge himself with L.1026, 9s. 10d. as the balance due by him on the 16th of December 1855, and decern *ad interim*."

Alexander Gifford, S.S.C.—Agent.

Nicholas Macleod, Petitioner.—*Moir*. No. 31.

Judicial Factor.—A judicial factor held entitled to apply funds in repairing a ship. *Opinion*, that he should have applied for special powers.

The petitioner was appointed factor *loco tutoris* to the children of Milley. He now prayed for his discharge. Dec. 5, 1856. 2d Division.

The accountant reported that the whole property of the pupils consisted of a small sloop, worth about L.80; that L.150 had been spent on repairing her, and she had been sent on a voyage to the Baltic, where she was lost. After paying the outlay on repairs, there only remained a balance of L.11, 10s. of the sum for which the vessel was insured.

The Lord Ordinary reported. Intimation was given to the deceased's

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widow, who gave in a statement approving of the petitioner's proceedings. The petitioner had done what appeared to be most advisable for the interests of the children, and had given up his charge for commission, &c.

LORD JUSTICE-CLERK.—This case shows the evil of continuing to keep the property of minors at hazard in trade, of which there was a strong example in the case of the ironmonger in Aberdeen some time ago. It is in favour of the petitioner that he makes no charge for commission, and we will grant his discharge; but the petitioner's proper course was to have applied to the Court for special powers.

MURDOCH & BOYD, S.S.C.—Agents.

No. 32.

JAMES GILMOUR AND OTHERS (Gilmour's Trustees), Petitioners.—*D. F. Inglis—Penney—Hector.*
ALLAN GILMOUR, Respondent.—*Lord Adv. Moncreiff—Young.*

Entail—Process—Objection to recording a deed of entail.—A petition for authority to record a deed of entail was opposed by the heir, called as institute, who declined to take under the deed;—*Held*, that as he did not aver any positive injury to result from recording the deed, the Court could not withhold their authority, and that it was not the proper stage for considering objections to the validity of the entail.

Dec. 6, 1856. — 1ST DIVISION. C.

THE late Allan Gilmour of Eaglesham, by trust-disposition, directed his trustees to execute an entail of his lands of West Walton, in favour of the series of heirs therein specified. His trustees having executed such a deed of entail, now applied for warrant to record it.

Answers were lodged by the institute, the nephew of the testator, stating that he was satisfied in his own mind that the trust-disposition of his uncle did not express the true will of the deceased. That he had instituted a reduction of it on the ground of facility and circumvention; and although he failed in that action, and, acting under legal advice to the effect that the evidence was insufficient for reduction, abandoned it at the trial, yet the deed was executed under such circumstances as to deprive it of all authority in his estimation. That in these circumstances the respondent could not conscientiously take any benefit under it, or even consent to the execution and recording of an entail in his favour, as institute or first heir, in terms of its provisions. The entail referred to in the petition was executed without any previous communication with the respondent, and he objected to it in so far as his name was inserted in it, not only without his consent, but against his will. He also objected to the recording of the deed with his name in it. He was resolved to take no benefit under the settlement in question; and, in so far as the law allowed him, he was resolved to prevent his name being inserted as a beneficiary in any deed executed under it. He was willing that the petitioners should retain the property as trustees.

D. F. Inglis, for the petitioners:—The trustees only want to do their duty. They have executed the entail as directed, and having done so, it was very doubtful whether the Court had power to refuse authority to record it. If the deed be informal, or to the prejudice of the respondent, he can afterwards set it aside by competent action.

The Lord Advocate, for the respondent:—It is not necessary that the respondent should state a reason for declining to be institute. He may be acting from caprice, or he may think it a *damnosa hæreditas*, but he is entitled to renounce his position, and to object to the recording of a deed containing his name as heir of entail. The statute does not compel the Court to record a deed which is not a good deed, and this cannot be considered a good deed when the institute has renounced.

LORD CURRIEHILL.—The question is, whether, if there be a deed at all, we can refuse to record it? The objection, as I understand it, is that there is no entail

because there must be a granter and grantee, and the respondent says he is not grantee, and cannot be made so without his consent. Suppose that were the case, and suppose there were here a formal renunciation by the respondent, there are other parties who are grantees. Therefore, we have not a deed without grantees. It appears to be a deed, and therefore I inquire no further. There may be many difficult questions raised under the deed. But these are not matters to be dealt with in considering whether we are to obey the Act of Parliament. No. 32. — Dec. 6, 1856. Gourlay's Trustees v. Kerr.

Lord President.—It rather appears to me that we have at present simply to interpone our authority to this deed being recorded. The parties presenting it aver that it is a good entail, and to consider the validity of every entail at this stage would be a very serious affair indeed. Many deeds have been recorded, the validity of which has been afterwards successfully impugned. If the respondent had stated any clear, tangible, and positive injury that he was to sustain by the recording of this deed,—that would have been another question. We could have understood it if he had said that in this entail there was a grievous libel on his character, and on that ground had objected to the recording of it. But he has not made out to my satisfaction any injury to result from it. As to the validity of the entail, I abstain from giving any opinion upon it. This is not the time for considering objections to it.

Lord Deas.—Upon the whole, I agree with your Lordship. I think that the respondent has it in his own power to defend himself against all consequences by executing a renunciation. He does not say that he will suffer any injury by recording the deed, and as there are interests beyond his, I do not think that he is entitled to stand in the gap to their prejudice. By executing a renunciation, he will save himself, and that is all that he can insist on.

Lord Ivory.—I incline to agree. I see much harm that would result from this deed not being recorded; and, upon the whole, I think it the safer course to follow what your Lordship has suggested.

The Court interponed their authority in usual terms.

Alexander Hamilton, W.S.—Gibson-Craig, Dalziel, & Brodie, W.S.—Agents.

Alexander Balfour and Others (Gourlay's Trustees), Pursuers.—*D. F. Inglis—Penney.* No. 33.

Christopher Kerr and John Kerr, Defenders.—*Macfarlane—Young—A. R. Clark.*

Process—Issues.—An action was directed against a law firm, on the allegation that, in violation of their duty as agents, they had become the purchasers of certain railway shares, which they had advised their clients to sell, knowing they would increase in value;—Form of issues to try the question.

See ante, vol. xviii. p. 619. Dec. 6, 1856.

This case was before the Court on 20th February 1856, on an objection by the defenders to the pursuers' title to sue, which objection was repelled. The action was a reduction of certain transfers of railway shares which had belonged to a joint-stock company, called the Dundee Foundry Company, of which the late Mr Gourlay—represented by the pursuers—had been a partner; and the sale of these shares, it was alleged, had been advised by the defenders, Christopher Kerr and John Kerr, writers in Dundee, who acted as law-agents for the company, ostensibly for the benefit of the company, but in reality for their own behoof—the purchasers holding the shares in trust for the defenders, whose position as agents for various railway companies enabled them with certainty to anticipate a great increase in the value of the shares in question. — 1st Division. Ld. Benholme. C.

The case was now reported on the adjustment of issues.

Lord President.—The record here is loosely expressed. The action is directed against Christopher Kerr and John Kerr, who are described as a firm; and that gives point and meaning to the words Christopher Kerr and John Kerr, distinguish-

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ing them from their individual capacity. At same time, the statement in reference to the purchase is not so worded as necessarily to imply that it was a purchase by the firm. It might have been a joint purchase by Christopher Kerr and John Kerr to distribute among themselves. There are various ways in which the purchase might have been made by them in violation of their duty as agents. It might have been made by the firm. It might have been made by Christopher Kerr and John Kerr jointly, and in any proportion they thought proper. It might have been made as a separate and independent purchase by Christopher Kerr and by John Kerr; or the whole purchase might have been made by Christopher Kerr, or by John Kerr. The summons is not so framed as to reach this last case; but we think that it does reach the case of a joint purchase, whether it be held for the firm, or in any proportion the individuals may choose; and, therefore, that the issue should be so framed as to make that clear. It does not appear to us that the record ties down the purchase to a purchase by the firm, although the summons may do so. Therefore the issue must be so framed as to prevent it applying to the third alternative; and we also think that the phrase, "became the purchasers," properly expresses the *species facti* set forth in the record.

THE following issues were approved of:—"Whether, in September 1845, the said Christopher Kerr and John Kerr were employed by the Dundee Foundry Company, or those interested therein, and by William Gourlay's trustees, as their agents, to sell certain shares of the Dundee and Newtyle Railway Company, belonging to them respectively?—and Whether, in violation of their duty as such agents, the said Christopher Kerr and John Kerr did, as a company, or did jointly as individuals, in the said month of September, or of October immediately following, become the purchasers of 217 of the said shares, or of any, and what part thereof?"

JOHN MACANDREW, Jun., S.S.C.—MORTON, WHITEHEAD, & GREIG, W.S.—Agents.

No. 34.

JAMES SHAW GALBRAITH AND OTHERS, Reclaimers.—*Pattison—Scott—F. W. Clark.*
JOHN RITCHIE, Respondent.—*D. F. Inglis—Arthur.*

Process—Cessio—Act 6 & 7 Wm. IV. cap. 56—Act of Sederunt 9th June 1839.—It is incompetent to reclaim against an interlocutor of the Sheriff in a cessio, unless it be disposing of the question, whether there shall be a cessio or not.

Dec 6, 1856.
—
1ST DIVISION.
C.
Sheriff of Edinburgh.

THE respondent was incarcerated on a civil debt, and thereafter presented a petition to the Sheriff for cessio. On 12th September 1856, the Sheriff-substitute appointed Tuesday the 14th October, for the examination of the petitioner. Of that date, all parties being present, the incarcerating creditor objected to the competency of the process, in respect the petition did not contain a list of all the petitioner's creditors; and a list of omitted creditors was produced. The Sheriff authorised the petitioner to call the persons named in the list, and adjourned the diet till the 30th October current; and, of that date, in respect the additional alleged creditors had then been called, he repelled the objection. The minute of procedure then proceeded:—"*Edinburgh, 14th November* 1856.—Present, &c.—Mr Arthur moved that the Sheriff would fix a diet for the petitioner's examination.

"Mr Pattison objected, that the motion was incompetent, in respect that the process had fallen, by reason of the party petitioner not having been examined, or proposed that he should be examined, either at the original diet of appearance fixed in terms of the statute, or at the subsequent diet to which the original diet was adjourned; and not having made any motion for an adjournment at the second diet, or proposal to proceed with the cause, and no adjournment of the diet having been then made by the Sheriff.

"*Eo die.*—The Sheriff-substitute having heard parties, finds that the petitioner was present on the 14th October last: Finds that the objection that all his creditors had not been called was then taken, whereby his examination was rendered impossible, or at least inexpedient: Finds that there is no nullity attached by the statute to the non-examination of the petitioner on his first appearance, nor to the failure to fix a diet for that purpose: Finds that this case, in these circumstances, substantially falls under the 9th section of the Act of Sederunt, 6th June 1839: Therefore repells the objection, and ordains the petitioner to appear within the Sheriff-court room, Edinburgh, upon Monday, the 24th day of November current, at one o'clock afternoon, for examination." No. 34. — Dec. 6, 1856. Brown v. Mason.

Against this interlocutor the objecting creditor reclaimed.

The pursuer of the cessio now objected to the competency of the reclaiming note. The Act 6 & 7 Will. IV. cap. 56, which regulates the procedure in a cessio, authorises a review of the Sheriff's judgment only where it disposes of the question whether cessio was to be granted or not (sect. 6). The statute was not intended to give an opportunity of bringing under review all the proceedings before the Sheriff; but, if such a reclaiming note as this were sustained, every possible objection, however frivolous, might be brought under review,—a result inconsistent with the object as well as the words of the statute.

The reclaimer pleaded;—That the judgment of the Sheriff, in effect, sustained the process, repelling the objections taken to its competency. There was no restriction in the statute as to the nature of the interlocutor that might be reclaimed against.[1]

Lord President. — The objection to the competency of this reclaiming note is sound. The power of review is truly of a judgment disposing of the petition for cessio, which this is not. Section 8 of the statute plainly contemplates the review of the ultimate judgment in the case, with the power of reviewing the previous judgments; and the whole policy of the statute is in that direction. There is thus a limit to the power of reclaiming. But, if the other reading were to be sanctioned, there would be no limit to reclaiming notes, and we would be enlarging the power of reclaiming exactly where it is least desirable to encourage it. Therefore, I am of opinion that this objection is well founded.

Lord Ivory.—I am of the same opinion. The words of the statute will not admit of any other reading than what your Lordship has put on them.

Lord Curriehill.—I concur.

Lord Deas.—I concur. The authority of Mr Bell, p. 35 of his Commentaries on this statute, is directly against this proceeding; and I think rightly so.

The Court pronounced the following interlocutor: — "Sustain the objections to the competency of the reclaiming note, and dismiss the reclaiming note accordingly: Find the pursuer of the cessio entitled to the expenses of the discussion of the reclaiming note: Allow an account thereof to be given in," &c.

J. M. Macqueen, S.S.C.—Richard Arthur, S.S.C.—Agents.

Robert Brown, Pursuer.—*Gifford.* No. 35.
Hector Mason, Defender.—*Pattison.*

Process—Proof—Master and servant—Payment of wages.—An action for payment of L.32 as the balance of wages payable weekly at the rate of 9s. or 9s. 6d. per week, was met by an allegation that only L.26 was due;—*Held* (altering judgment of Lord Ordinary), that the defender was entitled to a proof of his averments prout *de jure*.

[1] Fraser, 30th June 1837, 15 S. 1244.

No. 35.
Dec. 6, 1856.
Brown v. Mason.
1st Division.
Ld. Benholme.
C.

Brown brought this action against Mason, concluding for L.32, 6s. 1½d. as the balance of wages payable weekly, at the rate of 9s. or 9s. 6d. per week, due to him from September 1852 till October 1854.

The defender stated that the pursuer was engaged to take charge of his horse and gig, and also to work in his garden, and that he was also required, during the defender's absence in town, to make all necessary disbursements on his behalf, connected with the garden, and other matters. To enable the pursuer to do so, the defender advanced to him money from time to time, and the pursuer undertook to keep a correct account of his receipts and payments so received. The pursuer refused to account for the advances made by the defender, and he had also demanded payment of a large sum as the amount of wages due to him, without giving credit for several payments received by him to account thereof. The defender lodged a state showing only L.26, 5s. 9½d. to be due, and stated that he was willing, and had all along offered to pay the pursuer L.28 for a discharge of all claims, but that the pursuer had refused to accept it.

The Lord Ordinary pronounced the following interlocutor:—"Finds that the pursuer was engaged to serve the defender as a servant, and entered on his service 11th September 1852, at a weekly wage of 9s.: Finds it is not alleged by the defender that his wages were paid weekly or regularly to the pursuer, but that sums to account of wages and disbursements were from time to time paid to him: Finds it specially alleged by the defender that the pursuer's wages were all settled up to 14th March 1853, whilst the pursuer denies this, and alleges that, in respect of wages due from 11th September 1852 till 14th March 1853, amounting (twenty-eight weeks at 9s.) to L.12 12s., two sums, L.3 and L.4 respectively, only were paid: Finds that in the Minute, No. 17 of process, the defender admits that he took no receipts for the said wages, and that he cannot even condescend upon the time at, and the particular sums by which, the said wages down to 1853 were paid. Allows him a proof by the oath of the pursuer that his wages were fully settled till 14th March 1853."

The defender reclaimed, and pleaded;—That in the circumstances he was entitled to be assoilzied; but, at any rate, that the proof ought not to be limited to the pursuer's oath.

The pursuer pleaded;—That the proof ought to be limited, because the whole sum in dispute was only L.4. He also objected to a general proof, because of the indefiniteness of the defender's statements.

Lord President.—I am disposed to alter the interlocutor in so far as it limits the mode of proof, but *quoad ultra* to adhere.

Lord Curriehill.—It is a fatal objection to this interlocutor that the proof, which is thereby allowed, is a proof by oath of party, without there having been any reference to his oath by the other party. Without such a reference the Lord Ordinary had no power to allow such a proof. And further, as none of the alleged payments amounted to L.100 Scots, the proof cannot be so limited.

Lord Deas.—I do not wonder at the desire of the Lord Ordinary to bring this matter to a close, for the whole amount upon which the parties split was only L.4; and the difference between them, even now, is only the difference between the admitted balance of L.26, 5s. 9½d. and the balance claimed of L.32, 6s. 1½d. What the Lord Ordinary really meant was to find that, as there was no offer to prove by writ, the defence could only be proved by oath. But the question is, whether this was a case necessarily to be limited to writ or oath. Now I am not prepared to say, where the action is for weekly wages of 9s. or 9s. 6d., that, because the aggregate sum claimed exceeds L.8, 6s. 8d., the proof is therefore to be so limited, nor do I wish to give any opinion as to whether, in the case of wages, although the amount of the termly payment were actually above L.8, 6s. 8d., the party is in all cases to be limited to writ or oath to prove that the wages were paid. I give no opinion upon that. Moreover, the actual sum in dispute here is less than L.8, 6s. 8d.,

so that in every view the defender's proof ought not to be limited to the writ or oath of the pursuer. No. 35.

Lord Ivory.—I agree. Dec. 6, 1856. Miller's Trustees.

The Court pronounced the following interlocutor:—"Recall the said interlocutor, in so far as it limits the proof allowed to the defender to a proof by the pursuer's oath: Remit to the Lord Ordinary to allow said proof to the defender *pro ut de jure*, and to proceed in the cause as shall be just, reserving all questions as to expenses." Rodger v. Young.

T. H. Ferrie, W.S.—James F. Wilkie, S S.C.—Agents.

Miller's Trustees, Petitioners.—*Shirreff*. No. 36.

Public officer—Messenger-at-arms.—The Court refused to grant a warrant to sheriff-officers to execute a decree of the Court of Session against a party in Orkney.

The petitioners, a majority and quorum of the trustees of the late Mrs Elizabeth Miller, raised an action of exhibition, count, reckoning, and payment, against a co-trustee who had acted as agent for the trust. They obtained a decree in absence. The decree was extracted. This was a petition for warrant to sheriff-officers in Orkney to charge the defender on the extracted decree, and, if necessary, to carry it into execution by poinding, arrestment, and imprisonment—the defender being resident in Kirkwall, and there being no messenger-at-arms in the county of Orkney. Dec. 6, 1856. 1st Division. L.

It was stated that there was no messenger-at-arms residing nearer to Kirkwall than Thurso, in the county of Caithness.[1] The communication across the Pentland Firth was three times a-week, by a mail steamer between Thurso and Stromness.

Lord President.—I do not think there is such a case of necessity as will warrant us in granting the prayer of this petition, unless we are prepared to do so in every similar case.

Bell & Maclean, W.S.—Agents.

Mary Rodger, Suspender.—*Forman*.
John Young, Respondent.—*M'Ewen*. No. 37.

Process—Suspension.—The pursuer of an action of filiation in the Sheriff-court was unsuccessful, and was imprisoned on a decree for expenses. In an advocation on juratory caution, the lawyers for the poor reported that she had no *probabilis causa litigandi*. She raised a reduction of the Sheriff's judgment. The Court passed a note of suspension and liberation on juratory caution.

Mary Rodger, sometime a servant to John Young, a farmer in Perthshire, raised an action against him in the Sheriff-court of Perth, concluding for payment of inlying charges and aliment of an illegitimate child. The Sheriff (Mure), reversing the judgment of the Sheriff-substitute, assoilzied Young, and found him entitled to expenses. She presented a note of advocation on juratory caution; but the lawyers for the poor having reported their opinion that she had no *probabilis causa litigandi*, no further proceedings were taken in the advocation. She then raised a summons of reduction of the Sheriff's judgment, which was executed. Young extracted the Sheriff's decree for expenses, and in default of payment incarcerated Rodger. She presented a note of suspension and liberation. Dec. 6, 1856. 2d Division. Bill-Chamber. I.

[1] Mitchell, 19th June 1764, M. 7355; Cooper, 15th July 1854, ante, vol. xvi. 1104.

No. 37. — Dec. 6, 1856. Loudoun v. Young.

The Lord Ordinary on the Bills reported the case, and in the meantime granted warrant for liberation of the suspender on caution.

After hearing parties,[1] the Court passed the note on juratory caution.

ALEX. JAMES, S.S.C.—DAVID CURROR, S.S.C.—Agents.

No. 38.

JAMES LOUDOUN AND COMPANY, Pursuers.—*Penney—E. S. Gordon.*
MRS CATHERINE YOUNG and THOMAS YOUNG, Defenders.—*D. F. Inglis—Logan*

Process—Declarator—Proof—Onus probandi.—Creditors raised an action concluding for declarator that their debtor's *jus mariti* was not validly excluded by a disposition of heritable property in favour of his wife, excluding his *jus mariti*. The Court repelled pleas to the effect that the presumption being that the price of property purchased by a married woman was paid for from funds forming the communion of goods, the *onus* lay on the defenders to prove their allegation that the price of the property had been paid from funds bequeathed to the wife while still unmarried, excluding the *jus mariti* of any husband she might marry.

Dec. 6, 1856. — 2D DIVISION. Ld. Ardmillan. R.

THE pursuers, creditors of Thomas Young, the defender, raised an action, concluding for declarator that his *jus mariti* had not been validly excluded by a disposition of heritable property in his wife's favour, and that the rents thereof, which had been arrested, were liable for his debts. In the condescendence, it was stated (art. 7), Mr and Mrs Young were married on 23d May 1843. On 29th June following, the property was purchased for L.1200. Of this sum, L.500 was then paid; and, after an action against them in the Court of Session for the price, at the instance of the sellers, the balance of the price was paid on 19th February 1852, when the disposition in favour of Mrs Young was granted. At that time Thomas Young was largely indebted to the pursuers. (Art. 8.)—"The price of the said subjects and others was not paid from funds which belonged to Mrs Young exclusive of the *jus mariti* and right of administration of the said Thomas Young, but from funds falling under the communion of goods."

The pursuers' pleas now disposed of were—(1.) The subjects having been purchased during the subsistence of the marriage, it was to be presumed that the price was paid out of funds forming part of the goods in communion. (2.) That the *onus* of proving that the price was paid out of the funds from which the husband's *jus mariti* was excluded, rested on the defenders.

Defences were given in, stating that the L.500 paid on the 29th June 1843, was a sum contained in a bond specially conveyed to Mrs Young, exclusive of the *jus mariti* of any husband she might marry, by the settlement of her aunt, to whom Mrs Young had succeeded before her marriage; and that the balance found due by the Court was raised on a bond and disposition in security over the property granted by Mrs Young, with concurrence of her husband.

The Lord Ordinary reported the case, in respect of the interlocutor in a process of furthcoming, on arrestments of the rents of the property at the instance of the pursuers. (See ante, vol. xviii. p. 856.)

The pursuers argued;—To hold that the pursuer was bound to prove that the price of property acquired by Mrs Young was paid for out of the funds forming the *communio bonorum*, would be to establish a dangerous precedent; and there were no statements in the disposition on which there were grounds for shifting the *onus* the presumption of law laid on her.

It was answered;—The title being clearly in favour of the wife, the pur-

[1] Counsel referred to Holmes v. Tassie, 19th Jan. 1828, 6 S. & D. p. 394; Aitken v. Barlas, 11th July 1834, 12 S. & D. p. 922.

suers were bound to disprove the narrative of it, and the facts averred accounting for the state of it. All the argument of the pursuers was founded on a presumption of law, for which, in the circumstances set forth, there was no room. The defender, Mrs Young, was shown to be possessed of funds of her own, while it was not even averred that her husband was possessed of any means from which he could have paid for the property.

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LORD JUSTICE-CLERK.—I do not think the statement of the pursuers is sufficiently precise, or in accordance with practice. It is averred that the price of the subjects was paid from "funds falling under the communion of goods between the spouses." That statement must be altered. The goods in communion, during the subsistence of the marriage, are the property of the husband. It should be averred that the price was paid from funds, the property of Mrs Young.

With consent of the defenders, the statement on the record was amended as directed.

LORD JUSTICE-CLERK.—I do not think there is any doubt upon this point, that the pursuers are bound to prove their own case, and not to throw the *onus* of proof upon the defenders.

This property was purchased for Mrs Young at a public sale, and the price of it, she avers, paid by her out of funds of her own, and from which her husband's *jus mariti* was excluded. A part of the price was paid at the date of the purchase; and, after nine year's possession, the balance of the price was paid also from funds belonging to herself, and the title is a conveyance in favour of the lady, exclusive of the *jus mariti*, the term of entry, be it observed, being in 1843. On that title she is infeft, and it is through that title that the pursuers, as her husband's creditors, sought to arrest the rents of the property. Nine years after the acquisition of this property a bill was granted by Thomas Young, which was protested. And his creditors on that obligation say, that in this process the lady, infeft as I have stated, and that long before the bill was granted, must prove the narrative of the title in her own favour. It might have been alleged that the conveyance in Mrs Young's favour was fraudulent. This action, however, is not even in the form of a reduction, but of a declarator, and there is no averment of fraud. I cannot imagine any ground on which we can so dislocate a proper process of declarator, as to throw upon a defender the *onus* of proving what the pursuer undertakes to prove. This case must proceed in the usual way.

LORD MURRAY. — I need not take up the time of the Court by repeating the opinion stated by your Lordship, in which I entirely concur.

If the creditors of the husband wish to make out that this property possessed by the wife on a title excluding his *jus mariti* is the property in reality of her husband, on the ground that the price was paid out of his funds, they must make out that case.

LORD COWAN.—By our former judgment we held that the rents of the property of which the right was vested in Mrs Young, exclusive of the *jus mariti* of her husband, could not be *de plano* arrested for the debts of her husband. His creditors, before they could attack the rents, were considered bound to get behind the title by some action, as of declarator or otherwise, to set it aside. The ground of action is that the price of the property was paid out of the funds of Mr Young, and that the property, though by the form of the title vested in his wife, was truly his, and open to be attacked by his creditors. In the ordinary case, the *onus* lies on the pursuer to make out his averments, and we have only to consider whether anything has been stated or admitted by the defender on record which shifts the *onus* of proof. Now, so far from this being the case, the whole statements in the defence are quite consistent with, and support the case of the defender. The pursuers must make out that the property belonged to the husband, having been purchased with his funds. The only difficulty is, whether their statements are sufficient to allow them to be admitted to proof; but, on the whole, I think that they may be held sufficient.

LORD WOOD absent.

THE COURT pronounced this interlocutor: — "Find that the first and

No. 38. — Dec. 10, 1856. Millar v. Small.

second pleas in law must be repelled, so far as pleaded for preliminary findings in favour of the pursuers: of consent Repel the preliminary plea stated for the defender: Appoint the pursuer to lodge an issue."

EDMUND BAXTER, W.S.—J. F. WILKIE, S.S.C.—Agents.

No. 39.

GEORGE MILLAR, Charger.—*D. F. Inglis—Ross.*
JAMES SMALL, Suspender.—*Fraser.*
JOHN OGILVIE, Haver. — *Macfarlane.*

Proof—Confidentiality—Agent and Client.—Two actions, involving several parties, referred to the same subject matters of dispute. The pursuer and defender in the one action were both called as defenders in the other. This last action was at the instance of a public company, and was settled. The defender in the other action averred, that it was settled by collusive arrangement, for the purpose of defeating his rights;—*Held* that he was entitled, with the view of proving this arrangement, to recover from the agent of the company excerpts from the minutes of the company, and also letters between himself as country agent, and his correspondent in Edinburgh, so far as these related to the alleged arrangement.

Dec. 10, 1856. — 1ST DIVISION. C.

THE record in this case was made up in several conjoined suspensions of successive charges served upon the suspender, Mr Small, at the instance of the charger, Mr Millar, for payment of a ground annual of L.273 per annum, from Martinmas 1842 till Whitsunday 1853 inclusive.

The subject, on account of which this ground annual was claimed, consisted of a yard, with a warehouse and other erections thereon, lying on the south side of the Seagate of Dundee. The obligation upon which the charges to pay that ground annual had been given, was contained in a contract of ground annual, dated 30th and 31st October 1835, which was entered into between the trustees of the Dundee and Union Whale Fishing Company, and the suspender, Mr Small, and certain cautioners; and to which contract the charger, Mr Millar, had right by a conveyance from the Whale Fishing Company to him, dated 23d May 1836.

One of the questions raised in the first of these conjoined suspensions, viz., whether the suspender was liberated from his obligation in consequence of his having sold the subjects to a Mr Adamson, had been the subject of discussion in this Court, and in the House of Lords, and had been ultimately decided in favour of the charger. But there remained another question, viz., whether the suspender was free from his liability for the ground annuals charged for, in respect that, as he alleged, the charger had not a valid right or title to a large portion of the subjects in question at the date of the contract of ground annual in 1835, or for a period of about eighteen years thereafter, when, in 1853, he acquired such from the Crown, or the town of Dundee, as representing the Crown, to whom the subjects really belonged. The suspender proposed to establish the verity of his allegations which he had made in the record in support of that ground of suspension. The charger objected to this, on the ground that all these averments were irrelevant, and insisted for decree, on the case as it stood on the record, finding the letters orderly proceeded.

On 31st January 1856, the Court pronounced an interlocutor allowing the suspender to put in a minute of the matters on which he proposed to have investigation.[1] The suspender thereafter lodged a minute, averring, *inter alia*, that in the year 1843 the Magistrates and Town-Council of Dundee instituted an action of declarator against the Dundee and Union Whale Fishing Company, the charger, the suspender, Adamson and his

[1] See ante, vol. xviii. p. 402.

sureties, and certain other parties to the contracts of ground-annual, concluding that it should be found that they had the sole right to part of the subjects in dispute; and that defences having been lodged, a record was made up in the process. That Adamson and his cautioners instituted, in the year 1843, an action of reduction against, *inter alios*, the Dundee and Union Whale Fishing Company and the charger, concluding for reduction of the contracts of ground-annual and other relative writings. That the action at the instance of the Magistrates and Town-Council having stood for advising in the roll in the month of May 1853, it was delete from the roll upon a joint minute for the parties; and that thereafter an extrajudicial arrangement was entered into, by which the case was taken out of Court without a judgment on the merits; and this settlement of the case was made by concert between the Dundee and Union Whale Fishing Company, the charger, and the Magistrates and Town-Council of Dundee, or at least between the two former, for the purpose of evading the trial of the question raised in the action at the instance of the Magistrates and Town-Council. That on or about the month of June 1853, the Dundee and Union Whale Fishing Company purchased the right and interest in the subjects in question, which belonged to and was vested in the Magistrates and Town-Council of Dundee, and which they claimed in the action which was settled extrajudicially, as above mentioned; and that they or the charger had also purchased the right of the Crown in the said subjects.

Conjunct probation having been allowed, the suspender adduced as a haver John Ogilvie, writer in Dundee, law-agent for the Dundee and Union Whale Fishing Company. Being called on to produce (1.) excerpts from the minutes of the committee of management of the Dundee and Union Whale Fishing Company, dated 11th May 1853: (2.) Excerpts from the minutes of the annual general meeting of the Company, dated 8th June 1853: and (3.) Minutes of meeting of the committee of management of the Company, dated 9th November 1853, he objected that all of these minutes related to the private communings of the partners of the Company, and those in the management and direction of their affairs, regarding the action then in dependence against them at the instance of the town of Dundee, and the protection of their interests therein—the same matter being involved in the then also and still depending action against the Fishing Company at the instance of Adamson. The minutes in question were, therefore, privileged, and he, as the law-agent of the Fishing Company, was not bound or entitled to produce the same.

He also objected to produce a correspondence between his firm and their Edinburgh correspondent, regarding the depending actions at the instance of the town of Dundee against the Whale Fishing Company, and the conduct thereof on the part of the latter—the same matter being involved in the then and still depending action against the Fishing Company at the instance of Adamson. The objection to the production of this correspondence was, therefore, that, being of the nature of communications between the agents of a party litigant in a depending action, and in relation to the conduct of the proceedings therein, it was privileged and protected, and production thereof could not be enforced.

The commissioner made avizandum with these objections to the Court.

Macfarlane, for the haver, pleaded;— That the documents called for were of so confidential a character that he was neither bound nor entitled to produce them.[1]

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[1] Dickson on Evidence, p. 923 (and cases therein referred to); Rose, 27th November 1847, ante, vol. x., p. 156; Ersk. (Ivory's Ed.), B. 4, T. 2, 325 (and note.)

No. 39.
Dec. 10, 1856.
Millar v.
Small.

Fraser, for the suspender, pleaded ;—That the documents called for were not properly of a confidential nature, inasmuch as they were not between co-defenders of an action, nor were they, while relating to a pending suit, called for by one of the parties thereto from his adversary.[1]

Lord President.—This objection is a peculiar one. The case is not exactly like any of the cases referred to by either party. The person Small is resisting a charge for payment of ground-annuals, and he says that the property did not belong to the charger Millar, but to the town of Dundee. He pleads no title. Millar, on the other hand, says that he has a good title, but the answer is—"you made a transaction with the Magistrates of Dundee for the purpose of excluding a trial of the question, and for the purpose of giving you the appearance of a title." That is part of the question raised in this action between these parties. We have allowed a minute to be given in of the averments offered to be proved, and we have allowed a proof of the facts alleged in the minute. We have not sustained the relevancy of the averments, but we have determined that they are a fit subject of enquiry in this case. It follows that if the minutes and documents in the possession of this haver bear upon these averments, the suspender is entitled to get at them. We only say that the averments are fit to be enquired into, but that being so, the enquiry must relate to the averment that there was a collusive settlement to evade the trial of the case at the instance of the Magistrates against the Whale Fishing Company and others. I cannot see any confidentiality so far as that goes. In the first place, what is asked for is not anything that has passed in reference to the present case, and that is of some consequence. It may be that in the documents called for, there may be matters not fitting for this party to see. It is not said so, but it may be right to guard against letting in those things, if they do exist ; and I therefore think that these documents ought to be exhibited to the Commissioner, in order that he may order such excerpts as bear upon the matter admitted to proof.

Lord Ivory.—I am of the same opinion. My only hesitation would be as to the necessity of any qualification—there being no allegation of the kind—that may tend to introduce difficulties which the parties have not suggested to us.

Lord Curriehill.—I concur.

Lord Deas.—This appears to me to be a very special question, arising in complicated and peculiar circumstances. There were two actions between the same parties—the Town, Adamson, the Whale Fishing Company, Small and Millar—and relating to the same subject-matter, with which these parties were all connected by the deeds narrated in the record, the particulars of which I need not go over. The leading allegation in the minute of 8th February 1856, of which a proof was allowed, is, that one of these actions was settled by collusion and concert between the other parties, including the Whale Fishing Company, to defeat the rights of Small in the other action; and the writings in dispute are sought to be recovered in this action to prove that allegation. The objection to the production is taken by Mr Ogilvie, the clerk or agent of, and as in right of, the Whale Fishing Company; and the opinion I have formed agrees with that of your Lordships, that the objection, in the circumstances, cannot be sustained.

The Court pronounced the following interlocutor :—"Repel the said objections, and ordain the haver, within six days, to make production as called for,—but with this explanation, that, in so far as the writings, or any of them, may, on inspection by the Commissioner, be found to contain any matters of a confidential nature not bearing upon the question at present under probation, excerpts shall be taken at the sight of the Commissioner, excluding such matter only."

Miller & Crawford, S.S.C.—Maclachlan & Ivory, W.S.—Wotherspoon & Mack, S.S.C.—Agents.

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[1] Bower v. Russel, 26th May 1810, F. C.; Kidd v. Bunyan, 26th Nov. 1842, ante, vol. v. p. 193.

J. AND A. TAYLOR, Petitioners.—*Marshall.*
JOHN CROW, Objector.—*Gifford.*

No. 40.

Dec. 12, 1856.
Taylor v. Crow.

Bankruptcy—Discharge.—Held (*diss.* Lord Cowan), that under 2 & 3 Vict. c. 41, any creditor is entitled to appear and oppose a bankrupt's discharge at any time before the Lord Ordinary has confirmed the Sheriff's deliverance discharging him, where no objection was stated before the Sheriff, although no appeal was taken against his interlocutor within twenty-one days. *Question,* Whether the creditor could have appeared without a regular appeal, if the Sheriff had given judgment after hearing the objection?

2D DIVISION.
Bill-Chamber.
I.

THE estates of the firm of J. and A. Taylor, and James Taylor and Allan Taylor, the individual partners thereof, were sequestrated under the Bankrupt Statute in the end of 1854, and the total value of the assets amounted to the sum of L.33, 19s. 6d., which sum was swallowed up by payment of taxes, rent, and commission to the interim factor.

On 7th August 1856 the bankrupts applied to be discharged; and the Sheriff-substitute of Lanarkshire appointed their petition to be intimated in the Gazette. The subsequent procedure was as follows:—The Sheriff-substitute (Bell) pronounced this interlocutor:—"9th October 1856.—Having resumed consideration of this petition, with the report by the trustee on the bankrupts' conduct, and minute of concurrence of creditors, and having seen the *Edinburgh Gazette* of the 12th August last, containing the intimation ordered by last interlocutor, in respect more than twenty-one days have now elapsed since the publication of the said intimation, and that no appearance has been made to oppose the prayer of the petition,—Finds the bankrupt petitioners, James Taylor and Allan Taylor, entitled to their discharge; but, before granting the same, appoints them to make a declaration in terms of the statute." The declaration was taken of the same date, and in it the bankrupts "severally declare that they have made a full and fair surrender of their estates," &c. After which, also on 9th October, the following interlocutor was pronounced:—"Having advised the declaration made of this date, by the bankrupt petitioners, Finds the same satisfactory; discharges the said James Taylor and Allan Taylor, of all debts and obligations contracted by them, or for which they were liable, either as partners aforesaid, or as individuals, at the date of the sequestration," &c.

When the extract of this deliverance was presented to the Lord Ordinary on the Bills (Neaves) for confirmation, it was opposed in name of Mr Crow, and his Lordship pronounced a judgment, in which he, "before answer, appoints the proceedings before the Sheriff in the sequestration to be transmitted to the Bill-Chamber." *

The case then came before Lord Mackenzie, who allowed the opposing creditor to lodge a note of objections to the confirmation of the discharge.

Objections were accordingly lodged, to the effect that, notwithstanding the sequestration, James Taylor had immediately commenced business anew, under the firm of James Taylor and Company. And although the whole

* "NOTE.—As at present advised, the Lord Ordinary is of opinion that if there was here, as there ought to have been, a substantive interlocutor by the Sheriff, finding the bankrupt entitled to his discharge before proceeding to take his declaration, and if there has been no appeal in due time against that interlocutor, according to the course followed in Samson v. Campbell, 29th June 1849, that interlocutor is now final, and must receive effect. Any objection now raised against the actual discharge would, in that view, be confined to the question, whether the bankrupt's declaration was satisfactory; or, at least, to some other point not inconsistent with the original and final interlocutor fixing the bankrupt's right. But, in the meantime, the proceedings have been ordered to be transmitted, that the true state of the case may be seen."

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assets in the sequestration had amounted only to about L.33, he had bee known to advance L 180 to one man, and afterwards to receive L.100 fro another. The objections were summed up in the following article:—"Jame Taylor has thus not made a full and fair surrender of his estate. His credi tors have received no dividend or composition, and never will, if his discharg is now confirmed by your Lordship; and he has given no account either o how he became possessed of the L.180, and other funds, to enable him t start business afresh, nor of what has become of the L.100 received by him In these circumstances, the objector, who is a creditor to the extent of L.70 humbly submits that the bankrupt, James Taylor, is not entitled to his dis charge until he satisfactorily accounts for said funds, and makes a full sur render of his estate to his trustee."

The Lord Ordinary reported the case to the Second Division.*

For the bankrupts, it was now contended;—That it was too late for an creditor now to object. They were now proceeding under sect. 123 of th late Bankrupt Act, which enacted, that an extract of the Sheriff's deliver ance, granting the discharge, should be presented to the Lord Ordinary, wh "shall confirm" the same. His functions were thus purely ministerial, an not judicial in any sense; at the utmost they could not be so in a highe sense than was pointed at by the Lord Ordinary, of having a right to judg of the sufficiency of the affidavit; and in the present case it was admitte even by the objector, that it was quite satisfactory, and in terms of the sta tute. When the bankrupts had applied to be discharged, intimation ha been given in the Gazette—that was the proper time for the objector to hav appeared—or he might even have taken to appeal, within twenty-one day the subsequent deliverances of the Sheriff; but having adopted none of th ordinary modes of appearing allowed by the statute, he had no right wha ever to oppose the purely ministerial act of confirmation by the Lor Ordinary.

For the objector, it was replied;—That the question of the bankrupt discharge was *sub judice* till it was confirmed by the Lord Ordinary, and th discharge could be stopped on sufficient cause being shown. Here the bank rupt had made false statements; and a creditor having ascertained this, cam forward before confirmation and offered to prove that, and that the declaratio upon which the discharge bore to proceed was false from beginning to en The answer made by the bankrupts was, that the confirmation by the Lor

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* "NOTE.—From the proceedings which have been transmitted to the Bil Chamber, it appears that the petition for discharge was appointed to be intimat in the Gazette on 7th August 1856. That, on 9th October 1856, the Sheriff-su stitute pronounced an interlocutor, which bears that no appearance had been ma to oppose the prayer of the petition, and finds the bankrupts entitled to the discharge. On the same day the bankrupts made their declaration, and the Sheri substitute having found the same satisfactory, discharged them of all debts contract by them prior to the sequestration. No appeal was taken by the respondent Jo Crow, or any of the creditors, against the interlocutor of 9th October 1856, findi the bankrupts entitled to their discharge, and that interlocutor is now final. B when the bankrupts applied for the confirmation of their discharge, the responde appeared and objected, on the ground that they had not made a full and fair d closure of their affairs.

"It appeared to Lord Neaves, who first heard the case, that any objection no raised against the confirmation of the discharge should be confined to the questio Whether the bankrupts' declaration was satisfactory? or at least to some other poi not inconsistent with the original and final interlocutor finding that the bankru were entitled to their discharge. As at present advised, the Lord Ordinary inclined to think that this view is correct. But as doubts have been thrown up the point in consequence of the opinions expressed in Samson v. Campbell, 18 July 1851 (13 D. 1395), he has deemed it advisable to report the case to t Court."

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Ordinary was a mere mechanical process, and his Lordship had no jurisdiction whatever. But a more reasonable view was, that the statute intended that so important an Act as relieving bankrupts of all liability for their debts was too momentous to be left to any inferior court; and that no discharge, therefore, should be granted till the authority of this Court was interponed, and that till that was done there was jurisdiction to entertain any objections which creditors chose to state.

Lord Justice-Clerk.—There is a great distinction in questions arising in sequestrations—between those arising between the creditors themselves—say, between creditors as to ranking, or between claimants of goods and the general body of creditors—and those which arise between any of the creditors and the bankrupt. As to the first class of cases, they naturally were left, under various modifications, very much on the footing of ordinary litigations in civil causes; but as to those arising out of the relation of the creditors, or of any one of them, to the bankrupt, the state of matters was very different. The sequestration is essentially the creditors' process, and they are entitled to appear in it throughout. I know of no steps the bankrupt can take in it, whether to obtain his discharge or otherwise, in which they are not entitled to appear. What is the object of this very application for discharge now before us, but to recall their process of sequestration under which they hold him and his funds and *acquirenda* liable for their debts, and to discharge and relieve the bankrupt of these very debts? Then, unless the bankrupt has got fairly out of the process, I have no difficulty in sustaining the creditors' right to appear.

I apprehend the relation between parties not yet ranked or claiming against each other, and that of creditors to the bankrupt, to be quite distinct and clear in principle. I hold the creditors entitled to maintain their interests to the very last, in what is properly their own process, in which nothing can be done to put an end to it at the instance of the bankrupt which the creditors have not a right to resist. This appears from the study of the statute in the various sections referring to this matter, from sect. 113 to sect. 123, where we have frequently the direction "shall," without the Judge being tied down to any course of procedure; nay, as in sect. 114, where it is manifest that objections are to be heard and discussed, so in the next section (115), a deliverance shall be pronounced in the same manner as in sect. 114, showing that here again it is competent for creditors to appear; and I read the words, "shall pronounce," and "shall confirm," in sect. 116, as obligatory in no higher sense than in the previous sections. Then, again, if sect. 117 be looked at, it is quite apparent that objections are competent under it also; and the same is equally manifest under sect. 122, as we come nearer the section we have specially to deal with, the 123d. By it, notwithstanding the previous deliverance, the discharge is to be granted by the Judge, only "on being satisfied" with the oath. These words imply the power of judgment where the sequestration comes directly before the Lord Ordinary; and I hold the direction as to confirmation, where the order has in the first instance been pronounced in the Sheriff-court, to imply that he is to act, not ministerially, but judicially.

Three views have been taken of the meaning of this section—1. That the Lord Ordinary is, in this matter, to be regarded as a mere machine, with no power to judge, or do anything but confirm; but if the only object were, that an extract might be sent to the Bill-Chamber, why was it not provided that the extract should be recorded at once, without the interference of the Lord Ordinary at all? That view will not do, and is rejected by both the Lords Ordinary before whom the case went; and they seem to take the 2d view, namely, that the creditors may appear, but only state objections raised upon the declaration. This narrows the right to object, in a manner for which I find no warrant in the statute, if there be a right to appear at all. The 3d view was, that notice of the application to the Sheriff having been given, and twenty-one days allowed to elapse before anything was done, and no objector having appeared, the Sheriff regularly pronounced the deliverances of [illegible]th October. Now, I very much doubt the regularity of the proceedings here. Assuming the first finding to be correct, what follows is clearly calculated to defeat the object of the statute, which was to have every bankrupt examined as to his conduct, instead of which, we have the two partners brought together before the Sheriff; and then they "severally declare," &c. This is a very loose mode of

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procedure; and I concur farther in Lord Wood's opinion, which he has sent to me that it was quite irregular on the same day with the first finding to take th declaration and pronounce the discharge. Yet, founding on such procedure, th bankrupts say, you took no appeal from the interlocutors of 9th October, as yo might have done, in twenty-one days, which made them final, as if in a deliveranc regarding a claim of a creditor. I consider this view as ill-founded as the othe two. This section is not to be construed by itself, but in connection with th whole group relating to this one matter of the discharge; and when so regarded I hold it clear that creditors are entitled to appear and oppose the confirmation Consider what is to be done; the extract is sent, not at once to be recorded, but t the Lord Ordinary, to be confirmed. How is it possible that it should be compe tent for a bankrupt to make a motion in process, which they who instituted i shall not have a title to appear in? These bankrupts have declared that they hav made a full surrender. Now, no doubt, no appearance is made for the objector at first, but one of the creditors finds out that there has not been a full surrender—o that a succession has opened without their knowledge, and that the bankrupt want to get rid of all his obligations, and get quit of the debts which they have consti tuted, without handing them over this succession. That he should be entitled to d this without the creditor having a right to appear, would lead to monstrous injustice I hold that, equally upon the merits as upon the sufficiency of the declaration, the are entitled to ask for the judgment of the Lord Ordinary, just as if these objec tions had been stated before the Sheriff. Therefore, I am for sustaining the righ of Mr Crow to appear.

A totally different question would have had to be considered if these matte had been brought before the Sheriff, and decided by him, and no appeal taken I say nothing as to whether, then, he could have followed the matter before th Lord Ordinary. That is not the case here.

Lord Murray.—I agree as to the principles on which the proceedings as t discharge are to be dealt with. This case has not yet received the final decisio of the Lord Ordinary, and till it has, farther inquiry is not excluded. The part seeking his discharge is asking a great favour; and if he is to go out of the seques tration with clean hands, he cannot suffer by the inquiry. Any other view woul often lead to great injustice.

Lord Cowan.—This question would have been very important indeed, but fo the passing of the recent statute, under which the whole procedure in such a cas must hereafter be before the Sheriff, without the intervention of this Court. And were not our decision thus to be of very limited application, I should have presse your Lordships, before disposing of the case, to consult our brethren of the othe Division, so that the point might be definitively settled; for after repeated con sideration of the argument, I regret to be compelled to differ very strongly fro the views which your Lordships have expressed.

The case depends upon the construction of sections 122 & 123 of the Bankru Act, 2 & 3 Vict., which refer to the discharge of the bankrupt without compos tion; and is of the greater importance, because the same principle of constructi must be applied to the similar terms contained in sections 116 & 134, which rela to his discharge on composition-contract, and to the discharge of the trustee.

Since 54 Geo. III. c. 137, and the earlier Acts, a great alteration has been intr duced into the law on the subject of sequestration. Formerly, the process w competent only in this Court, but by 2 & 3 Vict. c. 41 sec. 27, it was enacted th while sequestration could be applied for only in the Court of Session, the proce should be remitted to the Sheriff, who is to exercise the whole "powers an jurisdiction" previously exercised by this Court (except where special provision made to the contrary), but that only "subject to review"—which review is pr vided for in section 128, whereby, within 21 days, any decision of the Sheriff m be brought in the way pointed out directly to the Inner House. Failing th review being applied for, the decision is declared to be final; and the discharge the bankrupt I take to be exactly on the same footing as any other proceeding the sequestration within the competency of the Sheriff.

What, then, are the provisions of section 122? The bankrupt may petition t Lord Ordinary for his discharge when the proceedings are in this Court, or t Sheriff when they are in the inferior court. Intimation is to be made in t Gazette, and if, after 21 days have elapsed, there be no opposition, it is provid

that a deliverance shall be pronounced, finding the bankrupt entitled to his discharge. These provisions are somewhat altered by the 16th section of the Supplementary Act of 1853, but not in any respect essentially to affect the case to be now disposed of, farther than that it is made imperative on the bankrupt, before he applies for his discharge, to have a report from the trustee as to his conduct, and specially as to whether he has made a fair discovery and surrender of his estate. Now, the bankrupt applied for his discharge to the Sheriff on 7th August 1856. Of this, notice was given in the Gazette. No appearance was made for any opposing creditor; and on 9th October, long after the lapse of the period of 21 days, he renews his application, and the Sheriff takes the matter up, not under the bankrupt's application alone, but along with the necessary consents by creditors, and also with the aid afforded by the trustee's report. Then the Sheriff, seeing a majority of the creditors consenting, and the trustee's report favourable, and no one opposing, pronounced an interlocutor, finding the bankrupt entitled to his discharge. That deliverance by the Sheriff was strictly within his powers and competency. Any opposing creditor was fully entitled to have brought it up for review within twenty-one days, but if not brought under review, then that deliverance, the statute says expressly, shall be final. Here no appeal was taken within twenty-one days.

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The procedure subsequent to the deliverance now mentioned, is regulated by section 123; and with deference, I apprehend, a very limited jurisdiction is there conferred upon the Lord Ordinary or the Sheriff, as the case may be. The only question to be entertained by either is, whether the oath or declaration of the bankrupt be satisfactory. If it is, he "shall" then discharge him. This is expressly provided: but if the deliverance discharging be pronounced by the Sheriff, then an "extract" is to be sent up to the Bill-chamber clerks, to be by them forthwith presented to the Lord Ordinary, "who shall confirm the same by a deliverance," an entry whereof is to be made in the Register of Sequestrations. My understanding of this last part of the statutory procedure is, that as every sequestration required to commence by presentation of the original petition in this Court, the process, even after the remit to the Sheriff of the bounds, when that has been made, still remains a depending process in the Court of Session and Bill-Chamber, so that it is proper and necessary, in point of form, that the Lord Ordinary interpone his authority, to the effect that the decree may appear in the Register of Sequestrations kept in this Court. That is the view which I think has been generally taken. There is a decision which so far sanctions it. The case regarded a discharge on a composition—under section 116—Stephen, 19th November 1853.[1] All the steps taken had been quite regular; but the application to the Lord Ordinary for confirmation had not been made "forthwith," the party having hung back for seven years, and meanwhile he and his cautioners failed to pay the composition. The question was, whether the Lord Ordinary was not bound to confirm, even in these strong circumstances; but the Court held he was not, as the terms of the statute had not been complied with. It was not said that the Lord Ordinary had the power here contended for, which would have at once removed all difficulty. It was, on the contrary, plainly because he was held to possess no such power, where the statutory forms were observed, that the case was considered to be difficult. Accordingly, it was decided solely on the ground of the *mora* in the procedure,—a ground of decision which does not exist here, for every step has been timeously taken. The case of Samson[2] does not affect this one,—it came to this Court by direct appeal within twenty-one days.

Assuming, therefore, that the case has been duly brought before the Lord Ordinary in terms of section 123,—I am of opinion that objections now taken for the first time on the ground that there has not been a due surrender by the bankrupt, or on any other ground affecting his right to his discharge, come too late, and that neither the Lord Ordinary nor this Court has jurisdiction to receive them. I cannot but think that the opposite view,—adverse as I hold it to be to the express provisions of the statute relative to the discharge, whether of the bankrupt or of the trustee,—may be attended with the very serious consequence of intending objectors refraining from opposition at the proper time, and only making appear-

[1] 19th Nov. 1853, ante, vol. xvi. p. 63.
[2] 29th Jan. 1849, ante, vol. xi. p. 1208.

No. 40. ance at the very last stage. I cannot regard this to be competent, and yet it is th necessary result. The procedure here, however, has been somewhat premature and the opinion which your Lordship has read from Lord Wood, goes partly o that ground. The Sheriff, without allowing twenty-one days to intervene, on th same day on which he found the bankrupt entitled to his discharge and ordaine him to emit his declaration,—proceeded to take the same; and then, having con sidered the declaration, he granted the discharge, and pronounced his last inter locutor. Both deliverances are dated 9th October 1856. I think it would hav been better if the emitting of the declaration and the pronouncing of the secon interlocutor had been delayed until the first had become final. But the statut does not prescribe this. Hence, if every thing else be regular, and no appe entered within the twenty-one days, it does not appear to me that there is any soli ground for holding the finality of the leading interlocutor affected by what wa done. In Samson's case, although the discharge by the Sheriff had been confirme it was set aside, because, within twenty-one days after the first interlocutor findin him entitled to it, an appeal had been taken to the Inner-House, in terms of th statute, and the interlocutor under that appeal recalled. There is no occasion t deal with this case on any such footing, for no appeal whatever against the deliver ance of the Sheriff has been taken. The only point raised regards the competenc of the Lord Ordinary, when required to confirm the discharge granted by an inte locutor admittedly final, entertaining objections that go to open up the whol question as to the bankrupt's right to his discharge at all. This seems to me n within his statutory competency.

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Lord Wood, who was absent, communicated the following opinion:—

I have had difficulty in forming an opinion in this case, and have at differe times taken a different view of it.

No appearance to oppose the application for discharge was made before th Sheriff, and a deliverance was pronounced on the 9th October 1856, findin the bankrupt entitled to a discharge. On the *same* day, the declaration require by the statute as an essential antecedent to the bankrupt's being discharge that he had complied with the provisions of the statute, was taken; and bein satisfactory to the Sheriff—as it could hardly fail to be—the discharge was the also granted of the same date. This I think was irregular, seeing that any cred tor—whether he had previously appeared or not—had a right, within twenty one days from the first of these interlocutors, to appeal against it. This right wa recognised in the case of Samson, where the appeal was not taken till after th interlocutor of the Sheriff granting the discharge had been confirmed by the Lor Ordinary, the Court having to disregard the later procedure, in order to secu the creditor's right to have the appeal heard and disposed of.

But although the procedure was irregular, the fact here is—that there was n appeal within twenty-one days from the first interlocutor of the 9th October,—th it was not till after their expiry, when that interlocutor had become final, that th interlocutor of the same date granting the discharge was acted upon, by a confi mation of it by the Lord Ordinary (before whom it had been laid, as provided b the Act) being moved for in the Bill-Chamber, which was necessary to give effect—and that it was only at that stage of the proceedings that the object appeared to oppose the confirmation.

In this state of matters, with a final interlocutor finding the bankrupt entitled his discharge, and having regard to the provisions of the 122d and 123d sectio of the 2d and 3d Vict. c. 41, and the 16th section of the 16th and 17th Vict. 53, required to be observed, in order to secure against a discharge being obtaine where the bankrupt has not so conducted himself as to be entitled to it,—and the provisions in the 128th and 129th sections of the first of these Acts for revie of deliverances by the Sheriff or Lord Ordinary, as the case may be, I confess th my first impression was, that the time for opposing the discharge in the form of simple compearance was past, even although founded, as it is, upon the groun that the bankrupt had not made a fair discovery and surrender of his estate. B upon farther consideration I have come to doubt the soundness of that view, whe applied, not to objections of a mere formal nature—which I am clear could not entertained—but to objections on the merits, of such a description as the one have here to deal with.

By the interlocutor finding the bankrupt entitled to a discharge, his right to

discharge is not absolutely decided. Whether or not he has complied with those provisions of the statute, his compliance with which may be called the fundamental requisites to his obtaining a discharge, is still open for inquiry. Where, indeed, the particular failure in compliance has been made the subject of *litigated* inquiry before the Sheriff, and disposed of by the interlocutor finding the bankrupt entitled to a discharge, it may be, that if not taken to review by appeal, the creditor would be concluded upon it. But otherwise, I do not think that the objection is strictly matter of review; or that, although it might be brought forward in that way, the taking an appeal is necessary to its being competently proponed. On the contrary, assuming the particular objection—as, for instance, the one here in question—not to have been previously litigated and decided, and that the proceedings in the Sheriff-court were regularly conducted, instead of being all carried through on the *same* day, I think it might be competently stated, as long as the process was before the Sheriff—that is, till an interlocutor discharging the bankrupt had been pronounced. In that case, I cannot hold the interlocutor finding the bankrupt entitled to his discharge as amounting to more than a finding to that effect for any thing yet seen;—or that in the course of the farther procedure its finality precludes all inquiry, except by the declaration or oath of the bankrupt. It would, I think, be a singular consequence to attach to it, that while the discharge was not yet granted by the Sheriff, a creditor should thereby be barred from coming forward and offering, and being allowed positively to prove, that the bankrupt had not complied with one of those provisions, his compliance with which is made essential to his obtaining a discharge,—that however conclusive might be the evidence he possessed to establish his objection, it must be excluded, and no inquiry allowed, except by the declaration or oath of the bankrupt:—And this although the objection may be, as here it is, the most important as affecting the patrimonial interests of the creditor, and resting on a fact which it is always to be presumed has only not been sooner brought forward, because till then the creditor was ignorant of it, and therefore had not at an earlier date appeared to oppose the discharge.

No. 40.

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Dec. 12, 1856.
Taylor v. Crow.

Take the case, that the proceedings had been before the Lord Ordinary, and that an interlocutor by his Lordship finding the bankrupt entitled to a discharge had become final, could it be maintained that, the proceedings being resumed after the lapse of the reclaiming days, it would have been incompetent for a creditor to appear and object to the discharge being granted, on the ground that the bankrupt had concealed his funds—and that, in the face of an offer to prove that fact, the Lord Ordinary must have gone on to grant the discharge, if nothing unsatisfactory was elicited by his declaration or oath? I cannot adopt that view.

It is, however, no doubt true, that no objection was stated in the Sheriff-court—(any opportunity of doing so, had the objector been then prepared to appear, having been precluded by the precipitate course of procedure which was adopted)—and that before the objector's compearance, the twenty-one days for review by appeal had expired, and the case had been removed from the Sheriff, by the deliverance discharging the bankrupt, or an extract of it having, in terms of the statute, been laid before the Lord Ordinary, in order to obtain his confirmation. But it does not appear to me that this farther step in advance towards the completion of the proceedings necessary to the bankrupt being effectually discharged, can operate as a bar to the admission of the objection in question. Although for certain purposes remitted to the Sheriff, it is by the 27th section of the statute declared that the process still to be held is to be in the Bill-Chamber of the Court of Session, and when, in terms of the Act, the deliverance of the Sheriff was brought up before the Lord Ordinary, the proceedings came properly to be in dependence before him;—and I apprehend that it would have required very strong words indeed to warrant the conclusion that he had no jurisdiction to deal judicially with the matter of the bankrupts' discharge, but was bound to go on blindfold, as it were, to confirm the discharge as granted by the Sheriff, let the objection to it be what it might. But I find no such words in the Act.

If the finality of the interlocutor finding the bankrupt *entitled* to a discharge would not have rendered the present objection incompetent in the course of subsequent proceedings before the Sheriff, or in those before the Lord Ordinary, had the application for a discharge been *originally* presented to him, (which, as I have stated, I am of opinion that it would not), I do not see how that finality, or the interlocutor *discharging* the bankrupt, shall be held to produce that result, when

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the objection is brought forward before the Lord Ordinary on his being moved confirm the discharge. Neither Lord Neaves nor Lord Mackenzie have adop the view that the duty of the Lord Ordinary is merely ministerial. To a cert extent they hold that he may deal judicially with objections to the confirming discharge. But, with great deference, I am unable to discover ground for stopp there, and holding that inquiry is limited to a consideration of the sufficiency of bankrupt's declaration or oath as to his compliance with the provisions of statute to which I have referred, and that the Lord Ordinary must shut his e to all statements, however pregnant, and all offers of proof, however specifically ma that one of these provisions—for instance, the discovery and surrender of estate—has not been complied with. That, I think, would be a very danger view to adopt, and which might be productive of the greatest injustice, and th too, when the continued dependence of the proceedings still afforded the means preventing it; for, as I have already observed, I cannot consider the ground objection now insisted in as being of a character which rendered it admissible or by process of review against the interlocutors of the Sheriff. I think, on the co trary, that the objection is of that fundamental nature, which makes it, as it we travel along with and accompany the proceedings throughout their whole cours that as between the bankrupt and his creditors—looking to their relative positio and the respective interests and rights of each under a sequestration,—a credito right to insist in it must, in justice, continue alive, and open to be acted upon, long as the proceedings are in Court;—that this is a legitimate, inherent conditic attaching to the bankrupt's claim to the statutory privilege and indulgence of discharge, from which it can at no stage of the proceedings be relieved;—and th there is nothing in the provisions of the statute, according to a fair reading of the to exclude its receiving effect.

I am therefore of opinion that, if duly qualified in point of statement, and there is no room for concluding that there has been any wilful delay in bringing forward, the objection here insisted in was competent before the Lord Ordinar when moved to confirm the bankrupt's discharge.

The Court pronounced the following interlocutor:—"Find that tl objector, John Crow, is entitled to appear to oppose the motion l the bankrupt for the confirmation of his discharge, and to insist i his objections to the discharge being completed,—Reserving a questions of expenses."

John Wright, W.S.—Wm. White Millar, S.S.C.—Agents.

No. 41.

Dundas Hamilton (Miller & Company's Trustee), Pursuer.— *Sol.-Gen. Maitland—Campbell.*

The Western Bank of Scotland, Defenders.—*D. F. Inglis—Blackbur*

Transaction—Pledge—Retention—Right in security.—A bank having discounte certain bills of large amount, received as collateral security a delivery order, virtue of which certain specified goods in a bonded warehouse were transferred the name of the manager in the books of the warehouse-keeper. The bills we duly retired, but previous to their being so, the bank made a large advance to tl owners of the goods;—*Held* (altering judgment of Lord Handyside), that th transaction did not constitute a contract of pledge by which the bank were bour to retransfer the goods on the bills being retired, but that it was a mere transfe ence of proprietary right, under which the bank were entitled to retain the goo until all advances made to the owners were repaid.

Dec. 13, 1856. — 1st Division. Ld. Handyside. L.

In December 1853, Miller and Company, merchants in Glasgow, applie to the defender Taylor, as manager of the Western Bank, to discount a bi drawn by them upon and accepted by A. S. Sichel of Manchester. Th bill was dated 28th December 1853, payable at four months, and it cons quently fell due on 1st May 1854. In March 1854 the defender, havin previously discounted the bill, required security for the advance, and o 16th March 1854, Miller and Company addressed the following letter to M Taylor:—" Enclosed we hand you transfer and delivery order for 30 cases brandy now lying in Messrs James M'Lean and Company's bonde

stores, the same to be held by you as collateral security, until retirement of our draft on A. S. Sichel, Esq., maturing 1st May next, for L.630, 10s. sterling." No. 41.

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In art. 3 of his condescendence, the pursuer stated "that the brandy was transferred by the warehouseman to the defender, in terms of the said delivery order." The delivery order was as follows:—

"Glasgow, 16th March 1854.—Deliver to John Taylor, Esq., manager, Western Bank, the undernoted 300 cases ex 'Euphemia Fullarton,' charging us rent from date of storage.—Marks, J. M., Nos. H. 251 @ 550.—RICHD. MILLER AND COMPANY. To James M'Lean and Company, 65 Jamaica Street."

When the bill of L.630, 10s. fell due, Miller and Company arranged with the bank for a renewal to the extent of L.500, dated 28th April, and payable at four months, being 31st August 1854. On 9th May 1854, Miller and Company wrote the following letter to the defender:—"Referring to our letter of 16th March last, and in consideration of our draft on A. S. Sichel, Esquire, for L.630, 10s. which matured on 1st instant, having been renewed to extent of L.500, and said renewal having been discounted by you on 28th ultimo, we authorise you still to hold 300 cases brandy transferred to your order 16th March last, as collateral security until Mr Sichel's next acceptance to us matures and is retired."

Mr Sichel's acceptance was duly retired on 31st August, but the defender continued to hold the brandy. On 9th September 1854, Miller and Company became bankrupt, and the pursuer, Dundas Hamilton, was appointed trustee on their estate. He applied to the defender for delivery of the brandy, but was refused, for the following reasons embodied in art. 7 of his condescendence: —"On or about the 21st July 1854, the bankrupts applied to the defender for further accommodation to the extent of L.400. The defender having good reason to believe in the solvency of Mr A. S. Sichel, the acceptor of the foresaid draft for L.500, which would mature on the 31st August immediately following, consented to allow the accommodation required, on the distinct verbal condition and agreement, that the brandy in question was thenceforth held by the defender in security of this additional advance, as well as of the L.500 draft aforesaid."

This action was accordingly raised by the pursuer, concluding for delivery of the brandy, and for L.200 of damages in consequence of its wrongful and illegal detention; or, in the event of the defender having wrongfully disposed of the brandy, then for L.1000 of damages.

He pleaded;—1. The brandy in question having been transferred to the bank as a collateral security for the due payment of the bill for L.630, 10s. and the renewal for L.500, and these bills having been duly paid and retired, the bank have no right to retain the brandy, but are bound to deliver and retransfer the same to the pursuer. 2. The bank having wrongfully withheld delivery, are liable for the loss and damage which has thereby been sustained, or may yet be sustained, by the pursuer as trustee foresaid. 3. In the event of its appearing that the bank have disposed of the brandy, and cannot deliver the same, they are liable in damages, in terms of the alternative conclusions of the libel.

The defender pleaded;—1. That being in possession of the brandy, and that under a transfer *ex facie* absolute, it rested with the pursuer to prove that his possession was of a more limited nature, and what was the nature thereof. 2. The brandy in question having been transferred and delivered to the defender absolutely and unconditionally, and in security of advances made by the defender to the bankrupt from time to time, the defender was entitled to deal with the same as his absolute property until the advances were fully repaid. 3. The brandy having been specially pledged in security

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of the advance of L.400, which had not been repaid, might be properly retained and dealt with by the defender, so as to effectuate payment of the advance.

The case was reported by the Lord Ordinary on the adjustment of issues, on 22d January 1856. It then appeared to the Court that if the defenders' averment in art. 7 were established, it would be conclusive of the whole case. A remit was therefore made to the Lord Ordinary, who allowed a proof to both parties. The defender deponed to the facts as given above, and with reference to the advance of L.400 on 21st July, deponed: "I made the advance of L.400, so asked by Miller, relying on these grounds stated by him. In particular, I relied specifically on the security of the brandy which had been originally transferred to me, and, in fact, I would not have made the advance but for this: Depones, Miller and Company never made any demand on me for re-delivery of the said last-mentioned brandy: Interrogated, Did you consent to allow the advance of the said L.400, on the distinct verbal condition and agreement that the brandy in question was thenceforth held by you in security of this additional advance as well as of the L.500 renewal before mentioned? Depones, I allowed it only on the distinct verbal understanding that the brandy in question should be so held."

On the other hand, Mr Miller deponed as follows:—"I am perfectly positive that there was no agreement entered into between me and Mr Taylor on the said 21st July in relation to the said 300 cases of brandy: There was no reference made to it at all at that time: Depones, I saw my partner immediately on returning from the bank to my counting-house on said 21st July 1854, and I then communicated to him the terms on which I had got the advance from the bank. The terms which I mentioned to him were the same terms on which I have above deponed the advance was made. Depones, there was no understanding at any time between the bank and myself or my firm, that the 300 cases of brandy were to be held in security for the said advance of L.400."

The Lord Ordinary, on 7th June 1856, pronounced the following interlocutor:—"Finds that the defender has not proved the agreement specified and averred in article 7 of his statement of facts: Orders the cause to the roll."*

The defender reclaimed. In July 1856 the case was again remitted to the Lord Ordinary, who pronounced an interlocutor on 18th July, allowing the defender to lodge the following additional pleas:—4. The brandy in question having been transferred and delivered by the bankrupts to the defende under a real contract of pledge, he is entitled to retain the possession s acquired until all advances made by him to the bankrupts, subsequent t his attaining such possession, at least all such advances made on the fait of such possession, and especially the L.400, mentioned in statement 7 o his defences, are repaid. 5. The said brandy having been transferred t

* "NOTE.—The Lord Ordinary is unable to come to any other conclusion tha that the defender has failed to establish his averment. Assuming the adequacy i point of law of Mr Taylor's evidence to establish the verbal condition and agree ment alleged, had it stood uncontradicted by conjunct probation on the part of th pursuer, the evidence of Mr Miller, the bankrupt, negatives the account given b Mr Taylor of what passed between them, and, unless Mr Miller is to be wholl discredited, the result is an unfortunate opposition in the testimony given by th only two parties to the transaction. The Lord Ordinary sees no sufficient groun for discrediting Mr Miller, though there are discrepancies between him and h partner, Mr Cowper, on collateral points. But that gentleman gives corroborati support to Mr Miller, by stating that he had no knowledge, as a partner, of th alleged pledge of the cases of brandy for the over-draft. There is no corroborati circumstance to aid the evidence of Mr Taylor."

the defender by conveyance *ex facie* absolute, and possession attained and held under such conveyance, he is entitled to retain possession thereof until all the advances made by him subsequent to said conveyance and possession are repaid.

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On 4th November 1856 the Lord Ordinary pronounced the following interlocutor:—"Finds that the defender has not proved the agreement specified and averred in article seventh of his statement of facts: Repels the whole pleas in law for the defender, the additional pleas in law allowed to be given in by the interlocutor of 18th July last, as well as his original pleas upon record: Finds that the defender was bound to transfer or deliver over to the pursuer the cases of brandy specified in the summons, and that the detention of them from the pursuer was wrongful and illegal; and in order that, if necessary, a specific decerniture may be pronounced under the alternative conclusions of the summons, orders the cause to the roll for that purpose: Finds the defender liable in expenses to the pursuer," &c.*

* "NOTE.—When this question was formerly before the Lord Ordinary, the only question raised by counsel for judgment was upon the proof led, and upon that the cause was taken to avizandum. The interlocutor which followed expressed the opinion of the Lord Ordinary on the proof, which he does not go back upon, and it was not the subject, and properly, of any further argument; and the interlocutor is therefore repeated. If an opposite view shall be taken of the proof, the contention between the parties is at an end. Should the finding of the interlocutor be affirmed, then only the point now to be adverted to is presented for consideration. This point not having been the subject of specific pleas on the record, the Lord Ordinary thought it fitting that additional pleas should be lodged. Referring to the note to the former interlocutor for explanation of the view which the Lord Ordinary took of the proof, he has now to state the grounds of his judgment on the point last debated.

"Assuming, as must be done, that his finding on the proof is equivalent to a verdict on the matter put in issue, the question is now, Whether, under the real contract of pledge, the pledgee is entitled to retain in security of advances subsequently made beyond, and independent of, the original consideration for the pledge, and that against the creditors of the pledger? The question is interesting, because it at once suggests a reference to the Roman law; and it is important, as it cannot be said to have been the subject of decision, or apparently of consideration, by authorities in our own law, with the exception of Professor Bell.

"By the earlier Roman law, it would seem that the extent of the creditor's right over the pledge was limited to securing the debt for which it had been given. The Pandects contain no law recognising a further security. But by a law of the Emperor Gordian, book viii., tit. 27, of the code, it was decided that an action for the restitution of the pledge might be met by the *Exceptio doli mali*—'Jure enim pecunia tibi a debitore reddatur vel offeratur quæ sine pignore debetur.' And the reason assigned is, 'nisi ea contendis debitores, eam solam pecuniam cujus nomine ea pignora obligaverunt, offerentes audiri non oportere, nisi pro illa etiam satisfecerint quam mutuam simpliciter acceperunt.' This law is referred to by Pothier in his digest of the Pandects, book xiii., tit. 7, in treating 'De actione pignoratitia directa,' and by Voet, in his commentary on the Pandects, under the same title. In his Treatise du contrat de Nantissement, Pothier states that this law had been adopted in French jurisprudence, and makes some observations on the principle of it, and the circumstances under which it could be applied. He distinguishes as to the power of retention of the pledge for another debt than that for which it had been originally pledged, according as it might be certain, and liquid, or otherwise, holding that it could only be exercised in the former case, giving as a reason, that where the debt is certain, and liquid, the creditor may obtain authority to seize the goods of the debtor in his own hands and those of third parties, and so he ought to be permitted to retain them attached in his own hands for such debt. By the modern law of France, under the Code Civile, section 2082, if a second debt be contracted subsequent to the pledge being made, and become payable before the

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The defender reclaimed, and prayed the Court to find that he had proved the agreement specified and averred in art. 7 of his statement of facts. He

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term of payment of the original debt, the creditor is not bound to relinquish without payment of both, although there had been no stipulation to engage the pledge in payment of the second. See also Merlin—Rèpertoire, voce Gage. The Lord Ordinary is not aware how the law may stand in other countries following the civil law, but which have not adopted the Code Napoleon.

"The doctrine of the civil law upon this subject is undoubtedly entitled to the utmost consideration with us. It is rather remarkable that, until the publication of Mr Bell's Principles, the particular question now raised should not have been adverted to specially by any of our authorities. Nor is there any case reported the circumstances of which appear to have admitted of a reference upon this particular point to the civil law. The case of Harriot v. Cunningham, May 21, 1791, Morr. 12,405, cited at the debate, involved a quite different point of law, and the circumstances excluded any other being raised. Mr Erskine treats very shortly of the contract of pledge; and all that can be said is, that his authority is negative by exclusion of the present point. But Lord Stair treats of pledge in different parts of his Institute very fully, and with particular reference to Roman law, yet there is nothing to be gathered which tends to lend his Lordship's authority to retention of the pledge for other debts. Lord Bankton is also silent upon the subject; and to refer back to an earlier writer, Balfour (Practicks, p. 194,) treats of pledge under the title 'anent things laid in wad,' and that pretty fully, and on sound principles, but without going beyond the ordinary case of the pledge being specific.

"The views of Professor Bell may now be considered, and they deserve particular notice, not only from the deference due to so learned a Jurist, but from his attention having been directed almost to the very point at issue in this case. In his Commentaries, at more than one place, he discusses the contract of pledge both in its general character and as a real contract, and under the latter he connects with it his statement of the law of securities for debt under an absolute disposition with back bond. An important passage is, where, after stating that the contract may be parole or in writing, and that the real right of the creditors is completed by delivery and continued by possession, that possession of the subject is proof of the creditors' right, for possession of moveables is in law held to infer property, unless in so far as the right is limited by evidence either written or parole, but that usually the terms of the contract of pledge are established by writing: He says,—'If the precise limits of the security and special appropriation to a particular debt are not established by the clearest evidence, the pledge will continue as an effectual security for all the debt due by the person who pledges on the principle explained already.' The reference made is to the principle of the right of retention for further advances, where the creditor has an absolute disposition to lands qualified by a back bond, declaring it to be in security of a specific debt. The cases cited are Brough's Creditors v. Jolly, and others applying the same doctrine to the absolute conveyance of a ship, or of a moveable bond.

"Now, as a good deal of argument was founded on this passage, it may be remarked that the application of the principle of the decision in the case of Brough's Creditors to a proper contract of pledge requires circumspection, for a fallacy lurks in running an analogy between an absolute disposition of lands, or anything else, and the creditors' right in the subject of the real contract of pledge. In it the property of the subject remains in the pledger, the possession only being in the pledgee—a doctrine acknowledged on all hands. But where an absolute disposition is granted, the property passes to the disponee, and all that the debtor obtains by his back bond is the personal obligation undertaken by it; and so before he can enforce that personal obligation, it is reasonable that he should discharge all his own personal obligations incurred to the granter of the bond though of a subsequent date. But indeed the passage quoted does not go so far as has been supposed, for the terms of it being carefully attended to, and taken with the context preceding, it assumes the want of evidence in writing or by parole that the property was held in special pledge, and if so, then the possession of the holder of the moveables inferring by law property in them, the analogy of the absolute disposition, and its effects, become apparent and decisive. Nay, under the case of Harriot v. Cun-

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pleaded;—That the analogy of the Scotch law, the authority of the Roman law, and the authority of the French laws, all corroborated the doctrine that

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ningham, referred to by Mr Bell at this place, the want of evidence of the nature of the pledge being special and limited, might give the creditors the right of holding it as a general pledge.

"In his Principles, however, Mr Bell adverts more directly to the subject. The heading of section 1367 is,—'Tacit Extension of Pledge.' He observes,—'It is an important question, whether a pledge is maintainable against third parties for more than the original advance where additional advances have been made to the creditor;' and stating, as the first case, that when an absolute conveyance is made, though only intended as a security, and a new loan takes place during its subsistence, the restitution is not demandable without payment of the whole debts, adding, that this is a peculiarity applicable to heritable securities by absolute disposition with an unrecorded back bond; and after giving as other instances the mortgage of a ship under the old law, and an absolute assignation of a moveable debt, he says,—'All these cases proceed on the ground of a right ostensibly universal and absolute, requiring to be resolved, not being mere securities *ex facie*.' Next, he adverts as to the second case, as follows:—'2. Where a jewel or other moveable has been given in pledge without limitation of the security, it may seem, that on the principle which regulated the above cases (Brough and Others), the universal right presumed from possession will effectually cover further advances, which cannot be supposed to be made but on that footing. But if there be proof to limit the pledge to a specific advance made at the time of its constitution, there does not appear to be any ground on which, as against purchasers or creditors, the original security by pledge can be held as extended.' Without analysing these sentences to point out the carefully qualified terms in which Mr Bell lays down the law as viewed by him, the Lord Ordinary will just say, that he apprehends that they exclude any recognition in the law of Scotland of the rights of the creditor under a pledge originally specific as to its subject, to have it extended, so as to entitle him to retention in security of subsequent advances. It will be noticed that Mr Bell refers to the interests of purchasers or creditors, which is really the important and testing point; for, as to the question, if arising between the pledger and the pledgee, it need not be considered.

"Now, in the present case, the acknowledged facts are, and that proved *scripto*, that the pledge was originally specific, and that the goods were delivered over and received, to be held in security of a particular draft. It is pleaded, indeed, that the delivery-order, under which possession was obtained of the subject of pledge, is *ex facie* absolute in its terms; but it is conceived that the letter accompanying it, and accepted and held by the creditor, made the pledge clearly specific. There was a pledge constituted, not a conveyance of property made. The subsequent extension of the pledge to other drafts, one under another letter received and retained by the creditor, and the other being averred by him, though he has failed to establish it under the proof, disentitles him, in the Lord Ordinary's opinion, to read the delivery-order otherwise than as the instrument of giving that possession required to make the contract of pledge real.

"In his illustrations, Mr Bell refers to some English cases, and both parties at the debate entered upon the law of England and of America upon the subject of pledge. The cases in England have occurred in the Courts of Equity; for at common law, it appears to the Lord Ordinary that all pledges and pawns are specific. See Addison on Contracts, 4th Edit., p. 317. The case of Demembray, which is cited by Mr Bell, and commented on by him, will be found in Vernon's Reports, vol. ii., p. 697. It was a decision of Lord Chancellor Harcourt, and is referred to in all the subsequent cases. Jones v. Smith, 2 Vesey, Jr., p. 372, decided by Lord Alvanley, and Adams v. Claxton, 6th Vesey, Jr., p. 225, decided by Sir William Grant, were also noticed at the debate. The Lord Ordinary will not enter into an examination of these cases, further than to observe, that he gathers from them, that, in regard to mortgages and pawns, a Court of Equity will not enforce redemption in a question with the party or his executors, except on payment of all that is due, but that if the interests of third parties or creditors arise, retention cannot be pleaded beyond the specific amount by the mortgagee or pawnee. Upon the law of America, Kent's Commentaries, vol. ii., p. 583, were

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a pledge was maintainable for more than the original advance where additional advances had been made to the creditor.[1]

The pursuer referred to his pleas as embodying his case. He pleaded; —That the effect of this transaction was much the same as a disposition and back bond over a heritable security.[2]

Lord President.—This case now comes before us on the third reclaiming note. It has been varying and changing its aspect every time it has come before us. When we had to consider it on the record with proposed issues, it appeared to us that the defender's statement in article 7, as to a distinct condition and agreement in July 1854, if established in evidence, would be conclusive of the case, whether the original transaction was to be regarded as a proper pledge or a conveyance in security, or whatever else it might be. We accordingly allowed a proof, which was taken on commission, and has now been reported to us. I have no doubt upon that proof, that the defender has failed to establish his averment. Taylor's own statement, taken by itself, would not have established it. On the contrary, the import of that statement is merely that there was on his part an "understanding" that he was to retain the brandy in security of the advance. But he will not say that there was any "distinct verbal condition or agreement" to that effect, which was the averment he had put upon the record. The question was put to him in so many words, but he does not answer it. He avoids doing so, and only says there was an "understanding" to that effect. But the evidence on the other side is explicit that there was no such agreement. It is impossible, therefore, to hold that the defender's statement is established. That part of the case for the defender has failed.

But we now have to consider the case apart from that alleged separate arrangement, and to consider whether the transaction that was entered into at an earlier period, in reference to this brandy, viewed in connection with the evidence before us, does constitute a right on the part of the Bank to retain it in security of advances subsequently made to Miller and Company. That is the question. In considering it, we must look to the statements of the parties on the record, and to the documents produced. Both parties have renounced farther probation.

On looking to the record, I have found considerable difficulty in knowing on what averments the parties respectively rest. They vary at different parts of the record, and it rather appears to me that the case of the pursuer is to be found in the averments of the defender, and the strength of the case of the defender is to be found in the averments of the pursuer. Then, again, I have been perplexed by the pleas in law. The difficulties in the way of disposing of the case with reference to these pleas are considerable, for the case appears to have been pleaded by both parties on the footing that this was beyond all question a transaction or contract of pledge, in the proper and legal sense of that term. The issues proposed on the part of the pursuer as proper for the trial of the case, put it as a transaction of pledge; and the

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referred to, which notices the English cases, and adverting to the general question, Whether the pawnee could retain the pledge, independent of a special agreement, for any other debt than that for which the chattel was specifically given, states that the question had been extensively discussed in the Court of Massachussetts, and the weight of opinion was against retention of the pledge, which Chancellor Kent declares to have been his own opinion.

"The Lord Ordinary has thought it right to explain thus fully his views on the authorities bearing upon the novel question raised in the present case, and he has only to state in conclusion, that he has not been able to satisfy himself that he would be warranted in recognising, as a principle of the law of Scotland, the extension of a specific pledge into a general security for further advances."

[1] Harriot v. Cunningham, 21st May 1791; Dict. *voce* Proof, p. 12405; I. Bell's Com. p. 684; Balleny, Dict. *voce* Compensation, No. 5; Dingwall, Bell's folio cases; 2 Bell's Com. p. 22; Bell's Pr. sec. 1363–7; Heineccius, vol. v. p. 353; Pandects, part 3, book 20, tit. 6, sec. 46; Code, book 8, tit. 27; Hubert, vol. iii. p. 58; tit. 6, sec. 1; Pothier, vol. ii. p. 958, sec. 47. See also Denembray, 2 Vernon's Chancery cases, p. 697; Uppingham, 1 Atkins, p. 236; 2 Kent's Commentaries, p. 584.

[2] Bartlet v. Buchanan, 21st Eeb. 1811, F. C.

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issues proposed on the part of the defender also put it as a transaction of pledge. But the argument latterly submitted to us on the part of the defender disowned altogether any transaction of pledge, and put the case upon a different footing,—upon the footing of a transfer of property. It was contended that the transaction was to be so regarded, and that the defender had, *ex facie*, an absolute title and right to the property of this brandy, whatever the separate qualifications or conditions of that right may have been. Additional pleas were added by the defender when the case was last before the Lord Ordinary; one of these additional pleas still puts the case on the ground of pledge, but the other is more general, and is to this effect,—that the brandy having been transferred to the defender by conveyance *ex facie* absolute, and possession attained and held under such conveyance, he is entitled to retain possession thereof until all the advances made by him subsequent to said conveyance and possession are repaid. That was the plea to which the defender adhered in the conclusion of his recent argument. But the pursuer treated the case altogether as a case of pledge, and it appears to have been so argued before the Lord Ordinary by both parties, for his Lordship's judgment and his note both proceed on that footing. But the question must be dealt with by us now on the aspect of the facts as we gather them from the record and the documents before us, and upon the argument submitted to us, which I think some of the pleas as now shaped are broad enough to embrace.

In the first place, it appears that this was a transaction whereby the brandy in question, being then in a bonded warehouse, was transferred from the name of the bankrupt into the name of the defender in consequence of a written order of delivery presented to the warehouse keeper, and followed by transference in his books. That is a fact upon which parties are not quite agreed; but I think it is sufficiently made out by the documents, that the goods being in a bonded warehouse belonging to the pursuer were transferred to the defender's name by authority of a delivery order, addressed to the keeper of the warehouse, and that they remained in the bonded warehouse standing there in the name of the defender as the person to whom they belonged. Taking the fact as I have now stated it, I think that this cannot be regarded as a transaction of pledge. It had reference, no doubt, to the advance of money. That appears from the letters that passed between the parties, and particularly from the letter that accompanied the delivery order. But the contract of pledge, properly so regarded, does not, and never did, exist in this case. There never was any custody by the defender of these goods. On the contrary, it is clear that they were never intended to be put into the defender's custody. Evidently it was not the intention of Miller and Company that the defender should present that delivery order, pay the duty, and carry off the goods,—and it is equally evident, that without paying the duty he could not carry off the goods. The intention plainly was, that the goods should remain in the bonded warehouse, and that an entry of the transfer of the property should be made in the warehouse books. That transaction does not, in my opinion, constitute a contract of pledge. If the goods were pledged at all, they were pledged only for the duties as before. They certainly were not pledged with the defender. They were not in his custody. By presenting the delivery order to the storekeepers, and getting the goods transferred to his own name in the books, the defender obtained what has been not unfrequently called constructive delivery. That is not actual delivery or custody—not even such actual delivery or custody as consists in giving over the key of the warehouse in which goods are. It is a thing introduced for the convenience of trade, and which is held to supply the place of actual delivery in reference to the transference of property so situated. But it is not a thing which has been recognised, by any authority I know, as coming in place of that custody, which is of the essence of the contract of pledge—the value of which consists in having the custody without the property of the goods. Nor is there in the dicta of our writers any encouragement to go farther in that direction. It would tend to complicate transactions and create confusion. For these reasons I cannot hold that the transaction in question constituted the contract of pledge. But although the defender did not get the goods pledged with him, still, if there is enough to constitute a transference of property, qualified, though it may be, by the writing and understanding of parties, it may give the defender a right to retain the goods for subsequent advances, which it is to be presumed he made on the faith of these goods. Looking to the whole aspect of the case, the facts to be gathered from this record, and the leaning of the authori-

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ties, I think this is to be regarded not as a transaction of pledge, but of transference of property. No doubt it may not have been the intention of parties that the property should permanently or ultimately remain with the defender. The same may be said in any case where there is an absolute conveyance qualified by a back bond, the intention of which is to give no more than a right in security, yet whereby an effectual right of property might be constituted. Such rights arise as between parties in a great number of cases, and I do not see why this case should be differently dealt with from them.

The question is not whether there can here be any right in the defender higher than that which actual possession of the goods would have given him, but whether the facts result in a contract of a different kind from pledge, and, of course, giving different rights, and leading to different consequences. The transaction wants the essential character of pledge—viz. the custody of the goods; and it has this other attribute—viz. a transference of the property of the goods on a written title, *ex facie* absolute, though with the understanding and qualification, in a separate writing, that they may be got back. If that qualification had been engrossed on the order for delivery, I am not sure that the keeper of the warehouse would have been bound to recognise any transaction of that kind, and complicate his books with such a qualification. The object of that register is for the transference of property. But, at all events, that was not here attempted to be done. It stands a transference of property. It must be taken with its qualifications, but the defender is entitled to retain the goods in satisfaction of his subsequent advances on 21st July 1854.

Lord Ivory.—This is a case in some respects of much novelty and importance. As regards the special agreement averred in art. 7 of the defender's condescendence, I am clearly of opinion that the defender has failed in establishing it. So far, therefore, I adhere to the interlocutor of the Lord Ordinary. But as regards the rest of the interlocutor, I am for altering it. The Lord Ordinary has put the case entirely on the footing of the security having been a transaction of proper pledge. I am not surprised at that. The record in its original shape must have presented itself to the Lord Ordinary as a case of pledge and nothing else. Had it been a case of pledge, it certainly would have raised questions of such importance and novelty as to merit the elaborate discussion which the Lord Ordinary has bestowed upon it. I do not say what opinion I would have had in that case. It might, perhaps, lean strongly to the opinion of the Lord Ordinary, but I wish to be distinctly understood as not now pronouncing any opinion upon that aspect of the case, for it is not the ground on which the judgment is to rest, and it would be, therefore, better to reserve it till the point comes before us in proper shape. The defender ultimately rested his case on that last plea which brings out a question, not of pledge nor of security, but of absolute transfer of right from the debtor to the creditor. It is upon that shape of the case that I think it safest that our judgment should now rest.

In this class of questions, and others bearing analogy greater or smaller to them, there has been a good deal of confusion introduced into our practice from a loose and not correctly discriminating use of the phraseology and doctrines of English law. That is unfortunate, for in regard to the passing of property, no two laws can possess terms of more opposite significancy, or be founded on more conflicting principles. It is in this way that the expressions "lien" and "set off" have got introduced into some of our books,—superseding,—as if they were in their practical bearings equivalent, or nearly so, to—our old Scotch doctrines of compensation and retention. And, perhaps, this is not to be wondered at, considering the analogies that do exist between the two laws. But it is most dangerous, in matters of this sort, to be carried away by analogies and similarities. That the two laws are perfectly distinct, even in origin and in their principles in regard to this class of questions, has been most clearly demonstrated by Professor More in a very learned passage in his Commentaries on Lord Stair, with which I may say that I am very much inclined to agree. In England there is much of statute, in Scotland there is wholly common law. The law of "set off" is altogether the creature of statute. The bankrupt law, again, has introduced a principle of set off of mutual debits and credits, which has still more closely approximated the law of England to the broad principle of the common law of retention. But, when you are dealing with statutory law on the one hand, and the common law on the other, it is impossible not to see the danger of trusting to the analogy between our own law and that of the sister country.

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Keeping this in view, there have, in our own law, arisen sometimes considerable difficulties as to the distinction between custody and possession. Questions may arise as to goods, which, in a certain sense, are in custody, if in the hands of a workman who gets them for the special purpose of performing operations upon them,—which being performed, the article has been changed in shape, and is, in its changed state, restored to the owner. The workman has the custody, but the possession is still in the proprietor. Again, a carrier has a limited custody, but not possession. A manufacturer has, perhaps, a higher right, but still he has not possession. He is merely the hand which holds the goods for a certain purpose, and his custody is the possession of the proprietor.

The second shape in which possession comes into operation is in the case of proper pledge, where not only custody in that sense in which I have now been explaining exists, but a title of possession is given,—that which in England is said to confer a special property in the article itself. The party possesses the article by force of his own title to it. It is, no doubt, possession of a limited kind, but still of a broader kind than that which exists in cases where it has been distinguished by the name of custody.

Lastly,— and this case falls under it,— the question of possession arises where property is held by absolute title or right,—where the property passes into a new possession, and where the right of property is, no doubt, qualified, but where the qualification does not exist in absolute right. It operates extraneously to that right. It is a personal obligation. The party in possession is absolute proprietor, but under a personal obligation to divest himself, and reinvest the original proprietor of the goods.

Now, in applying the law to these different categories, one might anticipate that different principles would have to be applied, and different results arrived at, and such has been the case. Under which of these classes does the present case fall? Not under that of custody, not under that of proper pledge, but it falls under the class of proprietary right. As to its being a case of pledge, the situation in which the property stood in the bonded warehouse excludes it. The statutes in regard to bonded warehouses provide for the sale and transfer of property, over which rights are to be conferred. But they deal with nothing except the sale and transfer of goods. They do not speak of any security, nor do they give *termini habiles* in which it can be passed. They do not speak of pledge. It is transfer alone with which they deal; nor could it be otherwise, for the goods are liable to the duties for which they have been bonded. They cannot be removed until these are paid; and, therefore, there could be no actual delivery to the pledgee, without which proper pledge could not exist. In a transaction of this sort, it never was meant that the duties should be paid by the creditor. What he was to get was the right to the goods, subject to these duties. He is to get the possession by which the property of the original party is to be transferred to him; and the goods, therefore, cannot come into the active possession of the creditor, for they can only do so by his adding to the loan already given, by advancing the duties to which the subjects are liable under the bond.

It seems to me that that is a state of a matters where the question of property cannot arise. What is given over is the absolute right in that *jus*, whatever it be, which the owner has over the goods in the warehouse, by which the transferee is to be substituted in his place, *quoad* the warehouse keeper, and *quoad* the right to the property in the goods. The party debtor ceases to be proprietor, and the party creditor comes in his stead to hold the *jus dominii*. It is that which is given. Possession remains where it was. Therefore there can be no pledge of the goods themselves. There is a transfer of the right, but that is very different from delivery of the goods. The right cannot here be given to the creditor without divesting the debtor of all right he had in the goods, and transferring it to the creditor, and that is a different contract altogether from the contract of pledge. There might, possibly, be pledge of goods in a bonded warehouse. If delivery orders had passed from hand to hand, these might have been a pledge of so many writings. One can understand such a document as would interpose difficulties in the way of the original proprietor getting the goods out of bond. It might be a security of its own kind, and there might also be questions whether there might not be an assignation in security. But that, again, is different from the present case. If that

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which is in the hands of a third party be so assigned, then it is a security alone which the party gets, and the right of property is not altered, just as, in an assignation of a bond, if duly intimated, the assignee comes to have an absolute right to the security. It is by force of law, and not by the intention of parties, that the ultimate right of parties arises. The goods here are in a somewhat like predicament, as in the case of a debt meant to be made the means of security and credit. You cannot pledge the debt, but you may grant an absolute assignation of it. The party cannot get possession except by a change of circumstances, to which he is not bound to be a party. But the bond may be pledged, in virtue of which the debt may be claimed, and thereby an obstacle interposed to the creditor getting his money. There may be assignation in security—there may be transference by absolute title—but there are no *termini habiles* for pledge.

In the present case the security is created by the delivery-note. It is absolute in its terms. It is intimated as an absolute transfer to the warehouse-keeper, and it is entered in the books as transferring the goods to the party; and, in short, if it had been a sale out and out, there would have been no difference in the use made of this delivery-order. The formal title being thus absolute, the legal right follows by force of law. The property has passed on absolute title, but on the other side there is a personal obligation to reinstate. This precisely comes within the category of cases with which we are familiar. It is the same as a disposition in security *ex facie* absolute, but with a back-bond apart; or an absolute intimated assignation of a bonded or other debt with back-titles; or an absolute vendition of a ship; or a trust constituted by absolute deed; or a seller's retention for a separate debt; or a cautioner's retention for a separate debt; or, in the case of a purchaser under mandate, of the purchaser's refusal to convey; or a wadsetter's right to apply rents; or a refusal to purge incumbrances. These are cases in every one of which decisions have been pronounced by this Court; and in one and all of them, the creditor's right of retention has been held to arise by force of law. It thus arises from the shape of the title, from its character as an absolute divestiture of the party granting it, and out of the very circumstance that the formal or legal title is absolute in him, with a mere personal obligation to apply it only in a particular way. It is just a right of retention under our common law, as applied to cases where compensation is shut out. It is compensation extended to the case of a bankrupt, or as Bell calls it, the settlement of accounts of a bankrupt. It gets quit of the ground of objection which applies in the case of compensation, if the debts are not of the same character as an obligation *ad factum præstandum* against a money claim, a present against a future claim, and many others. In one and all of these cases the law of retention has been held to apply, more especially where bankruptcy intervenes, for then there is by force of law given a wider right to the party, and he is entitled to all the remedies of retention, which applies alike to liquid and illiquid obligation.

But objections are raised, that this is against the good faith of the contract; and it may at once be conceded, that at first the intention of parties here was of a limited character. But so it was in all the cases to which I have referred, and never was held to be a good answer. The ruling principle is the absolute character of the title, and the intention to operate as against such a title. This leaves it open to presume an extension of purpose, where there is an extension of debt to the party having the absolute right. Therefore, I hold this to be in no sense a case of proper pledge. It is a question arising from a title giving an absolute right of property, where the debtor can only be reinstated by the act of the creditor, where he cannot call that act into existence, except by force of the personal obligation, and where he cannot insist upon that personal obligation, except by performing the obligations which he himself lies under to the creditor.

LORD CURRIEHILL. — The decision of this question depends upon the legal character of the right of the defenders to the brandy in question. If the right of property thereof was transferred to them, then, although the purpose for which that transfer was made to them originally was to secure the payment to them of a specific debt, yet, as the debtors parted with their right of property, their reversionary right was reduced to a mere personal claim, or *jus crediti*, entitling them to call upon the defenders either for restitution of the goods, upon the debt being paid *aliunde*, or to account for any balance of the price if the defenders

should sell the goods in order to obtain payment of the debt. This is clearly the law of Scotland, as has been established by a train of decisions, and a long course of practice, in reference to securities granted by means of completed transfers *ex facie* absolute, and qualified only by separate personal obligations.

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Another elementary principle in the law of Scotland is, that in such a case the holder of a security so constituted, when called upon to perform his personal obligation to restore to the original owner the subject of the security, or the balance thereof, on the specific debt in reference to which it was constituted being satisfied, is entitled to retain the same in security or satisfaction of any other debt which may then be owing to him by that original owner. That in the practice of Scotland the plea of retention operates in such a case, is *triti juris*. This right of retention is *sua natura* different from a right of *lien;* inasmuch as retention entitles a party who is the owner, or *dominus* of property, to withhold performance of some personal obligation to transfer his right of ownership to another, until the latter perform a counter obligation; whereas lien entitles a party who is in possession of what is another party's property, to continue to withhold it from its real owner, until the latter perform a counter obligation. And, on the other hand, the corresponding right to demand possession of the property, on the counter obligation being performed, is, in the former case, merely a personal right, or *jus crediti;* while, in the latter case, it is the real right of property.

The defenders maintain that they are in the predicament in which such right of retention is available to them. They state this plea, somewhat ambiguously, under the second head of their original note of pleas in law, and quite unambiguously under their fifth head in the additional note of pleas recently lodged by them.

In support of this plea they found upon an order, dated 16th March 1854, which was given to them by Miller and Company, the former owners of the brandy, directing James M'Lean and Company, the keepers of the bonded warehouse in which the goods were then deposited, to deliver the same to the manager of the defenders. The pursuer not only admits that this delivery-order was granted by Miller and Company, but farther sets forth, in explicit and unqualified terms, in the third article of his statement of facts, that the brandy "was transferred by the warehouseman to the defender in terms of the said delivery-order." And, were there nothing more in the case, it would be clear beyond question that the right of property of the goods was passed to the defenders by a completed transfer; and that any right thereto which may have remained in Miller and Company was nothing more than such a personal claim for restitution as I have referred to.

In the first place, it is another well established principle of our law, that, in cases of this kind, the effect of such a delivery-order, when it is intimated to the warehouseman, and *a fortiore* when (as is stated by the pursuer himself) the goods are actually transferred by the warehouseman to the grantee of such delivery order, is that the real right of property is transferred as effectually as if the goods had been actually delivered to him. The effect in law of such a proceeding is established to be, not only to transfer from the granter to the grantee, the personal obligation of the warehouseman or depository to deliver up the goods, but also the real right of property or *jus dominii* of the *ipsa corpora* of the goods.

And, in the next place, the delivery order, which in such a case is the written title of the transferee, was granted in terms *ex facie* absolute, and the delivery of it to the warehouseman put an end to all connection between him and Miller and Company, and thenceforth the defenders were the only parties for whom he held the goods.

But this was not all. Of the same date as that of the delivery-order, Miller and Company wrote to the manager of the defenders, stating that they enclosed the delivery order for the brandy, and that it was to be held as a security for a specific debt of L.630 in a bill therein mentioned. And, on 9th May 1854, they wrote to him that, as that bill had been renewed for L.500, they authorise him to hold the brandy which had been transferred to him on 16th March preceding, until this bill should be retired. And the pursuer maintains that the effect of these documents was to prevent the transfer of the goods, in the warehouseman's books, from operating a transfer of the right of property according to the rule of law above mentioned.

I am of opinion that this was not the case. The delivery order being *ex facie* in

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absolute terms, and the transfer in the warehousemen's books being confessedly i similar terms, the letters in question, even had they been back letters granted b the defenders to Miller and Company, would not have prevented the real right property from passing to the defenders in terms of the delivery-order, so long least as such back writings remained latent. In all the cases in which securities b transfers *ex facie* absolute have been found to pass the real right of property, the have been such separate latent back-letters delivered to the granters of the tran fers; but their legal effect was held to be merely to create *personal* rights, as alread mentioned.

The pursuer has maintained that the right which the defenders obtained was *su natura* a right of pledge for the debt above mentioned; that that debt was paid; an that on the debt for which goods are pledged being satisfied, the creditor's right pledge is extinguished, and he is not entitled to retain the subject of it for othe debts. I do not find it necessary to inquire whether or not in our law the righ of retention for a separate debt would operate in such a case; because, in m opinion, the effect of the transfer was to pass the right of property to the defender and not to create a right of pledge merely in their favour. There is no such limi tation of the right in any of the written documents. In the record the pursuer doe not allege that such was the nature of the right. On the contrary, he admits, an indeed expressly states in his own condescendence, that the brandy was transferre to the defender in terms of the delivery-order; and what he concludes for in th summons is, that the defender should now transfer or deliver the brandy to him.

That the right to the brandy created in favour of the defender was not a right o pledge, appears farther from this, that such a right could not have been complete without actual delivery of the goods to the creditor. Actual delivery is essentia for that purpose. But the right which was transferred to the defender was of such nature as admitted of being completed, and was actually completed, without actua delivery, by the warehouseman entering the transfer in his books, and indeed b the mere intimation thereof to him. Moreover, if the right had been merely pledge, the defenders could not have sold the goods without judicial authority. Bu there can be no doubt that the right which was transferred to the defenders wa such as would have enabled them to sell the goods without any such authority.

The reversionary right of Miller and Company to the brandy was thus only personal claim, or *jus crediti*. But the defenders, while they were under this per sonal obligation, confessedly lent to Miller and Company the L.400 mentioned i the 9th article of their statement of facts. And as, in this state of matters, th latter became bankrupt, the former, in virtue of the rule of law already referred to are entitled to retain their right to the brandy, and to operate payment of that deb out of the same.

On the ground I have stated, I think that the interlocutor of the Lord Ordinary except in so far as it finds that the defenders have not proved the agreement allege in the 7th article of their statement of facts, ought to be recalled; and that th defence of retention ought to be sustained.

Lord Deas.—I am clearly of opinion, with all your Lordships and the Lord Ordinary, that the defender has failed to prove the verbal agreement set forth in his 7th statement of facts. Assuming this to be so, the Lord Ordinary says, in his note, "The question now is whether, under the real contract of pledge, the pledgee is entitled to retain, in security of advances subsequently made beyond and independent of the original consideration for the pledge, and that against the creditors of the pledger?"

I do not doubt that this was the question argued to the Lord Ordinary. It is the only question distinctly pointed at in the record and pleas in law as they originally stood. And, although a different question is covered by the last of the additional pleas, added after the remit from the Inner-House of 10th June 1856, that plea was not urged, even in the opening speech upon this reclaiming note, otherwise than as entitling the defender to a presumption that the pledge was general, unless the pursuer distinctly proved the contrary, the *onus* of which lay, it was said, upon him; and, in connection with this, it was farther said that a specific pledge was not a limited pledge; and so we had the Roman law, and the French law, and the English law, very ably gone over again; but still all in support of a case of *pledge*. Just as in the issue, alluded to by your Lordship, which the defender had proposed

for the trial of the whole cause, although he insisted upon putting it so as to imply the necessity of a re-transference, he still put it as applicable exclusively to a case of pledge,—the words he proposed being, "Whether the defenders wrongfully failed to re-transfer and deliver to the pursuers 300 cases of brandy *pledged* by them in security of advances" to Miller and Company.

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Now I do not hesitate to say that, upon that shape of the argument, I should, as at present advised, have agreed with the Lord Ordinary. Assuming this to be a case of pledge, I think the pledge was specific, and thereby limited, first to one bill and then to another bill; and, if the brandy had been directly handed over to and placed in the cellars of the defender as a pledge, I should have held him bound to restore it on payment of the particular debt for which it had been so pledged.

Not only so, but had the object of the delivery-order been simply to enable the defender to go direct to the bonded warehouse and remove the brandy to his own cellars, and he had at once done so, I am not prepared to say that this would not have been a proper case of pledge,—perfected so soon as the defender had obtained the actual custody of the brandy.

But the *species facti* here are different. The pursuer himself distinctly states that the brandy had been stored by Miller and Company, and entered in their names in the books of Maclean and Company's bonded warehouse,—that it was transferred in these books to the name of the defender, "in terms of the said delivery-order,"—that nearly two months afterwards, when the L.500 bill was granted, a second letter was given to and accepted by the defender, bearing, "We authorise you still to hold the 300 cases brandy transferred to your order 16th March last,"—thus acknowledging the legality and propriety of the matter having been allowed to stand upon that transference,—and accordingly the summons, dated in January 1855, concludes that the defender should be ordained "to transfer or deliver over to the pursuer" the 300 cases of brandy, "now or lately lying in the bonded stores belonging to Messrs James Maclean and Company," with an alternative conclusion, applicable to the case of such transference and delivery having become impracticable,—thus again shewing that to leave the brandy in the bonded warehouse in the name of the defender was the proper and legitimate result of the transaction. Now, in this state of matters, I am of opinion that, whatever else was done, no effectual pledge was constituted of the brandy, whether general or special. That the parties *intended* to pledge it, I have very little doubt; and, if a pledge *could* be constituted by constructive delivery, such as we have here, then I should say this brandy was pledged, and that the consequences deduced by the Lord Ordinary from that contract of pledge would follow. The constructive delivery, if it perfected the contract of pledge, could have no higher consequences than actual delivery would have had. But no authority has been quoted to us for constituting a pledge in this manner. I agree with Mr Campbell that pledge is limited to corporeal moveables which pass from hand to hand, and so is termed a real contract. But to constitute that contract, must not the thing actually pass from hand to hand, which it did not do here? Mr Campbell said, very adroitly, that he would concede to the defender that his case was the same as if Miller and Company had delivered the brandy into the defender's own cellars. But I fear that is a concession for which the defender would have no reason to be grateful. At all events, I should say that if the case were to be taken upon that footing, *cadit questio*. But it is not so. Actual delivery was neither given nor intended to be given, probably because it could not have been given without payment of the duty. The object was to use the brandy as a fund of credit where it lay, by transferring it into the defender's name; and this, as I have already said, did not, and could not constitute the contract of pledge.

The debateable question, if there be one, I think is, whether, having failed in creating a pledge, there was any good right or security created in favour of the defender at all? All the cases referred to of absolute conveyances of property, heritable or moveable, which, although intended to be special securities, have been held to cover the general balance, have been cases in which delivery, neither actual nor constructive, was necessary for their completion. Whereas here, constructive delivery was admittedly necessary, while actual delivery, if stipulated for and given, would, I think, have constituted the different and inferior right of pledge. The subject-matter of the right was a corporeal move-

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able, which, but for the peculiarity of its position, could only have been the subject of pledge; and it is this peculiarity of position which alone can render it, if at all, the subject of a different, and, to the creditor, necessarily a higher right. Nevertheless, I am satisfied that, although different from any case quoted, this peculiarity of position is enough to make way for a security in the form of an absolute transference of a corporeal moveable, which otherwise, while it remained in that position, could not have been made the subject of any security at all. I do not enquire whether plate in the hands of a banker, or goods in the hands of an agent could be dealt with in a similar manner. Or whether the only available course, in such cases, would be to get up the articles and pledge them, or to give a delivery-order for the avowed purpose of enabling the pledgee forthwith to get them up, and so to constitute an effectual pledge so soon as he did actually get them. Neither do I say that a delivery-order, even if applicable to goods in a bonded warehouse, given for the avowed purpose of enabling the creditor at once to get up the goods, and to hold them as a pledge, could be used for the different purpose of getting the goods transferred into the creditor's name, and so enabling him to hold them by an *ex facie* absolute title. There, not only the resulting legal rights would be different from what had been intended (which may often enough happen), but something would be done which the granter of the delivery-order had not intended or authorised to be done—namely, the using of that order to obtain a transference in the books in place of using it to obtain actual delivery. But here nothing was done which the parties did not intend to be done. They intended the goods to remain in the bonded warehouse—the transference to be made in the books of that warehouse,—and the matter to stand upon that transference; and, although the resulting legal rights turn out to be different from those which were contemplated or intended, *that* is a difference which, as I have already said, may often happen, but which can neither render the transaction wholly ineffectual nor give it different consequences from those which the law attaches to it.

I have not hesitated to express my opinion upon the legal question decided by the Lord Ordinary, because not only was that question fully and learnedly argued to us, but it is precisely upon the difference of principle applicable to a case of pledge, and to the case of an *ex facie* absolute transference, like what took place here, that my opinion rests. In a case of pledge the property remains with the pledger, and, consequently, if the article be pledged for a specific debt, the right to withhold it is limited to that debt. But in a transference like this the property passes to the transferee, subject only to a personal obligation to reconvey, and consequently the right of retention for the general balance, competent by the law of Scotland to a party in whose favour the property has been transferred, comes to be applicable—just as happens in the case of an absolute disposition to heritage, or an intimated assignation to a debt, qualified by a back-bond.

D. F. Inglis, for the pursuer, moved for expenses.

Sol.-Gen., for the defender objected. The party had put forward a case which had not been decided. Neither party should be entitled to their expenses.

Lord President.—Then, why did the defender put forward a case of pledge? The pursuer should get the expenses of the averment which was sent to proof. But as to the general expenses of the case, which is of a complex kind, the defender should have expenses, subject to modification.

The Court pronounced the following interlocutor:—"Adhere to the interlocutor of the Lord Ordinary reclaimed against, in so far as it finds that the defender has not proved the agreement specified and averred in article 7th of his statement of facts. *Quoad ultra*, alter the interlocutor reclaimed against, and Find that the defender is entitled to retain the brandy in question, until the advance made by him subsequent to the original transaction is repaid; Assoilzie the defender from the conclusions of the summons, and decern: Find the pursuer entitled to his expenses, occasioned by the averment of the defender sent to proof; and remit to the Auditor to tax the same, and

to report: Find the defender entitled to his expenses in the other parts of the cause, but subject to modification; and before modifying the same, Remit the account thereof when lodged, to the Auditor to tax and report. No. 41. Dec. 13, 1856. Blantyre v. Lang.

PATRICK, M'EWAN, & CARMENT, W.S.—SMITH & KINNEAR, W.S.—Agents.

LORD BLANTYRE, Pursuer and Claimant.—*Penney—Dundas.* No 42.
MISS JAFFRAY, Claimant and Objector.—*Logan—Fraser.*

Commonty.—Question whether, in the division of a commonty, the valued rent of the lands belonging to the claimants, or the extent of possession had by each in the common, is to be taken as the rule for allocating the share of commonty to the several claimants?

THIS was a case of division of commonty, in which no point of law was determined, the decision having turned entirely upon the special facts of the case. It was argued by Miss Jaffray, one of the parties, that the commissioner to whom the Court had remitted to divide the commonty had held a portion of it to belong, as a road, to Lord Blantyre, which ought to have been included in the division, and had, moreover, allocated to her a less quantity than she was entitled to, in consequence of his adopting an erroneous principle for estimating the extent of her right. The commissioner, it was said, had looked to the valued rent in the valuation-rolls of the county, and had allocated a portion of the common to her corresponding to such valuation in proportion to the valuation of the other claimants in the process. It was said that this was unfair, because two portions of her estate were not found in the valuation-roll at all; and it was contended, with reference to such cases, that the rights of parties in the common should be taken according to the use that they previously had of it, and not according to the valuation. The objector proved that she had been in use to pasture, by her tenants, a certain number of sheep upon the common, and ought to get a portion of it sufficient to pasture that number of sheep in future. Dec. 13, 1856. 1ST DIVISION.

In reference to this point, it appeared that there had been a decree-arbitral between Miss Jaffray's predecessor and the neighbouring proprietor, by which her interest was limited in the common "to the *cumulo* valuation of their several lands," which, it was contended, settled the mode by which the allocation of the commonty must take place. Further, the first interlocutor in the case granting the commission to divide the common, directed the commissioner to "divide the said ground among the several parties having interest therein, and that according to the several valued rents of the lands." This interlocutor was pronounced in absence, no defences having been lodged, and was in the usual style of the interlocutor pronounced in cases of division of commonty, where no special circumstances are stated; and Miss Jaffray contended that it must now be disregarded by the Court, who ought, in considering the report of the commissioner, to determine the case according to the proof, which shewed that there was no valuation at all of a portion of the lands, and the state of possession must therefore be taken as the measure of the quantity of the common to be allocated.

The Court did not consider any general question to arise, but held the point to be settled by the terms of the decree-arbitral and the interlocutor. The following is a portion of the opinion delivered, which was adopted by the other Judges as the opinion of the Court:—

LORD DEAS.—As to the valuation being the proper rule, this appears to me to be fixed both by the decreet-arbitral upon which Miss Jaffray necessarily founds, and by the interlocutor allowing a proof and remitting to the commissioner. The decreet-arbitral was pronounced upon a submission to which her predecessor was a party. It divides a certain portion of the common muir of Kilpatrick, and it sets

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aside a certain other portion of it (being the portion now under division), as the common property *pro indiviso* of the objector and various other parties. The decreet-arbitral is, therefore, the objector's own title. It was the *pro indiviso* share allotted to her predecessor by that decreet-arbitral which was conveyed to her by the disposition of 1792. Had it not been for the decreet-arbitral, the disposition would probably have been held to be inept,—for I am not prepared to say that the interest of a feuar in an undivided commonty could be validly conveyed without conveying also the dominant tenement to which that interest attached. But by the decreet-arbitral the interest of the feuar was converted into an interest of common property in a specific portion of ground allotted to him and the other feuars as *pro indiviso* proprietors, and it is this fact alone which makes the disposition clearly a *habile* conveyance. Now, by the decreet-arbitral, the ground is allotted to "the parties submitters as effeiring to the *cumulo* valuation of their several lands;" and, under that title, I do not see how the objector can claim a share of the ground on any other footing than in proportion to her valuation. Then the interlocutor of 17th June 1851 directs the commissioner "to divide the said ground among the several parties having interest therein, and that according to the several valued rents of the lands;" and here, again, I do not see what the commissioner could do, under such an interlocutor, but take the valued rent as his rule. Moreover, as I have already indicated, the interlocutor is in the only terms it could have been, looking to the nature and terms of the title of the parties among whom the division was to be made. (His Lordship here stated the grounds upon which he held the Commissioner to be right upon the other objections also.

THE COURT pronounced the following interlocutor:—"Having heard counsel for the parties on the objections by Miss Agnes Colquhoun Jaffray to the interim report of the Commissioner; repel these objections, and remit to the Commissioner to place march stones on the boundary lines as now adjusted, and to report: Find Lord Blantyre entitled to the expenses of this discussion," &c.

DUNDAS & WILSON, C.S.—JAMES FINLAY, S.S.C.—Agents.

No. 43. THE MAGISTRATES OF DUNDEE AND OTHERS, Pursuers.—*Patton—Thoms.*
DONALD LINDSAY, Defender.—*Boyle.*
JOHN MORRIS AND OTHERS, Defenders.—*D. F. Inglis—Penney.*

Process—Multiplepoinding—Stat. 1584, c. 3.—In a multiplepoinding to try who was entitled to a succession as heir-at-law and next of kin of a deceased, parties who claimed to be legatees were cited, but did not appear. After decree of preference, they raised an action against the trustee and the parties preferred, concluding for declarator that by certain testamentary writings a valid bequest was made in favour of the pursuers;—*Held*, that the pursuers of the declarator were entitled to insist in that action without reducing the decree of preference, and without being obliged to pay the expenses incurred by the defender in the multiplepoinding.

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2d DIVISION.
Ld. Handyside
I.

IN the multiplepoinding raised at the instance of the judicial factor on the estate of the late John Morgan (see ante, vol. xvi. p. 82,) the defenders, John Morris and others, were preferred as next of kin to the deceased. When these parties moved for decree of preference, the nine incorporated trades of Dundee applied for leave to lodge a condescendence and claim, which was refused (see ante, vol. xvii. p. 817.)

The incorporated trades claimed to be entitled to a legacy bequeathed to them by Mr Morgan by holograph writings found in his repositories:—to make good their right to that bequest, this action was raised at the instance of the Provost and Magistrates of Dundee, and the Convener and Box-master of the nine incorporated trades of Dundee, concluding for declarator that certain testamentary writings of the late Mr Morgan contained a valid legacy and bequest of his moveable estate, or at least of as much of it as might be

necessary for erecting and establishing in the town of Dundee an hospital to accommodate one hundred boys—that his succession was burdened with the said bequest—that his executor, and the parties who might succeed to his moveable estate, were bound to retain the residue of the estate, or so much of it as might be necessary to satisfy the bequest; or, if they had intromitted therewith, should be decerned to pay to the pursuers L.100,000, or the amount which should be fixed by the Court as necessary for the execution of the bequest, and that a scheme for the application of the funds should be prepared and fixed in terms of the bequest.

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Defences were given in for Donald Lindsay, the judicial factor on the deceased's estate, and for John Morris and others, who had been found to be the next of kin of the deceased.

The Lord Ordinary, after hearing parties on the defences so far as dilatory and preliminary, ordained parties to print and box the summons and defences, in order to report.*

The first four pleas in law stated for the defenders were :—1. The pursuers had no sufficient title to sue. 2. As the whole of Mr Morgan's estate still formed the fund *in medio* in a depending process of multiplepoinding, this action was incompetent, or not maintainable independently of the multiplepoinding. 3. The pursuers were barred from maintaining this action by the process of multiplepoinding, so long as the interlocutors therein remained unchallenged in the multiplepoinding itself. In particular, the nine incorporated trades were so barred by the Act 1584, c. 10, in respect of their having been duly called in the multiplepoinding ; and the

* "Note.—On the suggestion of the defenders, this case has been reported to the Inner House for the disposal of the defences, preliminary and dilatory. Though generally indisposed to take this course, the Lord Ordinary has, after consideration, deemed it fitting to adopt the suggestion. He has no difficulty as to the pursuers' title to sue, whether of the convener and box-master of the nine incorporated trades, if the alleged bequest is special or limited to the trades, or of the Magistrates of Dundee on behalf of the community, if the charity is for a more general purpose, but still of a local character. But the 2d plea in law, and in connection with it the 3d and 4th pleas, raise questions for consideration which have immediate reference to proceedings before the Inner House in the multiplepoinding, and which are reported in the current volume of the Session Reports, pp. 817–18.' The pursuers rely on the opinions there given as sanctioning, at least suggesting, the action now raised, and, as the defenders do not acquiesce in this view, the Lord Ordinary thinks it preferable to report the case rather than give judgment. He will remark, however, that had the multiplepoinding been at an end, he apprehends nothing has occurred as regards either class of the pursuers to conclude them from bringing an action of the present kind against the parties preferred under the multiplepoinding to the succession. The apparent difficulty is in this action being brought when the multiplepoinding is still *de facto* a depending process, no decree for payment having been pronounced, and certain interlocutors being under appeal. But as decree of preference over the whole fund *in medio* has gone out and been extracted in favour of the defenders called in this action, the difficulty is rather perhaps technical than of substance. The Lord Ordinary would have been disposed to disregard it. Further, he does not see that any reduction of the decree of preference is necessary, nor, if otherwise entitled to bring this independent action, the pursuers can be required, as preliminary to being heard, to satisfy the defenders' expenses in obtaining the decree of ranking and preference in the multiplepoinding. Whether, should the pursuers ultimately succeed under the present action in vindicating out of the hands of the defenders called in this action the succession which they have been preferred to, that succession is to be estimated otherwise than at the net value of it, which came or was presumed to be in their hands, after allowing for deduction of the expenses incurred in vindicating their primary right to the same by the present pursuers having lain by till now, is a question which it is not necessary to anticipate."

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Magistrates could not, by themselves, maintain the action in the manner in which it was libelled; and, at any rate, they were also barred from suing this action, they and their predecessors having been aware of the process of multiplepoinding: and, 4. The pursuers ought not to be allowed to insist in this action, or to disturb the interlocutors in the multiplepoinding, except on payment of the expenses incurred by the defenders.

The defenders were allowed to lodge two additional pleas in law to this effect—1. The action as libelled was incompetent, as there were no conclusions for reduction of the decree of preference; and, 2. The pursuers were in no event entitled to insist in this action, except on condition of paying to the defenders their expenses in the multiplepoinding.

The pursuers moved for an order to make up a record.

The defenders, John Morris and others, objected, and argued;—By the decree of preference in their favour, absolute beneficial enjoyment of the deceased's whole moveable estate was vested in them. Their right under that decree could not be competently questioned in an action of declarator. The only competent mode of doing so was by a reduction of the decree.[1] In ordinary cases parties could only be reponed against a decree in absence on payment of the expense incurred in obtaining the decree.[2] But a decree in absence in a process of multiplepoinding was in a different position, parties who allowed a decree in absence in such cases to go against them being precluded by special statute from opening it up.[3] The fund *in medio* as condescended on amounted to L.97,000; and as the summons concluded for declarator that the pursuers were entitled to a legacy of L.100,000, the result of success in the present action would be that the whole funds vested in the defenders would be swept away, and the large sums of money they had spent in litigation would be entirely lost, and that because the present pursuers had chosen not to appear in the multiplepoinding, although they had been cited in that process. Had they appeared, the first question that would have been settled would have been whether the late Mr Morgan's succession was testate or intestate,[4] and whether the writings founded on by the pursuers constituted a valid bequest? These points might have been settled at small expense, and if the pursuers prevailed, would have saved further litigation. The case of the pursuers was not strengthened by the Provost and Magistrates having lent their names as nominal pursuers. The Magistrates had not been cited; but they were well aware of the proceedings, and besides had no interest under the alleged testamentary writings founded on. The real pursuers, the nine trades, who were cited and did not appear, could not be in a better position than other claimants who had not been cited, and whose claim the Court had refused to admit when the decree of preference was moved for unless on payment of expenses.[5] The position contended for was most equitable and reasonable: one claimant was not to be allowed to lie by and see another spend his whole funds in making out his case, and then, with his means unexhausted, deprive the successful litigant of the benefit of his decree. Or could twenty different claimants raise successively as many different actions, not as law but as policy might dictate, with the view of crushing the claimant who has a preferable title to them

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[1] Mackay v. Murray, 23d Nov. 1826, 5 S. & D. p. 34; Scott v. Campbell, 20th Feb. 1840, ante, vol. 2, p. 631.

[2] Ersk. 4, 3, sect. 6, 23. Shand's Practice, p. 599.

[3] Stat. 1584, c. 3; Sir Geo. Mackenzie's Observations, p. 214; Goodsir v. Chalmers' Trustees, 17th May 1821, 1 Sh. & D. p. 12 (N. E.); Smith v. Nisbet, 9th March 1826, 4 Sh. & D. p. 538; Dewar v. Cruickshanks, 23d June 1842, ante, vol. 4, p. 1446.

[4] Watson v. Simpson, 1st Feb. 1670, Mor. 2710 and 1 Br. sup. p. 606.

[5] Morris v. Geekie, 11th March 1856, ante, vol. 18, p. 818.

all? To admit a rule capable of such abuses would be quite contrary to the whole spirit of Scotch law and practice in multiplepoindings. No. 43.

After hearing counsel for the pursuers,[1] the Court made avizandum. Dec. 14, 1856. Magistrates of Dundee v. Lindsay.

At advising,—

LORD JUSTICE-CLERK.—This action is met by the plea of incompetency; and 2dly, by the demand, as the condition of the action being entertained, for payment of all the expenses incurred by the defenders, the Morris and others, in the competition as to their propinquity to the late John Morgan in the multiplepoinding raised by the judicial factor, which has been so often before the Court; and the latter condition is urged not only against the Nine Incorporated Trades of Dundee, who were cited in that multiplepoinding, but also against the Magistrates and Council of the burgh, who were not cited in that action. At the close of the additional argument yesterday, Mr M'Farlane intimated, that if the present pursuers were successful, his clients were willing to give obligation that they would repeat and pay back the expenses, which they insisted should be paid down now, as the condition of being allowed to go on with the action. Under the head of incompetency, it is further maintained that the only form of action which could be in any circumstances entertained, is that of reduction of the decree of preference, which the Morris and others obtained in the multiplepoinding, after establishing that one of them was the heir in heritage, and the others the next of kin of the deceased. Any other form of trying the question proposed to be raised by the pursuers, it was maintained, was necessarily excluded by the decree of preference, which, therefore, the pursuers had to reduce on competent grounds.

The question of competency is quite distinct from the condition as to payment of the expenses in the multiplepoinding—although the condition was in one light said to be the result of the form of action—(a reduction) which it was said was the only form of action competent. The question as to the necessity of a reduction will be considered in disposing of the competency of the action.

The character, object, and effect of this action must be carefully attended to, as well as the statement of facts on which it is founded. The action is directed against Mr Lindsay, as still judicially holding the estate of the deceased, and against the Morris and others, as *next of kin and representatives of the deceased* John Morgan. In that character, and in that character only, are they called. Then the conclusion —we shall see on what statements grounded—is first, that "it should be declared that the testamentary writings contain a valid legacy and bequest of the whole of the residue of his moveable estate, or at least of so much thereof as may be necessary for the purpose of erecting and establishing, in the town of Dundee, an hospital to accommodate 100 boys, and that the same are valid and effectual as testamentary deeds of the deceased to that effect."

No doubt the conclusion says, in the first part, *the whole* of the residue of the deceased's moveable estate, and the whole argument of the defender was really rested on that expression in that part of the sentence. But most clearly the claim, if it exists at all, can only be, as stated in the main part of the conclusion, for so much as may be necessary for the intended hospital. To no other extent can the claim exist, and it is needless to say that if the Court shall now be called upon to allow, on due information, a proper sum for the purpose, we should not withdraw one sixpence for the purpose of any other sort of building than what suits the eleemosynary character of an hospital for poor boys, as the deceased very sensibly says in one writing ought to be its character. And as the fund was several years ago stated to be about L.100,000, the surplus which would remain would necessarily be very considerable.

The summons then asks to have it found and declared that the "succession of the deceased is burdened with the said bequest, and that the defender, the said Donald Lindsay, as executor foresaid, or the parties found entitled to succeed to the deceased's moveable estate, are bound to retain the residue of the moveable

[1] *Pursuers' authorities.*—Longmuir, 21st May 1850, ante, vol. 12, p. 926; Ersk. 4, 3, sect. 23, 69; Mackay v. Murray, 23d Nov. 1826, 5 S. & D. 31, II. Bell's Com. p. 298; Stair, IV. 16; sect. 3; Smith v. Lauder, 30th May 1834, 12 S. & D. p. 646; Johnstone v. Elder, 17th Jan. 1832, 10 S. & D. p. 195.

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estate, or at least so much thereof as may be necessary for the purpose of erecting and establishing the hospital, in fulfilment of the testamentary bequest, subject to the orders of the Court, in order to its application for the purpose of founding an hospital; or otherwise is or are bound to pay over the same to the pursuers, or to such persons as may be appointed for the purpose of superintending the erection and establishment of the said hospital, or for carrying such testamentary purpose into effect."

The other conclusions are really subsidiary to these two, and are further directed against the defenders if they should have intromitted as the representatives of the deceased. The object of the action, then, is merely to establish that, under a certain writing, there has been constituted a certain claim or burden on the succession, whoever may be the representatives, which must be satisfied and fulfilled out of the moveable estate, to be drawn by such representatives to the extent which the Court may direct, if they have any materials for carrying out the object, in the writings left by the deceased. And the effect of any decree, in terms of the summons, will not disturb, in the smallest degree, or subvert the decree of preference which the defenders have obtained *qua* next of kin. That decree proceeds upon the verdict which found them to be the next of kin, and sustains their claim in express terms *as next of kin*, to the whole moveable estate of the deceased, and ranked and preferred them accordingly. That a party brings an action to constitute a burden on that succession, created by the act of the deceased, whether by bond or by legacy, which it is alleged the next of kin must fulfil, in no respect disturbs the basis on which the claim of the defenders, and the verdict in their favour, rested—viz. that the deceased died generally intestate, and that the defenders are next of kin. That he died intestate is quite consistent with the statement that he gave directions for the application of a part of his funds for a certain purpose, if that was effectually directed to be done. Neither does such a claim to any extent disturb or affect the actual decree of preference which the next of kin have obtained, or the character established in their favour. The decree is in the usual words of style applicable to such a case. As next of kin, the defenders are and will be entitled to the whole moveable estate of the deceased. If these had been debts, open, apparently, to objections, and which the judicial factor had thought it better that the next of kin, as the parties truly interested, should dispute, than himself, the defenders—notwithstanding their decree, and, indeed, in respect of the very decree in their favour—must have paid if well founded. Or, if the judicial factor had paid unquestionable debts, such would be deduction to be borne by the defenders, although the decree finds them entitled to the whole moveable funds of the deceased,—a form of expression which relates to their character as universal representatives, but necessarily entails all burdens on the succession, just because they are representatives. Therefore, neither the form, character, nor effect of the present summons will disturb or overturn in any respect the decree of preference. Nor is there any repugnance or contradiction between the same and his claim.

On this point I have a very firm opinion.

In this view it is very plain that a reduction of the decree of preference cannot be necessary in order to constitute the claim; and, indeed, would be quite inapplicable to the case to be tried, and inconsistent with the only object of calling the defenders. The pursuers state no grounds for reducing that decree, and have no case which would warrant that form of action. The decree sustains the claim of the defenders as next of kin, and prefers them on that ground. The pursuers have not a word to state against that decree. They do not seek to establish in themselves the character established by the decree of preference. A reduction would be totally inapplicable to the case. They go against the defenders, because they are in the character of next of kin, legally established in them by that very decree of preference. The effect of the action will not then impeach or invalidate that preference as next of kin.

Further, in the statement of facts on which the conclusions are rested, there is not one word which disputes the validity of the decree of preference obtained by the defenders, or interferes with its operative effect. A reduction could not be relevantly laid in the circumstances of the case.

It is therefore, perhaps, unnecessary to say much on the Act 1584, c. 3, and on the argument founded on that statute in regard to the finality of a decree of

preference. The object of the statute has been quite misapprehended. Its main object is to protect the raiser of the multiplepoinding against subsequent demands by new claimants and creditors who had not appeared in the former action. In the course of the statute there are terms which also seem to protect those who have drawn the rents from the raiser of the multiplepoinding, so far as not extant, from the claims of subsequent parties having a better right; and to that extent it shews that the preference was not final to the extent alleged, nor the decree exempted from all after challenge. The authorities quoted are, to my apprehension, decidedly opposed to the view taken of the statute by the defenders. But it is needless to say more on the subject, because there is not a word in the statute, or in any law book, which exempts the next of kin from liability to make good either legacies or obligations of the deceased, although he may have died intestate, and parties may have, in a competition, obtained a decree of preference as the next of kin *in mobilibus*. It is only by keeping out of view the character of this action, and by a total misstatement as to its object and effect, that the general argument was raised against its competency as to the finality of decrees of preference and the necessity of reduction. These pleas are wholly inapplicable to the case.

But then it is further contended, that, as a general rule, the action could only be sustained on condition of paying to the defenders the whole expenses which they had incurred in the multiplepoinding, and this again was latterly rested, so far as it was said to be a general rule, on the supposed necessity of a reduction. What might in such a case be the rule, if a new claimant as nearer of kin should now appear, and be found entitled to institute a reduction of the decree of preference in favour of the defenders as next of kin, it would be out of place to consider. What I have stated as to this action, and its character and effect, shews that all the reasoning addressed to us on a totally opposite view of the action is wholly misplaced. Whether a rule as to payment of expenses in previous proceedings extends beyond the case of a reduction of a decree in which expenses are decerned for personally against the raisers of the reduction, or applies in every such case of a reduction, I need not inquire. But, in the law of Scotland, we have no equitable rule as to payment of prior expenses, even in cases of great hardship. I called attention to the case of Scott v. Campbell, Feb. 20, 1840, as a very pointed and marked instance of a different view being entertained. Nor have the remarks made on that case in any degree tended to shake the conclusion that it shews that the law of Scotland does not entertain, to any great extent, the views of equitable interference with the rights of parties to institute actions, by attaching thereto the condition of paying expenses previously incurred in another process, although relating to the very same matters as to which the party is harassed in another process. The claim for expenses in that case was extremely strong. Nor is the remark that there was no reduction in that case of any weight, unless we first find that the pursuers cannot raise any action, except in the form of a reduction. The case of Goodsir v. Chalmers' trustees was quoted by the defenders only from one of the reports, which does not mention the most important question in the case in point of precedent. Chalmers' trustees raised a process of multiplepoinding and exoneration. They disputed a variety of claims of creditors, and incurred in that way considerable expense. At last they obtained a judgment of exoneration. Then another party came forward, and they maintained that, as the condition of being allowed to appear to open up the exoneration in their favour, the compearer must pay the whole expenses incurred by the trustees. But the Court found that the party was only bound to pay the expenses incurred since the date of the interlocutor of exoneration, but no part of the expenses incurred in the discussions with other claimants, which had resulted at last in that interlocutor of exoneration.

This case—I have examined the session papers—turns out to be a precedent clearly against the claim of the defenders. In that case, the party sought directly to open up the interlocutor of exoneration, which the trustees had obtained after full discussion; but the trustees failed in the attempt to obtain payment of all the expenses incurred in the process in the litigation with other claimants,—and that, on the principle, such litigation you must have had, even if no new party came forward. You chose to try these points, and hence, the new claimant cannot be compelled to pay such expenses as the condition of now appearing, notwithstanding your decree of exoneration. The case is very important as a precedent: and

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estate, or at least so much thereof as may be necessary for the purpose of erecti and establishing the hospital, in fulfilment of the testamentary bequest, subject the orders of the Court, in order to its application for the purpose of founding hospital; or otherwise is or are bound to pay over the same to the pursuers, or such persons as may be appointed for the purpose of superintending the erectio and establishment of the said hospital, or for carrying such testamentary purpo into effect."

The other conclusions are really subsidiary to these two, and are further directe against the defenders if they should have intromitted as the representatives of th deceased. The object of the action, then, is merely to establish that, under a ce tain writing, there has been constituted a certain claim or burden on the successio whoever may be the representatives, which must be satisfied and fulfilled out of th moveable estate, to be drawn by such representatives to the extent which the Cou may direct, if they have any materials for carrying out the object, in the writin left by the deceased. And the effect of any decree, in terms of the summons, wi not disturb, in the smallest degree, or subvert the decree of preference which th defenders have obtained *qua* next of kin. That decree proceeds upon the verdi which found them to be the next of kin, and sustains their claim in express term *as next of kin*, to the whole moveable estate of the deceased, and ranked and pr ferred them accordingly. That a party brings an action to constitute a burden o that succession, created by the act of the deceased, whether by bond or by legac which it is alleged the next of kin must fulfil, in no respect disturbs the basis o which the claim of the defenders, and the verdict in their favour, rested—viz. th the deceased died generally intestate, and that the defenders are next of kin. Th he died intestate is quite consistent with the statement that he gave directions f the application of a part of his funds for a certain purpose, if that was effectual directed to be done. Neither does such a claim to any extent disturb or affect th actual decree of preference which the next of kin have obtained, or the characte established in their favour. The decree is in the usual words of style applicable t such a case. As next of kin, the defenders are and will be entitled to the whol moveable estate of the deceased. If these had been debts, open, apparently, t objections, and which the judicial factor had thought it better that the next of ki as the parties truly interested, should dispute, than himself, the defenders—notwith standing their decree, and, indeed, in respect of the very decree in their favour— must have paid if well founded. Or, if the judicial factor had paid unquestionabl debts, such would be deduction to be borne by the defenders, although the decre finds them entitled to the whole moveable funds of the deceased,—a form of expres sion which relates to their character as universal representatives, but necessaril entails all burdens on the succession, just because they are representatives. There fore, neither the form, character, nor effect of the present summons will disturb o overturn in any respect the decree of preference. Nor is there any repugnance o contradiction between the same and his claim.

On this point I have a very firm opinion.

In this view it is very plain that a reduction of the decree of preference canno be nécessary in order to constitute the claim; and, indeed, would be quite inappli cable to the case to be tried, and inconsistent with the only object of calling th defenders. The pursuers state no grounds for reducing that decree, and have n case which would warrant that form of action. The decree sustains the claim o the defenders as next of kin, and prefers them on that ground. The pursuers hav not a word to state against that decree. They do not seek to establish in them selves the character established by the decree of preference. A reduction would be totally inapplicable to the case. They go against the defenders, because they are in the character of next of kin, legally established in them by that very decree of preference. The effect of the action will not then impeach or invalidate that preference as next of kin.

Further, in the statement of facts on which the conclusions are rested, there is not one word which disputes the validity of the decree of preference obtained by the defenders, or interferes with its operative effect. A reduction could not be relevantly laid in the circumstances of the case.

It is therefore, perhaps, unnecessary to say much on the Act 1584, c. 3, and on the argument founded on that statute in regard to the finality of a decree of

representatives of the nine trades were called for their interest in the multiplepoinding. They might have appeared, and it was said that if they had then appeared, and had a good case (a supposition which the pursuers cannot refuse to take) the whole expenses of the competition would never have occurred, and hence they have thus caused enormous expense to the defenders, which they now propose to render altogether fruitless by allowing the multiplepoinding to proceed on the assumption that the deceased died intestate.

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Every part of this view of the case is open to various and complete answers.

If the office-bearers of the nine trades neglected their duty by not appearing, I apprehend that in this case the Magistrates and Council would clearly be entitled to appear for the town, and vindicate the right now claimed. It was said that the Magistrates and Council knew of the claim from not only general report, but information communicated to them, and ought on that account to pay down the whole expenses incurred by the defenders. That is much too loose, and I suppose any such ground for the condition of paying the expenses of another law-suit, in which the party was not cited—viz. that he knew of it—was never previously imagined by any one. The objection as to the nine trades would not therefore much avail the defenders, even if it were well founded.

As to the nine trades, I much doubt whether neglect of their office-bearers at the time—five years ago—to appear, could entail any such result as the forfeiture of their right, or the condition of paying down L.5000 or L.6000 of expenses before they can be heard. If they had appeared, a judgment against their office-bearers would no doubt have been *res judicata*. But I am not prepared to admit that neglect to appear must be attended with the result now demanded—the claim not being one in the competition to which the decree of preference applies.

No question of an intestate or testate succession is raised by the pursuers' case. The pursuers do not propose to establish a general will, appointing executors, and conveying, if good, the whole succession of the deceased. They simply set forth a particular writing or writings said to contain a bequest, which they say must be fulfilled by the party entitled to the intestate succession, to the extent which the Court may choose to allow, for the purpose stated in that writing.

Suppose the trades had appeared in the multiplepoinding, what would have been the course to be taken at the outset? No one was acknowledged to be any relative at all. Great doubt existed as to all the parties: even those who have prevailed had to prove a great deal, and they disproved altogether the relationship of those who claimed to be the nearest relations. It might turn out that none of the parties were relations, and the case of M'Lean shews how claimants in such a case may successively be shewn to be impostors. In that state of things, would the Court have gone on to try the validity of this paper for an hospital in Dundee, as the purpose to be fulfilled by the party entitled to the intestate succession, when it did not appear that there was any one entitled to the character of next of kin? Or, were the present pursuers to be put to the expense and vexation of trying this question with all the parties who had come forward as next of kin, when it might turn out that one and all were mere impostors? I have no notion that the Court would have begun the multiplepoinding by adopting any such course. I think the proper and natural course was first to enter into the competition between the claimants for the character of next of kin, and then, when it was ascertained who was the next of kin, would arise, in some form or other, the question as to the validity of any particular bequest claimable from such party. I have no doubt whatever that the competition would have gone on exactly as it has done between the claimants for the character of the next of kin. I look on the representation, therefore, that if the claim had been preferred in the multiplepoinding no expenses would have been incurred in the competition if the pursuer had been successful, as altogether groundless. I have no doubt that the question as to the validity of this bequest would have been superseded, and the competition gone on, just as it did actually do. Hence I see no room whatever for the demand from the pursuers for the expenses incurred in the multiplepoinding in establishing their character as next of kin, as the condition of the pursuers being allowed to come into Court.

Whether the matter is to be viewed with reference to the objects of this action, to the character and effect of the decree of preference, to any rules as to such decrees,

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or any views sanctioned by the Court as to the expenses of previous litigations, the pleas maintained by the defenders in this stage of the litigation must be repelled.

Lord Murray.—I have come to the same conclusion; and having listened to the very able arguments from the bar, I see no grounds for differing. The Act 1584 is a very valuable Act, but it is for the protection of parties subjected to double distress, and the reason of it is, that when a party has raised a multiplepoinding, he ought not to be troubled by any parties who do not appear. *Res judicata pro veritate habetur*. The party must be protected, and here Mr Donald Lindsay would be entitled to the protection of the Act, if he had paid away the money. I do not see what benefit it would have been to the defenders had these parties here come forward earlier, and I do not think their delay has caused any otherwise unnecessary expense. The same expense would be incurred either way. That these parties incurred much expense in making their claim, cannot affect the law: they are the nearest of kin, and the pursuers do not seek to interfere with their title, or to reduce their rights in any way.

Lord Cowan.—When these parties proposed to appear in the multiplepoinding, the proceedings had reached such a stage as to require, in the opinion of the Court, and in justice to the successful competitors, that decree should be pronounced, putting an end to that process. The whole competition had been directed to the enquiry as to which of the claimants were nearest of kin and heirs of line of the deceased, and entitled in that character to take up his whole succession, heritable and moveable. After years of litigation, decree was on the point of being pronounced, when the compearance was made; and in that situation, it was considered that some such proceeding as the institution of an action like the present was indispensable.

It is all important to attend to the precise nature and extent of the claim advanced in this action by the pursuers. Their contention is that the deceased left certain testamentary writings, containing a valid bequest for the purpose of erecting an hospital in the town of Dundee. It is not alleged that these writings contain a valid conveyance of the *universitas* of the deceased's estate. All that is maintained is, that they afford evidence of the deceased's intention to bequeath a specific legacy of so much of his estate as may be necessary to accomplish the purpose he had in view. Thus the claim is not such as to bring into competition the right of parties claiming to be executors-nominate with the title and right of the next of kin, and proper representatives of the deceased. On the contrary, it might have been advanced against executors-nominate, had there been a regular settlement left by the deceased equally, as against the intestate heirs *in mobilibus*. Again, as regards its extent, from the very nature of the claim that cannot be ascertained until the action has been proceeded with. The fulfilment of the bequest may cut deep into the succession of the deceased, or it may leave a large residuary fund to the next of kin after it is satisfied. But whatever be its extent, it is a claim to be made effectual against, and in competition with, the parties entitled to the estate generally, disburdened of debts and legacies, whether those parties be executors-nominate, or heirs *ab intestato*.

The summons contains conclusions declaratory and petitory, aptly and relevantly framed for trying the validity of the alleged bequest. It asks the Court to find that the erection and establishment of this hospital in Dundee is a burden on the succession of the deceased, for which funds must be provided out of the residue falling to the next of kin. The parties called as defenders are Mr Lindsay the judicial factor, the confirmed executor-dative, and the parties who have succeeded in establishing their right as next of kin against all the other claimants in that character. The parties called are the proper defenders in such an action; and although the title of the pursuers is objected to in the defences, it is beyond dispute that the Magistrates and Council of this royal burgh have sufficient right and title to institute proceedings in regard to a matter affecting the interests of the community, while the fact set forth in the summons that the hospital is destined for the education of "the poor children of the nine trades" is conclusive of the title of the other pursuers, as representing the nine incorporated trades of Dundee.

In this state of things, what are the objections taken to this action being allowed to proceed in the usual course? Having regard to the proceedings in the action of multiplepoinding, and to the decree of preference pronounced in their favour the defenders say that the action is objectionable, as incompetent, both generally

and on the special grounds of the summons, containing no recissory conclusions. And farther, they maintain that the payment of the expenses incurred by them in the action of multiplepoinding is, in any view, a condition compliance with which is indispensable before the action is allowed to proceed.

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I entertain no doubt either of the competency of the action or of its sufficiency, without recissory conclusions, to try the question which it is the object of the pursuers to have tried. It may be that the claim could have been made the subject of discussion in the multiplepoinding. I think it might; but, although it had been made even at an early stage of the proceedings, I am not satisfied that its discussion would have taken precedence of the competing rights that were disposed of between the parties alleging themselves respectively to be next of kin. The nature of the claim, as I have said, is limited. It is not for the *universitas* of the estate, but for a specific legacy or bequest, burdening and affecting the *universitas*. No matter, although it may by possibility swallow up the personal estate, — which cannot, however, *in hoc statu*, be taken for granted, for it may, in course of the proceedings, be found to be of comparatively limited extent,—this does not affect the essential nature of the claim as specific and not universal, and burdening merely the general succession. Even if made in the multiplepoinding, therefore, it by no means follows that the discussion of it either would have taken the lead, or would have prevented the parties competing for the character and rights of next of kin from going on with their competition. But whether it would or not, is truly of no consequence in the question of competency. The fact comes just to be this, that the *universitas* of the estate was the subject of competition in the multiplepoinding, that decree has been pronounced in favour of the defenders, and that the special claim here made must now be directed against the parties preferred to the succession.

The decree of preference does not require to be reduced. Clear it is that the decree relative to the heritable estate is not in the least affected. But neither is that relative to the moveable estate, farther than this, that the succession to which the defenders have been preferred may, to a greater or less extent, be burdened, would the pursuers be successful in their declaratory conclusions. Subject to that burden the decree stands.

It is said, however, that as the pursuers representing the nine trades were called in the multiplepoinding, and as the other pursuers, the Magistrates and Council, pursue for the same interest, there is necessity for reduction by the very terms of the statute 1587, c. 3. I do not think that the present case falls within the statutory provisions. I concur in the observations of your Lordships as to that enactment. But, as I have said, no reduction of the decree obtained by the defenders, properly speaking, is required, or would have been competent,—certainly not *in toto*, or as preliminary to the discussion of this claim. If creditors of the deceased were appearing and claiming payment of their debts, they could not be required to reduce the decree of preference. Proceeding on the footing of that decree having fixed on the defenders the character and liabilities of representatives of their debtor, the demand against them would have been direct for payment. So is claim by special legatees. Reduction is no more necessary in the one case than in the other.

But then comes the question of payment of expenses as a condition of the action being proceeded with. A sum, said to amount to about L.6000, expended by the defenders in establishing their character of next of kin, is asked to be paid down by the pursuers before they are permitted to state the grounds of their claim. In so far as the demand was based on the necessity of a reduction, that has been disposed of. It is alleged, however, that on grounds of equity such payment ought to be enforced *in limine*, and, as I understood the defender's counsel, absolutely, whatever may be the result of the action. I know of no principle or rule of practice recognised by the decisions of this Court sanctioning the proposition, which, in my opinion, might lead to the most inequitable results. Take it that the pursuers are unsuccessful in asserting their right to this specific bequest, the defenders would not only go out of Court with absolvitor, and their full expenses of this process, but be enriched to the extent of the L.6000, although it is by the expenditure of that sum they have fixed their right to the general succession as next of kin. I think there would be little equity in that. But say that the pursuers are successful, the claim sustained by the Court may be to a comparatively

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limited extent, keeping in view the largeness of the moveable succession, with its accumulations, set forth in the condescendence of Mr Lindsay. The bulk of the funds may still be left with the defenders, after satisfying this specific bequest, and they will take that in their character of next of kin. Yet it is gravely proposed, although this may possibly be the result, that all the expense of establishing their title to it shall now, *ante omnia*, be paid over to the defenders. There is, I humbly think, as little equity in this view of the result of this litigation as in the other, to justify the claim. Were it to turn out, indeed, that the whole succession will be absorbed by the claim of the pursuers, there might be ground for a claim in equity of the kind pleaded on the part of the defenders; and this, I think, is what the Lord Ordinary points at in his note. But plain it is, that no such equitable view or question can arise for consideration until the extent of the bequest, if it shall be sustained to any extent, be ascertained under the record in this action.

LORD WOOD absent.

THE COURT pronounced this interlocutor:—"Repel the two additional amended pleas in law lodged by John Morris and others, by the permission of the Court, and the second, third, and fourth pleas in law stated in the defences for the said parties: Repel also the first plea in law in these defences in so far as relates to the declaratory conclusions, but reserve consideration of the same, so far as it can competently be stated against the petitory conclusions: Find the defenders John Morris and others, liable in the expenses of the pursuers as against the defenders in the discussion in the Outer and Inner Houses, and remit," &c.

JOHN ROGERS, S.S.C.—HOPE & MACKAY, W.S.—WEBSTER & RENNY, S.S.C.—Agents.

No. 44.

GAVIN SCOTT, Pursuer.—*Fraser*.
ARCHIBALD CHRISTIE, Defender.—*Patton*.

Process—Agent and Client—Withdrawal of agency.

Dec. 16, 1856. 1st Division. Ld. Mackenzie L.

SEE ante, vol. xviii. p. 859.

This case was set down for trial at the Christmas sittings. A note wa[s] now lodged by the pursuer's agent, to the effect that he was no longe[r] to act as agent for Scott, and moving that it be intimated to the de[-]fender.

LORD PRESIDENT.—The Court is not to interfere in this way between agent an[d] client. If a client chooses to dispense with the services of his agent, or an age[nt] withdraws his agency, the intervention of the Court is surely not required.

NOTE withdrawn.

WILLIAM MUIR, S.S.C.—Agent.

No. 45.

WILLIAM FAIRHOLME, Pursuer.—*D. F. Inglis—Pyper—Hector*.
ALEXANDER PRINGLE AND OTHERS (Fairholme's trustees), Defenders.—*Baillie—Ross*.
GEORGE KNIGHT ERSKINE FAIRHOLME, Defender.—*Lord Adv. Moncreiff—Dundas—Macpherson*.

Reduction — Deathbed.—In a reduction *ex capite lecti* of a holograph writing [of] which the date was not authenticated, allegation of facts and circumstances leadi[ng] to the presumption that it was executed of the date it bore, though not exclusi[ve] of the possibility of execution on deathbed, *held* relevant to go to proof, and decr[ee] of reduction *de plano* refused.

Proof—Jury trial or commission.—There is no absolute rule that cases [of] deathbed must be tried by jury. Circumstances in which proof by commissi[on] granted.

No. 45.

Dec. 16, 1856.
Fairholme v. Fairholme's Trustees.

1st Division.
Ld Mackenzie.
L.

The late Adam Fairholme, of Chapel, executed on 8th December 1841 a trust-disposition and settlement, whereby he conveyed his whole property, heritable and moveable, in favour of Mr Pringle, of Whytbank, and others, as trustees—1st, for payment of debts, &c.; 2d, of legacies; 3d, to hold the residue, "subject to such directions or appointments relative to the disposal thereof as I shall think fit to give or make by codicil hereto, or any other writing or writings under my hand, even although executed on deathbed, and however informal the same may be, if clearly indicative of my intentions; and, failing any such directions," to convey the same to his nearest heirs and executors whomsoever. The truster died on 24th May 1853. On opening his repositories the trust-deed was found, having appended to it a holograph codicil in these terms:—" Chapel, 1st Jan. 1842.—I hereby direct and appoint my trustees to assign, convey, and make over the whole of my trust-estate, heritable and moveable, real and personal, to and in favour of James Fairholme, second son of my brother George Fairholme of Greenknowe, and his issue lawfully begotten; and, failing him and them, to George Fairholme, third son of my foresaid brother, and his issue lawfully begotten, subject to such alterations as I may hereafter make. (Signed) A. Fairholme. In witness whereof I have written with mine own hand, and subscribe this codicil at Chapel, the first day of January, one thousand eight hundred and forty-two." There was no attestation of witnesses to the execution, and no authentication of the date when it was written. George Fairholme, of Greenknowe, predeceased his brother, the truster, although alive at the date of the trust-deed, and his eldest son, William, who thus was the heir-at-law of his uncle, brought the present action of reduction of the settlement, so far as it conveyed heritage *ex capite lecti*. James Fairholme had joined Sir John Franklin's expedition to the polar seas, and George Fairholme, the party favoured next after him, was abroad when the action was raised; but, on his return to this country, he adopted the defences which had been given in by the trustees.

The Lord Ordinary pronounced the following interlocutor:—" Having considered the closed record and productions, and heard parties' procurators, Finds it admitted that the pursuer is the heir-at-law of the deceased Adam Fairholme, Esq. of Chapel, who died on the 24th May 1853: Finds that this action has been raised by the pursuer, for the purpose of reducing a writing or codicil, holograph of the said deceased Adam Fairholme, bearing to be dated 1st January 1842, in so far as it contains directions for the disposal of his heritage, to the hurt and prejudice of the pursuer as his heir-at-law, on the ground that the same was executed on deathbed: Finds it alleged by the pursuer that the said writing or codicil was written and subscribed by the said Adam Fairholme when he was on deathbed, and within sixty days previous to the said 24th May 1853, when he died: Finds this averment is denied by the defenders, who allege that the said writing or codicil was executed by the said deceased Adam Fairholme, of the date it bears, that is, on the 1st January 1842, and that he was then, and continued for some years thereafter, in sound health, and in the enjoyment of all his faculties, mental and bodily: Finds it admitted by the pursuer that the said deceased Adam Fairholme was in good health on 1st January 1842, and continued to be so for some years after that date: Finds, with reference to the conflicting statements of the parties as to the period when the deed sought to be reduced was executed, and having regard to the facts and circumstances averred by the defenders on the record"—[These were that "for seven years prior to the truster's death, he had not heard from his nephew James," and had " given up all hopes of his return long before the date at which, on the pursuer's supposition, the codicil must have been written, and had in consequence contemplated altering the codicil so early as August 1852, though he never completed the alteration;" and the "date as given, both in figures and in writing, is holograph, as the body of the document is, of Mr

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Fairholme himself, and the handwriting in which it is written and signed, when compared with other writings, also holograph of Mr Fairholme, written before and shortly after January 1842, appears to correspond with the ordinary handwriting of the deceased at that period, and to bear no marks of being written at a time when he was enfeebled by disease or otherwise. Down to the end of the year 1849 or thereby, no perceptible change in the handwriting of the deceased took place, but from that date, down to the day of his death, a marked change was perceptible; his handwriting during the latter period having become smaller and weaker, so that it did not correspond in appearance with that in which the said direction or appointment has been written and signed by the deceased. The defenders have no doubt, whatever, that the said direction or appointment was, in point of fact, executed by him on the 1st of January 1842, as therein stated"] "That the pursuer is not entitled to insist *de plano* for decree of reduction of the said holograph writing or codicil, and to this extent repels the third plea* in law for the pursuer, and appoints him *quam primum* to lodge an issue for the purpose of trying the question whether the said writing or codicil was executed by the said Adam Fairholme on deathbed; and in the meantime reserves all questions of expenses." †

The pursuer reclaimed, and pleaded;—Where the presumption of deathbed was once raised, the *onus* lay on the party founding on the deed, to allege and prove such facts as should get the better of that presumption. In all previous cases where proof had been allowed, the allegations had amounted to positive evidence, either that the deed had existed previously, or that it could not possibly have been executed within the 60 days. There was not here a single averment which necessarily excluded the presumption. All that was said in regard to the handwriting was, that it appeared to correspond with that of the testator at the date the codicil bore, and that it did not correspond with his usual writing about the date of his death. That was not a relevant defence,—it should have been averred that it was impossible for the deceased to have so written.

Lord President.—I have no doubt the statement here is relevant to go to proof.

Lord Deas.—The defenders aver that the codicil was written of the date it bears. Surely that is relevant.

Draft issues were then lodged by the pursuer, throwing the *onus* on the defender, and the defender throwing it on the pursuer, but the pursuer's contention was, that, in the circumstances here, as the case must turn on delicate views of legal presumption and of the law of deathbed, jury trial was not a suitable way of disposing of it. There was the farther peculiarity that the party first called by the codicil, and so principally interested, had gone abroad, and might still be alive and return. In such a case, it was peculiarly important that the whole evidence should be preserved, in order that, if he

* The defenders have not set forth any facts sufficient to elide the legal presumption that the said writing or codicil was executed on deathbed.

† "Note.—It was contended by the pursuer at the debate, that he was entitled, *de plano*, to decree of reduction, on the ground that the defenders had not set forth on the record a relevant case to support the deed or writing challenged. A holograph writing does not prove its own date; and if it be prejudicial to the heir-at-law, the presumption is that it has been executed on deathbed, where there is no counter-presumption or legal evidence to the contrary. But it is quite competent for the defenders to instruct their averment that the deed was executed of the date it bears, in *liege poustie*; and it appears to the Lord Ordinary that they have set forth facts and circumstances which entitle them to a proof on this point, under the general issue usually adopted in practice for trying the question of deathbed."

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ever returned, he might see on what ground it had been reduced in his absence, if it should be reduced.[1]

The trustees stated that they would be satisfied with any course the Court thought best, but they conceived it their duty to submit that the usual course should be followed of sending the case to a jury.[2]

Lord President.—I am a good deal moved by the peculiarity of the circumstances in this case. Although the general rule, undoubtedly, is to try deathbed cases by jury, yet there is no imperative rule on the subject, and when there are strong grounds for taking another course, it is open for the Court to adopt it. This appears to me to be such a case. The leading defender, if alive, is abroad, and it certainly thus becomes very desirable to preserve the fullest possible record of the proceedings. Then I do not think there need be an issue at all, when the proof is to be taken by commission. This is not a large record, and does not open up much ground for discussion.

The Court pronounced the following interlocutor:—"The Lords, on report of Lord Mackenzie, Ordinary, and having heard counsel for the parties, remit to the Lord Ordinary to grant a proof on commission to both parties, and to each a conjunct probation; the pursuer to lead evidence first: Find that an issue is unnecessary: Reserve all questions of expenses."

Gibson & Hector, W.S.—A. & A. Campbell, W.S.—Arthur Forbes, W.S.—Agents.

No. 46.

William Porteous (Inspector of Poor for Parish of Dalrymple), Pursuer.
G. Bell—D. Mure.

Alexander Blair (Inspector of Poor for Parish of Dailly), Defender.—
Penney—N. C. Campbell.

Poor—8 & 9 Vict. c. 73, sect. 74—Settlement—Interruption of residence by receipt of relief.—Circumstances in which *held,* that parochial relief given to a party not a proper object of relief, had not the effect of preventing his acquiring a residential settlement;—*Question,* whether relief given by an inspector, within a few days of the completion of a five years' residence, without any inquiry, and without complying with the forms issued by the Board of Supervision, could amount to statutory relief?

Process—Advocation.—In advocations, the interlocutors brought under review should be prefixed, and not subjoined, to the inferior Court proceedings.

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The nature of this action, as well as the allegations of parties, and import of the proof which was led, appear from the following interlocutor pronounced by the Sheriff-substitute at Ayr (Robison), which, on considering a reclaiming note, was adhered to by the Sheriff-depute (Christison):—"Finds that this is an action at the instance of the parish of Dalrymple to recover from the parish of Dailly certain alimentary advances made by Dalrymple to two individuals, husband and wife, of the name of M'Nish, residing in Dalrymple, and alleged to have there become proper objects of parochial relief at the time when the advances in question began to be made by the pursuer, namely, on the 19th day of October 1848; and the action also concludes for relief of future advances, and is directed against the parish of Dailly as being that in which James M'Nish, the husband, was born; while the defence set up by Dailly is, that the giving of relief to the supposed paupers by the pursuer was merely a device to prevent them from acquiring a residential settlement in Dalrymple, which they were nearly completing when the said advances began to be made, but without being warranted by the circumstances of the recipients, who were then able to support them-

[1] [illegible], 6th July 1822, Sh. vol. 1, p. 551.
[2] M'Farlane on Issues, p. 531.

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estate, or at least so much thereof as may be necessary for the purpose of erecting and establishing the hospital, in fulfilment of the testamentary bequest, subject to the orders of the Court, in order to its application for the purpose of founding an hospital; or otherwise is or are bound to pay over the same to the pursuers, or to such persons as may be appointed for the purpose of superintending the erection and establishment of the said hospital, or for carrying such testamentary purpose into effect."

The other conclusions are really subsidiary to these two, and are further directed against the defenders if they should have intromitted as the representatives of the deceased. The object of the action, then, is merely to establish that, under a certain writing, there has been constituted a certain claim or burden on the succession, whoever may be the representatives, which must be satisfied and fulfilled out of the moveable estate, to be drawn by such representatives to the extent which the Court may direct, if they have any materials for carrying out the object, in the writings left by the deceased. And the effect of any decree, in terms of the summons, will not disturb, in the smallest degree, or subvert the decree of preference which the defenders have obtained *qua* next of kin. That decree proceeds upon the verdict which found them to be the next of kin, and sustains their claim in express terms *as next of kin*, to the whole moveable estate of the deceased, and ranked and preferred them accordingly. That a party brings an action to constitute a burden on that succession, created by the act of the deceased, whether by bond or by legacy, which it is alleged the next of kin must fulfil, in no respect disturbs the basis on which the claim of the defenders, and the verdict in their favour, rested—viz. that the deceased died generally intestate, and that the defenders are next of kin. That he died intestate is quite consistent with the statement that he gave directions for the application of a part of his funds for a certain purpose, if that was effectually directed to be done. Neither does such a claim to any extent disturb or affect the actual decree of preference which the next of kin have obtained, or the character established in their favour. The decree is in the usual words of style applicable to such a case. As next of kin, the defenders are and will be entitled to the whole moveable estate of the deceased. If these had been debts, open, apparently, to objections, and which the judicial factor had thought it better that the next of kin, as the parties truly interested, should dispute, than himself, the defenders—notwithstanding their decree, and, indeed, in respect of the very decree in their favour—must have paid if well founded. Or, if the judicial factor had paid unquestionable debts, such would be deduction to be borne by the defenders, although the decree finds them entitled to the whole moveable funds of the deceased,—a form of expression which relates to their character as universal representatives, but necessarily entails all burdens on the succession, just because they are representatives. Therefore, neither the form, character, nor effect of the present summons will disturb or overturn in any respect the decree of preference. Nor is there any repugnance or contradiction between the same and his claim.

On this point I have a very firm opinion.

In this view it is very plain that a reduction of the decree of preference cannot be necessary in order to constitute the claim; and, indeed, would be quite inapplicable to the case to be tried, and inconsistent with the only object of calling the defenders. The pursuers state no grounds for reducing that decree, and have no case which would warrant that form of action. The decree sustains the claim of the defenders as next of kin, and prefers them on that ground. The pursuers have not a word to state against that decree. They do not seek to establish in themselves the character established by the decree of preference. A reduction would be totally inapplicable to the case. They go against the defenders, because they are in the character of next of kin, legally established in them by that very decree of preference. The effect of the action will not then impeach or invalidate that preference as next of kin.

Further, in the statement of facts on which the conclusions are rested, there is not one word which disputes the validity of the decree of preference obtained by the defenders, or interferes with its operative effect. A reduction could not be relevantly laid in the circumstances of the case.

It is therefore, perhaps, unnecessary to say much on the Act 1584, c. 3, and on the argument founded on that statute in regard to the finality of a decree of

preference. The object of the statute has been quite misapprehended. Its main object is to protect the raiser of the multiplepoinding against subsequent demands by new claimants and creditors who had not appeared in the former action. In the course of the statute there are terms which also seem to protect those who have drawn the rents from the raiser of the multiplepoinding, so far as not extant, from the claims of subsequent parties having a better right; and to that extent it shews that the preference was not final to the extent alleged, nor the decree exempted from all after challenge. The authorities quoted are, to my apprehension, decidedly opposed to the view taken of the statute by the defenders. But it is needless to say more on the subject, because there is not a word in the statute, or in any law book, which exempts the next of kin from liability to make good either legacies or obligations of the deceased, although he may have died intestate, and parties may have, in a competition, obtained a decree of preference as the next of kin *in mobilibus*. It is only by keeping out of view the character of this action, and by a total misstatement as to its object and effect, that the general argument was raised against its competency as to the finality of decrees of preference and the necessity of reduction. These pleas are wholly inapplicable to the case.

But then it is further contended, that, as a general rule, the action could only be sustained on condition of paying to the defenders the whole expenses which they had incurred in the multiplepoinding, and this again was latterly rested, so far as it was said to be a general rule, on the supposed necessity of a reduction. What might in such a case be the rule, if a new claimant as nearer of kin should now appear, and be found entitled to institute a reduction of the decree of preference in favour of the defenders as next of kin, it would be out of place to consider. What I have stated as to this action, and its character and effect, shews that all the reasoning addressed to us on a totally opposite view of the action is wholly misplaced. Whether a rule as to payment of expenses in previous proceedings extends beyond the case of a reduction of a decree in which expenses are decerned for personally against the raisers of the reduction, or applies in every such case of a reduction, I need not inquire. But, in the law of Scotland, we have no equitable rule as to payment of prior expenses, even in cases of great hardship. I called attention to the case of Scott v. Campbell, Feb. 20, 1840, as a very pointed and marked instance of a different view being entertained. Nor have the remarks made on that case in any degree tended to shake the conclusion that it shews that the law of Scotland does not entertain, to any great extent, the views of equitable interference with the rights of parties to institute actions, by attaching thereto the condition of paying expenses previously incurred in another process, although relating to the very same matters as to which the party is harassed in another process. The claim for expenses in that case was extremely strong. Nor is the remark that there was no reduction in that case of any weight, unless we first find that the pursuers cannot raise any action, except in the form of a reduction. The case of Goodsir v. Chalmers' trustees was quoted by the defenders only from one of the reports, which does not mention the most important question in the case in point of precedent. Chalmers' trustees raised a process of multiplepoinding and exoneration. They disputed a variety of claims of creditors, and incurred in that way considerable expense. At last they obtained a judgment of exoneration. Then another party came forward, and they maintained that, as the condition of being allowed to appear to open up the exoneration in their favour, the compearer must pay the whole expenses incurred by the trustees. But the Court found that the party was only bound to pay the expenses incurred since the date of the interlocutor of exoneration, but no part of the expenses incurred in the discussions with other claimants, which had resulted at last in that interlocutor of exoneration.

This case—I have examined the session papers—turns out to be a precedent clearly against the claim of the defenders. In that case, the party sought directly to open up the interlocutor of exoneration, which the trustees had obtained after full discussion; but the trustees failed in the attempt to obtain payment of all the expenses incurred in the process in the litigation with other claimants,—and that, on the principle, such litigation you must have had, even if no new party came forward. You chose to try these points, and hence, the new claimant cannot be compelled to pay such expenses as the condition of now appearing, notwithstanding your decree of exoneration. The case is very important as a precedent: and

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I shall be well pleased to see a fuller explanation of it in a note to the report of the present question.*

The first consideration which strikes the mind in regard to this demand for the expenses in the multiplepoinding incurred by the defenders in proving their propinquity, is that such expenses were not incurred in recovering, securing, or protecting the funds of the deceased. The fund was entire and safe in the hands of the judicial factor, and latterly of the Court. The expenses, then, were utterly unproductive of benefit to the present pursuers, if their claim is well founded. The fund has neither been recovered, enlarged, or protected by such expense. This is a very important—often a ruling consideration—in regard to such a demand for expenses, whether stated as a condition of instituting an action, or as resulting from its success, as in the case of Agnew. Accordingly, the demand for expenses is not rested on any benefit accruing to the present pursuers, or to the fund, from any such outlay. On the contrary, it is rested on the loss said to be occasioned to the defenders, if the case of the pursuers is well founded. And the defenders insisted on the condition of paying all the expenses in the multiplepoinding, in respect of the particular circumstances attending that multiplepoinding. These were stated at extreme length to us, but in truth may be summed in a very few words. The

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* Goodsir v. Aiken and Others (Chalmers' Trustees.)

This was an action of multiplepoinding and exoneration raised by the trustees on the bankrupt estate of Chalmers and Company—the creditors were called as defenders.

The dividend on one debt ranked on Chalmers' estate having been claimed by Crawford as trustee for a creditor, and also by the Fife Bank in virtue of an assignation to the debt, Chalmers' trustees raised a multiplepoinding before the Sheriff of Fife, in which they resisted a motion for consignation of the dividend as the fund *in medio*, on various grounds. After much litigation between Crawford and the Bank, he was preferred. Various other questions, raised between the bank and Crawford, were undecided in the Sheriff-Court when the proceedings were advocated *ob contingentiam* of the multiplepoinding and exoneration raised in the Court of Session in name of the trustees. It was then alleged by Crawford, the only creditor who objected, that Aiken, the leading trustee, who was also manager of the Fife Bank, had sacrificed the interests of the creditors on Chalmers' and Company's estate to relieve the bank, and that as acting for the creditors he had not given a faithful account of his intromissions with the bankrupt estate. Crawford urged many objections to the state of the funds of the bankrupt estate forming the fund *in medio*. It was alleged that the trustees had taken credit for a large sum for law business, the accounts for which had not been taxed, and had never been rendered in detail,—that an illegal and unfair distribution had been made of the trust-funds,—that one of Aiken's co-trustees had, as trustee on another estate, retained a large sum of dividends due to Chalmers' estate,—that no proper state of the funds had been lodged in the process, and that the trustees had failed, by culpable negligence, to recover L.500 due to the estate.

Instead of investigating these objections, Aiken having entered into an extrajudicial arrangement with Crawford, his claim was purchased by the bank, and the objections urged by Crawford not being insisted in by the bank, the trustees, on 15th May 1819, procured a decree of exoneration.

Goodsir, another creditor on Chalmers' estate, presented a representation against the decree of exoneration, which was admitted after the discussion already reported.—(See 1 Shaw's reports, p. 12, N. E.) The grounds on which it was contended that the decree as against him was in absence were, that he had never authorised his name to be used in the multiplepoinding. The affidavit and claim put into process had been procured from him only in order to be used at a meeting of creditors; and the counsel who appeared both for the trustees to crave exoneration and to consent thereto for the creditors, were both instructed by the agent for the trustees. The Lord Ordinary (Alloway) found Goodsir was entitled to be reponed against the decree on payment of the expenses incurred by the trustees. But on a representation to the Inner House, he was allowed to be reponed on payment only of the expenses incurred subsequent to the 15th May 1819, the date of the decree of exoneration.

representatives of the nine trades were called for their interest in the multiplepoinding. They might have appeared, and it was said that if they had then appeared, and had a good case (a supposition which the pursuers cannot refuse to take) the whole expenses of the competition would never have occurred, and hence they have thus caused enormous expense to the defenders, which they now propose to render altogether fruitless by allowing the multiplepoinding to proceed on the assumption that the deceased died intestate.

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Every part of this view of the case is open to various and complete answers.

If the office-bearers of the nine trades neglected their duty by not appearing, I apprehend that in this case the Magistrates and Council would clearly be entitled to appear for the town, and vindicate the right now claimed. It was said that the Magistrates and Council knew of the claim from not only general report, but information communicated to them, and ought on that account to pay down the whole expenses incurred by the defenders. That is much too loose, and I suppose any such ground for the condition of paying the expenses of another law-suit, in which the party was not cited—viz. that he knew of it—was never previously imagined by any one. The objection as to the nine trades would not therefore much avail the defenders, even if it were well founded.

As to the nine trades, I much doubt whether neglect of their office-bearers at the time—five years ago—to appear, could entail any such result as the forfeiture of their right, or the condition of paying down L.5000 or L.6000 of expenses before they can be heard. If they had appeared, a judgment against their office-bearers would no doubt have been *res judicata*. But I am not prepared to admit that neglect to appear must be attended with the result now demanded—the claim not being one in the competition to which the decree of preference applies.

No question of an intestate or testate succession is raised by the pursuers' case. The pursuers do not propose to establish a general will, appointing executors, and conveying, if good, the whole succession of the deceased. They simply set forth a particular writing or writings said to contain a bequest, which they say must be fulfilled by the party entitled to the intestate succession, to the extent which the Court may choose to allow, for the purpose stated in that writing.

Suppose the trades had appeared in the multiplepoinding, what would have been the course to be taken at the outset? No one was acknowledged to be any relative at all. Great doubt existed as to all the parties: even those who have prevailed had to prove a great deal, and they disproved altogether the relationship of those who claimed to be the nearest relations. It might turn out that none of the parties were relations, and the case of M'Lean shews how claimants in such a case may successively be shewn to be impostors. In that state of things, would the Court have gone on to try the validity of this paper for an hospital in Dundee, as the purpose to be fulfilled by the party entitled to the intestate succession, when it did not appear that there was any one entitled to the character of next of kin? Or, were the present pursuers to be put to the expense and vexation of trying this question with all the parties who had come forward as next of kin, when it might turn out that one and all were mere impostors? I have no notion that the Court would have begun the multiplepoinding by adopting any such course. I think the proper and natural course was first to enter into the competition between the claimants for the character of next of kin, and then, when it was ascertained who was the next of kin, would arise, in some form or other, the question as to the validity of any particular bequest claimable from such party. I have no doubt whatever that the competition would have gone on exactly as it has done between the claimants for the character of the next of kin. I look on the representation, therefore, that if the claim had been preferred in the multiplepoinding no expenses would have been incurred in the competition if the pursuer had been successful, as altogether groundless. I have no doubt that the question as to the validity of this bequest would have been superseded, and the competition gone on, just as it did actually do. Hence I see no room whatever for the demand from the pursuers for the expenses incurred in the multiplepoinding in establishing their character as next of kin, as the condition of the pursuers being allowed to come into Court.

Whether the matter is to be viewed with reference to the objects of this action, the character and effect of the decree of preference, to any rules as to such decrees,

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or any views sanctioned by the Court as to the expenses of previous litigations, the pleas maintained by the defenders in this stage of the litigation must be repelled.

Lord Murray.—I have come to the same conclusion; and having listened to the very able arguments from the bar, I see no grounds for differing. The Act 1584 is a very valuable Act, but it is for the protection of parties subjected to double distress, and the reason of it is, that when a party has raised a multiplepoinding, he ought not to be troubled by any parties who do not appear. *Res judicata pro veritate habetur.* The party must be protected, and here Mr Donald Lindsay would be entitled to the protection of the Act, if he had paid away the money. I do not see what benefit it would have been to the defenders had these parties here come forward earlier, and I do not think their delay has caused any otherwise unnecessary expense. The same expense would be incurred either way. That these parties incurred much expense in making their claim, cannot affect the law: they are the nearest of kin, and the pursuers do not seek to interfere with their title, or to reduce their rights in any way.

Lord Cowan.—When these parties proposed to appear in the multiplepoinding, the proceedings had reached such a stage as to require, in the opinion of the Court, and in justice to the successful competitors, that decree should be pronounced, putting an end to that process. The whole competition had been directed to the enquiry as to which of the claimants were nearest of kin and heirs of line of the deceased, and entitled in that character to take up his whole succession, heritable and moveable. After years of litigation, decree was on the point of being pronounced, when the compearance was made; and in that situation, it was considered that some such proceeding as the institution of an action like the present was indispensable.

It is all important to attend to the precise nature and extent of the claim advanced in this action by the pursuers. Their contention is that the deceased left certain testamentary writings, containing a valid bequest for the purpose of erecting an hospital in the town of Dundee. It is not alleged that these writings contain a valid conveyance of the *universitas* of the deceased's estate. All that is maintained is, that they afford evidence of the deceased's intention to bequeath a specific legacy of so much of his estate as may be necessary to accomplish the purpose he had in view. Thus the claim is not such as to bring into competition the right of parties claiming to be executors-nominate with the title and right of the next of kin, and proper representatives of the deceased. On the contrary, it might have been advanced against executors-nominate, had there been a regular settlement left by the deceased equally, as against the intestate heirs *in mobilibus*. Again, as regards its extent, from the very nature of the claim that cannot be ascertained until the action has been proceeded with. The fulfilment of the bequest may cut deep into the succession of the deceased, or it may leave a large residuary fund to the next of kin after it is satisfied. But whatever be its extent, it is a claim to be made effectual against, and in competition with, the parties entitled to the estate generally, disburdened of debts and legacies, whether those parties be executors-nominate, or heirs *ab intestato*.

The summons contains conclusions declaratory and petitory, aptly and relevantly framed for trying the validity of the alleged bequest. It asks the Court to find that the erection and establishment of this hospital in Dundee is a burden on the succession of the deceased, for which funds must be provided out of the residue falling to the next of kin. The parties called as defenders are Mr Lindsay the judicial factor, the confirmed executor-dative, and the parties who have succeeded in establishing their right as next of kin against all the other claimants in that character. The parties called are the proper defenders in such an action; and although the title of the pursuers is objected to in the defences, it is beyond dispute that the Magistrates and Council of this royal burgh have sufficient right and title to institute proceedings in regard to a matter affecting the interests of the community, while the fact set forth in the summons that the hospital is destined for the education of "the poor children of the nine trades" is conclusive of the title of the other pursuers, as representing the nine incorporated trades of Dundee.

In this state of things, what are the objections taken to this action being allowed to proceed in the usual course? Having regard to the proceedings in the action of multiplepoinding, and to the decree of preference pronounced in their favour, the defenders say that the action is objectionable, as incompetent, both generally

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and on the special grounds of the summons, containing no recissory conclusions. And farther, they maintain that the payment of the expenses incurred by them in the action of multiplepoinding is, in any view, a condition compliance with which is indispensable before the action is allowed to proceed.

I entertain no doubt either of the competency of the action or of its sufficiency, without recissory conclusions, to try the question which it is the object of the pursuers to have tried. It may be that the claim could have been made the subject of discussion in the multiplepoinding. I think it might; but, although it had been made even at an early stage of the proceedings, I am not satisfied that its discussion would have taken precedence of the competing rights that were disposed of between the parties alleging themselves respectively to be next of kin. The nature of the claim, as I have said, is limited. It is not for the *universitas* of the estate, but for a specific legacy or bequest, burdening and affecting the *universitas*. No matter, although it may by possibility swallow up the personal estate, — which cannot, however, *in hoc statu*, be taken for granted, for it may, in course of the proceedings, be found to be of comparatively limited extent,—this does not affect the essential nature of the claim as specific and not universal, and burdening merely the general succession. Even if made in the multiplepoinding, therefore, it by no means follows that the discussion of it either would have taken the lead, or would have prevented the parties competing for the character and rights of next of kin from going on with their competition. But whether it would or not, is truly of no consequence in the question of competency. The fact comes just to be this, that the *universitas* of the estate was the subject of competition in the multiplepoinding, that decree has been pronounced in favour of the defenders, and that the special claim here made must now be directed against the parties preferred to the succession.

The decree of preference does not require to be reduced. Clear it is that the decree relative to the heritable estate is not in the least affected. But neither is that relative to the moveable estate, farther than this, that the succession to which the defenders have been preferred may, to a greater or less extent, be burdened, should the pursuers be successful in their declaratory conclusions. Subject to that burden the decree stands.

It is said, however, that as the pursuers representing the nine trades were called in the multiplepoinding, and as the other pursuers, the Magistrates and Council, pursue for the same interest, there is necessity for reduction by the very terms of the statute 1587, c. 3. I do not think that the present case falls within the statutory provisions. I concur in the observations of your Lordships as to that enactment. But, as I have said, no reduction of the decree obtained by the defenders, properly speaking, is required, or would have been competent,—certainly not *in toto*, or as preliminary to the discussion of this claim. If creditors of the deceased were appearing and claiming payment of their debts, they could not be required to reduce the decree of preference. Proceeding on the footing of that decree having fixed on the defenders the character and liabilities of representatives of their debtor, the demand against them would have been direct for payment. So the claim by special legatees. Reduction is no more necessary in the one case than in the other.

But then comes the question of payment of expenses as a condition of the action being proceeded with. A sum, said to amount to about L.6000, expended by the defenders in establishing their character of next of kin, is asked to be paid down by the pursuers before they are permitted to state the grounds of their claim. In so far as the demand was based on the necessity of a reduction, that has been disposed of. It is alleged, however, that on grounds of equity such payment ought to be enforced *in limine*, and, as I understood the defender's counsel, absolutely, whatever may be the result of the action. I know of no principle or rule of practice recognised by the decisions of this Court sanctioning the proposition, which, in my opinion, might lead to the most inequitable results. Take it that the pursuers are unsuccessful in asserting their right to this specific bequest, the defenders would not only go out of Court with absolvitor, and their full expenses of this process, but be enriched to the extent of the L.6000, although it is by the expenditure of that sum they have fixed their right to the general succession as next of kin. I think there would be little equity in that. But say that the pursuers are successful, the claim sustained by the Court may be to a comparatively

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hesitate to lay it down, that wherever there have been such defects, no sum that may have been paid to the party claiming relief can be held to have the character of proper parochial relief in a question of settlement; or that they can of themselves be conclusive against the plea, that, at the date contended for, and when the relief was afforded, he had come to be in that state which precluded his subsequent residence in the parish being of avail to give him a settlement in it. At the same time, I entirely agree with Lord Murray that there are many cases where relief or assistance may have been given by a parochial board, which could not be taken to be proper parochial relief.

But, then, there is the broader view of the case now before us—viz., whether in the circumstances, as appearing from the evidence, M'Nish, the alleged pauper, can be held to have been a proper object of parochial relief at the 19th October 1848; or, to state it more correctly, whether it can be justly said that he was not then able to maintain himself without having recourse to common begging by himself or his family, and without receiving parochial relief. I think there is not sufficient evidence to instruct that such was M'Nish's condition at the time, when it is contended by the parish of Dalrymple that he was entitled to relief as a pauper. In weighing the evidence, I conceive that the defects in the prescribed preliminary inquiries, and the want of any regular deliverance by the board, are important, and that the circumstances and condition of M'Nish, immediately and for some time both before and after the period when he is said to have become a proper object of parochial relief, are also most relevant matter for consideration. Taking the whole together, I concur in opinion with your Lordships that the interlocutors of the Sheriff ought to be adhered to.

Lord Cowan.—The observations of Lord Wood make it scarcely needful for me to say anything. The case might not have been unattended with difficulty had the pauper come forward and been demanding relief on the ground of residence for five years within the parish of Dalrymple. Could he, after he had asked for relief and got it within the five years, have maintained his right on the footing of his having acquired a residential settlement? This is the strongest way of putting the case for Dalrymple. The actual case, however, is different, and the facts are to be considered in their bearing on the relative rights of the two competing parishes. The pauper received two payments—one of 5s., and another of 2s. 6d.—within the five years. As regards the effect of relief given from mere temporary or occasional illness during the currency of the five years, there may be difficulty in holding the settlement period to be thereby interrupted. A single payment, such as was here made, could scarcely have that effect. But the case, as put by the advocator's counsel, does not raise that question. Permanent disability commencing at the date when the 5s. were paid, as in a case requiring permanent relief, is the proposition alleged to be established by the proof. And certainly if this be so, there was no acquisition of a residential settlement by the pauper in Dalrymple. But is this the truth of the case? This man's settlement was the parish of Dalrymple, unless he had *bona fide* received or applied for parochial relief within the five years. This is a matter of fact into which the Court is entitled to inquire. Suppose we had had to consider in the question of settlement, and as a part of the five years, the condition of this pauper and his family *after* Martinmas, when it appears they were receiving from the parochial funds 2s. 6d. a month,—would not the Court have been entitled and been bound to investigate whether there had been a *bona fide* exercise of their discretion by the parochial board in giving that relief in the proved circumstances of the pauper? If that power were not in the Court, very great abuse might occur in such cases. Now the pauper himself says, that at and from Martinmas he got 6s. a-week, including the 1s. spent on tobacco, and got besides bed and board. It would be a perversion of the statute to say that that man was entitled to parochial relief. Now, are not the 5s. in October, and the 2s. 6d. in November, in an equally bad position? The payment of 5s. was made to the wife on an untrue statement—viz., that the man was "lying," *i.e.* bedridden, which was not the fact, and we must put it out of the question. I quite agree as to that with the views which have been stated. Thus all that remains is the sum of 2s. 6d. paid on the 18th November. This was only four days before the expiry of the five years, and before the date when the pauper came into the enjoyment of wages and bed and board, which clearly removed

him from the class of paupers. On that ground, and independently of the suspicious nature of the payment (for I do not go on the conduct of the inspector), I think this single payment cannot be held to have interrupted the currency of the period requisite to fix the pauper's settlement through residence in Dalrymple. No. 46. — Dec. 17, 1856. Wellwood's Trustees v. Boswell or Hill.

The Court pronounced the following interlocutor :—" Advocate the cause—Of new find that the advocator has failed to prove that James M'Nish did not maintain himself in the parish of Dalrymple without parochial relief; and find that the said James M'Nish, at the expiration of the five years of his residence in that parish, was not a proper object of parochial relief; therefore, of new, assoilzie the defender from the conclusions of the action, and decern : Find him entitled to expenses, both in this Court and in the Inferior Court."

Hunter, Blair, & Cowan, W.S.—Patrick, M'Ewen, & Carment, W.S.—Agents.

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Ralph Clarke and Others (Wellwood's Trustees), Real Raisers.—
D. F. Inglis—Macfarlane.
Mrs Sibella Boswell or Hill and Spouse, Claimants.—
Penney—Patton.
Mrs Maria Ann Boswell or Rattray and Spouse, Claimants.—
G. G. Bell.

Trust—Construction.—Landed estates were conveyed to trustees, with directions to settle them upon the truster's granddaughter on her marriage or majority (in April 1849), but declaring that in the event of her marriage without the approbation of the trustees, her interest in the estates should cease and determine. The granddaughter having married (in August 1848) without the knowledge and consent of the trustees, they raised a multiplepoinding for the purpose of ascertaining on whom they were to settle the estate, and, in obedience to an interlocutor of the Court, they lodged a minute stating that they were willing to give their consent to the marriage. The Court held that the subsequent consent was enough to avert the forfeiture.

(1.) Thereafter the heiress claimed the byegone and accruing rents from the date of her marriage in 1848, or of her majority in 1849. But, by subsequent agreement, she allowed the trustees to draw the whole of crop 1849 and the first half of 1850. Out of these rents the trustees expended L.145 in building a cattle shed for the tenant of one of the farms. This was objected to by the residuary legatees—amongst whom the accumulated rents of the estate, so long as vested in the trustees, were directed to be divided—as being an application of the trust-funds in favour of the heiress, and to the loss of the residuary legatees.—*Objection repelled.*

Trust—Expenses.—(2.) The trust-settlement provided that the expense of the entail should be defrayed out of the trust-funds. The heiress employed a separate agent to look after her title. *Objection* to his accounts being paid out of the trust-funds *sustained.*

Factor.—(3.) The trustees employed one of their number to act as factor, agent, and cashier ;—*Held* (applying judgment in the case of Lord Gray and others), that he was not entitled to any professional remuneration whatever.

(4.) The factor having placed the trust-funds realised in the management of the estate in his own banking account, charged himself with bank interest thereupon, and having at various times advanced funds to the estate, charged the trustees with bank interest thereupon ;—*Held*, that a factor so mixing up trust-funds with his own proper funds was liable to pay interest at the highest legal rate, but was entitled to charge bank interest on his advances.

The late Mr Wellwood died in February 1847. He left a widow and an only child—Mrs Boswell—then also a widow, with a family of four children. By trust-disposition and settlement, Mr Wellwood appointed his widow and Mr Dec. 17, 1856. — 1st Division. Ld. Ardr "'

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Ralph Clarke and others his trustees. They accepted, and appointed Mr Warren H. Sands, W.S., one of their number, to be their agent, factor, and cashier. The trustees also accepted of the office of tutors and curators to the truster's grandchildren, so far as regarded the provisions settled upon them by the deed. To each of the trustees the truster bequeathed a sum of L.50. The trust-estate consisted of the lands of Foleyhill and Colinton Mains,—L.650 contained in a bond and disposition in security, and personal property amounting to L.7643, 19s. 1d.

By the eighth purpose of the trust, the trustees were directed, upon the marriage of Miss Boswell, or upon the death of Mrs Wellwood, if Miss Boswell should then have attained majority, or upon her attaining majority, in the event of her grandmother's predecease, to entail and secure the lands of Foleyhill "to and in favour of the said Maria Ann Boswell, and the heirs whomsoever of her body;" whom failing, to and in favour of Miss Boswell's mother. By the same purpose of the trust it was declared, that "in the event of the said Mary Ann Boswell marrying without the approbation of my said trustees first had and obtained, then and in that case her right and interest in the said lands shall immediately cease and determine; and if prior to her marriage the same may have been settled upon her, and she shall marry without such consent and approbation, the next heir of entail called to the succession shall be entitled to take up the succession in the same way as if the said Maria Ann Boswell were naturally dead; and which declaration, in the event of the lands being conveyed and entailed to her before her marriage, shall be engrossed in the deed of entail to be executed in her favour."

Mr Wellwood also directed his trustees to accumulate the surplus of the rents and produce arising from the said trust lands, "so long as vested in them," and to pay over the sums, with the whole residue of his means and estate, after payment of his debts, legacies, and obligations, so far as not directed to be made real burdens upon his said lands, to his four grandchildren, "equally between them, and the survivors or survivor of them, and that at the first term of Whitsunday or Martinmas after the entail of the said lands has been executed."

Miss Boswell attained majority on 29th April 1849. In August 1848 she married Mr Alexander Rattray, but without the consent of the trustees being asked or obtained to her marriage. In these circumstances Mr Wellwood's trustees, in 1850, raised the present action of multiplepoinding and exoneration, for the purpose of having the rights of parties judicially determined.

Mrs Rattray (Miss Boswell) claimed to have the lands directed to be settled and entailed upon her and the other heirs of entail, in terms of the eighth purpose of the trust-deed.

The other heirs of entail maintained that Mrs Rattray's right had been forfeited in consequence of her marriage without the previous approbation of the trustees.

After the preparation of a record, the Lord Ordinary reported the case to the First Division, who pronounced an interlocutor on 30th May 1851, appointing the raisers "to state to the Court whether any, and if any, what steps have hitherto been taken towards obtaining their consent to, and approbation of, the marriage of Mrs Rattray; and also whether they are now willing to give their consent to, and approbation of, the said marriage." In compliance with this interlocutor the raisers lodged minutes, giving their consent; and thereupon the Court, on 21st June 1851, ranked and preferred Mrs Rattray on the fund *in medio*, in terms of her claim.[1]

The obstacle to the trustees giving effect to the marriage being thus

[1] Ante, vol. xiii. p. 1211.

removed, Mr and Mrs Rattray, on 3d July 1851, lodged an additional claim, wherein, founding on the eighth purpose of the trust, and the interlocutor of 21st June 1851, she craved, *inter alia*, "to be preferred on the fund *in medio*, so far as consisting of the bygone and accruing rents of the lands of Foleyhills and others, to the effect of drawing the said rents from and after the month of December 1848, being the date of the claimant's marriage, or from and after April 1849, being the date of her majority, as the periods alternatively when the said lands ought to have been settled or entailed upon her, or from such other date as may be found to have been the proper terminus at which Mrs Rattray's right shall be held to have begun under the eighth purpose of the trust."

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Ultimately, in 1852, Mrs Rattray agreed to allow the trustees to draw the whole rent of crop 1849 and the first half of the crop 1850. This arrangement was embodied in a joint minute by Mrs Rattray and her husband on the one hand, and her brothers and sisters, including Sibella Boswell, now Mrs Hill, on the other. In the condescendence for the trustees, it was stated that "Mr Sands, who acted for Miss Sibella Boswell, had no special authority to make this arrangement on her behalf; but having long been the family agent, he took upon himself to make it, seeing that she might benefit by it." Following out the above arrangement, an entail in favour of Mrs Rattray was duly executed, providing for various legacies, and an annuity to Mrs Clarke, all directed to be made real burdens on the entailed lands.

The trustees now stated that the whole special purposes of the trust had been fulfilled. In the accounts lodged by them, they debited themselves for behoof of the general and residuary legatees with the rents of the entailed lands for crop 1849 and the first half of crop 1850; and, on the other hand, they took credit for all payments on account of these lands applicable to the same period. Among these payments was a sum of L.145, on 16th December 1850, for building a cattle-shed on the farm of Colinton Mains.

The accounts of Mr Sands, the factor, had been audited and adjusted by Mr Donald Lindsay, accountant, and Mr Thomas Ranken, S.S.C. The trustees now stated that the duties performed by Mr Sands far exceeded his own proper share of the general duties of his office, and had he not so acted, it would have been necessary for the trustees to employ some neutral party to act as factor, cashier, and law-agent for them. The fact of Mr Sands having acted as such, had not occasioned any extra charge or expense whatever to the trust-estate.

Miss Sibella Boswell, one of the truster's grandchildren, and, as such, interested in the succession, married, in 1853, Mr Hill; and she and her husband now lodged objections to certain proceedings of the trustees. They objected, in the first place, to credit being given to the trustees for the disbursement of L.145 for building a cattle-shed on the farm of Colinton Mains. There was no requirement in the lease of the lands between the truster and the tenant for the building of additional houses at Colinton Mains, and the trust-estate received no benefit therefrom. Such expenditure was unauthorised by the trust-deed. It was an application of the trust-funds in favour of the heiress of entail and her husband to the loss and damage of the residuary legatees.

With regard to this objection, the trustees explained that it was only after mature consideration that they agreed to erect the building referred to. It was right and proper in the circumstances, and only what any prudent landlord would have authorised. They acted in the matter in *optima fide*, and to the best of their judgment.

(2.) Again, under the trust-deed all the expenses connected with the making up of the title of entail were to be paid out of the trust-estate. Mrs Rattray's agent, Mr Gardner, S.S.C., under this provision, made a claim for the

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whole of his account connected with looking after his client's title, lodged it in process, and enrolled the case to get an order for payment. The trustees objected to this, and to save the expense of making up a record, the question was referred to Mr Ranken, W.S., who sustained the claim to the extent of L.25, 16s. 6d., after taking off above L.50.

This payment was objected to on the ground that the account was only due by Mrs Rattray, and payment thereof by the trustees out of the trust-estate was a misapplication of the trust-funds.

(3.) It was farther objected to the accounts of Mr Sands, that they contained charges for professional remuneration, trouble, or responsibility, on the ground that, as one of the trustees, he was not entitled to profit and emolument from the trust as its law-agent or factor, and was only entitled to all his proper disbursements, which the objectors were willing to allow, and as the same should be ascertained by the Auditor of Court.

(4.) It was also objected that, in the accounts of charge and discharge between Mr Sands and the trustees, he was liable for interest on all sums in his hands at the legal rate. On the other hand, Mr Sands claimed and reserved the right, if the accounts were to be held open, to increase his charges, and, in particular, to charge a higher rate of commission than he had done. He explained that he never retained money in his hands, except until he had realised sufficient to enable him *seriatim* to discharge the liabilities of the trustees, and that for a short time he was actually in advance for the trust.

(5.) They also objected to a charge of L.5, 5s. as a notary fee, which was admitted to be an error, and was withdrawn. The trustees pleaded;—(1.) That Mr Sands having acted as factor, cashier, and agent for all the trustees, was, in the circumstances, entitled to his charges for commission and agency *bona fide* and properly incurred. (2.) More especially, there being no part of Mr Sands' charges which could be held to be applicable solely to what he was bound to do himself exclusively *qua* trustee, or otherwise, there was no ground for any deduction from such charges. (3.) In the circumstances, all the other objections taken against the accounts in question were ill-founded, and ought to be disallowed. More particularly, credit had been properly taken, and ought to be allowed, for the expense of farm-buildings at Colinton Mains, in respect that such expense was a fair and reasonable disbursement by the trustees in the charge and management of the estate, and in respect also of the settlement with Mrs Rattray having taken place on the footing that such disbursement was not to be disturbed.

The objectors pleaded,—1. That testamentary trustees were not entitled to charge salary, commission, or profit for the management of the trust, nor to appoint one of their own number to an office entitling him to receive salary, commission, or profit out of the trust-funds; and all such items should be disallowed. 2. The trustee, Mr Sands, was liable for interest at the rate of five per cent on all sums of money in his hands, such monies having been mixed up with his own funds in bank accounts in his own name, or otherwise used by him in his business. 3. The application of the trust-funds for any purposes other than those warranted by the trust-deed, was illegal; and the accounts should be rectified to the effect of disallowing all such items. 4. The claimants, Mr and Mrs Rattray, having obtained a judgment of the Court upon a closed record on a claim which excluded payment to them of rents falling due while the estates subsequently entailed stood vested in the trustees, were barred from insisting in a claim to these rents, and the payments of a certain portion of these rents to them was unwarrantable. 5. The expenditure upon the steading at Colinton Mains not being in conformity with the directions of the trust-deed, nor a legitimate subject for the disbursement of trust-funds, the charge fell to be dis-

allowed. It could not be justified on the ground of an alleged agreement as to the rents, even if the agreement were otherwise binding, seeing that it formed no part of the agreement. No. 47. — Dec. 17, 1856. Wellwood's Trustees v. Boswell or Hill.

The Lord Ordinary pronounced the following interlocutor:—"Finds that both parties have expressed their adherence to the arrangement made on 25th February 1852, by which the additional claim of Mrs Rattray was disposed of; and having considered the objections taken to the accounts of the trustees, repels the objection taken to the charge in the trustees' accounts for L.145, expended in December 1850 in building a cattle-shed on the farm of Colinton Mains: Finds that Mr Warren H. Sands, himself a trustee, acted as factor, cashier, and law-agent for the trust, and that his accounts, after due examination, have been found to be sufficiently vouched, and to be reasonable in amount: Finds that Mr Sands is not entitled to charge any commission or factor's fee against the trust-estate for his management as factor and cashier: Finds that in so far as Mr Sands' accounts as law-agent have been incurred in the conduct of suits in which the trustees were parties, and he acted as agent for the trust in the suit, he is entitled to make a charge against the trust-estate for his professional remuneration; but that, in so far as his said accounts have been incurred in the administration of the affairs of the trust, apart from judicial proceedings, Mr Sands is not entitled to claim against the trust-estate any professional remuneration, but only to be reimbursed his outlay: Repels the objection by the claimants to the charge for L.25, paid to Mr Gardner, the agent of the heiress of entail, for his business account in the execution of the entail, which, by the terms of the trust-deed, the trustees were bound to execute, and to that extent sustains the charge against the trust-estate: Finds that the charge of L.5, 5s., referred to in statement 20th for the objectors, is admitted to be an error, and to that extent sustains, of consent, the objection to the trustees' accounts: Finds that, under all the circumstances, the interest chargeable against Mr Sands during his management has been fairly stated in the accounts, and that no higher interest is exigible: With these findings, appoints the cause to be put to the roll with a view to the ascertainment of the fact as to residence from Martinmas 1849 to Whitsunday 1850, and with a view to procedure in the multiplepoinding and exoneration." *

* "NOTE.—The point of difficulty in the case relates to the business accounts of Mr Sands, W.S., who being himself a trustee, was factor, cashier, and law-agent to the trust. He had been previously agent for the family, and was well acquainted with the affairs. He was one of several trustees, and when he was appointed factor, a quorum was left to control him, and his management has been satisfactory to all the trustees, and favourably reported on by Mr Donald Lindsay and Mr Thomas Ranken. It is accordingly a hard case for the application of the rule that a trustee shall make no profit by his office, and it is not without some hesitation that his professional remuneration as law-agent has been limited to charges for agency in judicial proceedings. But the general rule of law is now settled, and it has been declared by the highest authority to be important and salutary. The case of Home v. Pringle was decided in the House of Lords on 22d June 1841 (Rob. App., vol. 2, p. 384); the case of Seaton v. Dawson, in this Court, on 18th December 1841 (4 Dun. 319), and the case of Cullen v. Baillie, on 20th February 1846 (8 Dun. 517), and the promulgation of the rule, at least within the legal profession, must be viewed as complete, before the date of Mr Wellwood's death on 25th February 1847, so that the administration of this trust commenced after the rule had been judicially announced and enforced, in this respect differing from the case of Miller's Trustees v. Miller, 23d February 1848 (10 Dun. 765.) A sum of L.50 was bequeathed to each of the trustees; the beneficiaries are, many of them, in minority, and there are no grounds for inferring adoption or homologation of the agency of Mr Sands as professional, and to be remunerated, so

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LORD PRESIDENT.—The points which the Lord Ordinary has decided are numerous, and had better be dealt with by us in the order in which they are presented to us in his Lordship's interlocutor. According to that order, the first point relates to a sum of L.145 expended by the trustees in building a cattle-shed on the farm of Colinton Mains in December 1850. Mr Hill objects to the trustees being allowed to take credit for that sum. The Lord Ordinary has allowed them to do so, and the question is, whether we are to confirm or alter the judgment of the Lord Ordinary on that point.

It appears that the heiress of entail attained majority in April 1849. She had been married in August 1848, but she had been married without the consent of the trustees, and, according to the terms of her grandfather's settlement, their consent was required. Under these circumstances, a question was raised as to her right of succession, and eventually the Court allowed the trustees to state whether they would give their consent to the marriage or not. They did consent to it; and the Court then held that Miss Boswell was entitled to succeed. The expenditure here in question was made at the desire of the tenant of the farm of Colinton Mains. There was no obligation expressed in the lease under which the trustees or landlord could be required to expend money in erecting a cattle-shed. The lease also was for nineteen years from Martinmas 1840, and the disbursement was made in 1850,—therefore about the middle of the lease. The rent was stated to be upwards of L.400, and the expenditure in question L.145.

It appears from certain minutes, not printed, but which have been read to us, that the tenant had applied for this expenditure in November 1848, but that the trustees had then refused to grant it. It also appears that the tenant had renewed the application in 1849, and that then the trustees considered it reasonable and expedient to allow it. They directed the cattle-shed to be erected, and arranged with the tenant that he should defray the expense of erecting it, and should retain the expense out of the rent; and he did retain it at the end of the year 1850, out of the rent for

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as to bring the case within the operation of the principle recognised under special circumstance in Ommaney v. Smith, 3d March 1854 (16 Dun., p. 721.) It was contended by the trustees that Mr Sands being one of several trustees, and there being a quorum without him, he is not within the general rule, and the case of Cradock v. Pyper, 18th January 1850, was strongly founded on in support of this argument. But after careful consideration of the decision in Cradock v. Pyper by Lord Cottenham (Hall v. Twells, Cham. Rep., v. 1, p. 617), as well as the previous case of New v. Jones, 8th August 1833 (reported in a note to the report of Cradock v. Pyper, as above, p. 63), decided by Lord Lyndhurst when Chief Baron, and the more recent case of Lincoln v. Windsor, 9th July 1851 (Law Journ., v. 20, Chan. Rep., p. 531) decided by Vice-Chancellor Turner, the Lord Ordinary has felt himself unable to recognise any ground of exception from the general rule, in the mere fact that the trustee acting as agent is not a sole trustee, but one of several. In the case last mentioned, the point is expressly referred to by the Vice-Chancellor, and no ground for this distinction is recognised, and in the case of the Bon Accord Assurance Company v. Soutter's Trustees, 13th June 1850 (12 Dun., 1010) the claim for professional remuneration was rejected, though there were several trustees. A distinction in regard to agency in a suit, where the trustees were parties, where a law-agent must have been employed, and where the costs of the estate have not been augmented, seems to have been recognised in England, and also in the case of Findlay's Trustees v. M'Omie, 6th March 1852 (14 Dun., p. 621), and to this exception effect has been given in the present case.

"It cannot be otherwise than reluctantly that the Lord Ordinary has felt himself compelled to disallow charges by an agent of the highest respectability, for business necessary and proper, and conducted on terms not denied to be reasonable. But where a general rule of a salutary, though severe character, has been adopted and judicially announced, it must be firmly and inflexibly administered: at least, the Lord Ordinary cannot venture to introduce any further modification of the rule than what has been already recognised in regard to the costs of judicial proceedings."

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the year 1849. These are the facts. Then it appears that in the question whether Miss Wellwood was to succeed to the estate, or was precluded by her marriage,—judgment having been pronounced in her favour,—the farther question arose as to the date from which she was to be entitled to the rents of the estate? and, also, what amount of them should go towards the accumulation directed to be made by the trust-deed? And by minute of agreement it appears that she was to get the rents for the last half of 1850, and not any of the previous rents.

The parties interested in the succession now contend that there was no obligation on the landlord, and, consequently, none on the trustees, to erect this shed: that it was a gratuitous act on their part for the permanent benefit of the estate, and not for the interest of the parties entitled to the accumulated rents up to the period of the majority or marriage of the heiress of entail, and, consequently, that the disbursement cannot be charged as trust-expenditure in the management of the estate to be defrayed from the rents coming into the hands of the trustees for the purposes of such management.

It appears to us, upon the whole, that the Lord Ordinary has arrived at a right conclusion in this matter. The arrangement as between the landlord and tenant appears to be unquestionably a judicious and proper arrangement; and not only so, but it appears to have been more or less necessary to maintain the tenant in the enjoyment of the lease then current. At the time the arrangement was made, the rents out of which the tenant was allowed to retain the expenditure were the rents of 1849. According to the course of succession—if there had been no disturbance of it—these rents would have belonged to the heiress of entail, and, in that case, the burden would have fallen upon her. But, by an arrangement subsequently made, she surrendered as a matter of compromise two years' rents of the estate, and agreed to take the rents from the last half of 1850. Now, it had already been arranged that a sum of L.145 was to be retained by the tenant out of the rents of 1849. It had been retained out of these rents, and, therefore, when the heiress of entail surrendered the rents of these years, she surrendered them as they stood, subject to the arrangements which had already been concluded between the trustees and the tenant as to this expenditure.

The next point relates to the accounts of Mr Sands. The recent judgments of the whole Court settle that point. The broad principle laid down is, that a trustee, in a position which gives him an interest which may possibly be adverse to the estate, is not entitled, in reference to the estate, and in the management of it, to put himself in a position which may give him a bias, and prevent him from discharging faithfully disinterested duties. The judgment of the Court on that point is conclusive. Therefore that part of the interlocutor falls to be altered.

Then, as to Mr Gardner's account, the amount is certainly not large. But it does not appear to us that there was any ground here for calling on Mr Gardner to act at the expense of the estate. The entail was made with such advice as the trustees chose to take, and under a remit from the Court. In these circumstances, it does not appear to us that there was any occasion to employ Mr Gardner at the expense of the estate for Mrs Rattray's behoof.

There then comes the question of interest. That is of considerable importance as a question of principle. Mr Sands was acting as factor and agent for the trust. He was also one of the trustees. I presume that this trust required the command of certain funds, and also that a balance from time to time arose; and Mr Sands, in his accounts, has given the trustees credit for the same interest they would have got if such balance had been deposited in a bank account. It does not appear that there were any accumulations as in bank-accounts, but the rate of interest he allowed them was the same. On the other hand it is contended that a party being trustee is not entitled to keep in his hands funds of the trust, he being trustee and factor, and that, if he does so, he must be liable for interest, not at the rate of bank-interest, but at the highest legal rate, whatever that may be, and also that he would require to have the interest periodically adjusted. In some cases, such a rule may be very essential, because the trust-funds may be in great peril if in the hands of a trustee. If of considerable amount, great loss may accrue to the estate, and it could not be clear, without mixing up an investigation into the parties' own funds, how the matter stood in regard to these funds. The perils are

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considerable, even in regard to persons whose affairs appear to be in a flourishing condition. That observation does not apply merely to an agent who is trustee, but to merchants and others who may be factors on an estate. Again, a trustee, who may also be acting as factor and agent for the trust, may be a person of unquestionable wealth and of undoubted solvency, but it does not appear to the Court that they can make any distinction between such a case and that of a person of less reputed wealth and more doubtful solvency, for it appears to them that it is the only safe course to require that the trust-funds should be disposed of in a way which shall separate them from the proper funds of the person so managing them, and it is easy to do so by having a separate bank-account, in which the trust-funds will be deposited, and be accessible at all times. No doubt, if the party is in advance beyond the amount in the bank-account, he will receive proper remuneration for these advances. But in regard to the interest paid by him,—if he does not take the course of separating the trust-funds from his own, it appears to us that there is no ground for distinguishing between the case of a respectable and responsible person, and a person who may be of questionable responsibility, and, therefore, we think that, in this case, Mr Sands must pay interest at the highest legal rate upon all the trust-funds at any time in his possession.

On the other hand, where there has been an advance by him, he is entitled to the bank-interest which he charges.

Lords Ivory and Curriehill concurred.

The Court pronounced the following interlocutor:—(After a finding approving of the rate of board allowed by the trustees to Mrs Boswell, afterwards Mrs Clark, for Marion Ann Boswell or Rattray, the grandchild of the truster, and the heiress of entail)—"Sustain the charge for the said allowance, without any deduction: *Recall* the finding in the said interlocutor in reference to the accounts of Mr Warren H. Sands, or Messrs Sands, as law-agent or law-agents for the trustees and trust-estate in the conduct of suits in which the trustees were parties: Find, that Mr Warren H. Sands himself being a trustee, the business charges in the accounts of himself as law-agent, and those of Messrs Sands as law-agents, of which firm Mr W. H. Sands is a partner, cannot be sustained, except to the extent of costs out of pocket, and, except to that extent, that Mr Wellwood's trustees are not entitled to credit for the business accounts of Mr W. H. Sands, or Messrs Sands, and sustain to that extent the objection of Mr and Mrs Hill: Recall the said interlocutor, in so far as it repels the objection by Mr and Mrs Hill to the charge of L.25, paid to Mr Gardner, the agent of the heiress of entail, and sustain their objection to that charge: Recall the said interlocutor, in so far as it has reference to the interest chargeable against Mr W. H. Sands during his management: Find that, in the circumstances of the case, Mr Sands falls to be charged with interest at the rate of four cent. per annum on all trust-moneys in his hands from time to time, and that his trust-accounts fall to be balanced annually, so that the yearly balance, on whichever side of the account it may be, may bear interest. *Quoad ultra*, refuse the prayers of both of the notes, and adhere to the interlocutor reclaimed against, and decern: Farther, they remit to the Lord Ordinary to give effect to the present interlocutor, and to proceed in the cause as shall be just, and reserve all question of expenses.

Melville & Lindsay, W.S.—Hill & Robertson, W.S.—Agents.

WILLIAM A. DOBBIE, Pursuer.—*Millar*.
THE ABERDEEN RAILWAY COMPANY, Defenders.—*E. S. Gordon*.

No. 48.

Dec. 18, 1856.
Dobie v. Aberdeen Railway Co.
Scott v. Christie's Trustees.
1ST DIVISION. Lord Neaves. C.

Jury trial—Process—Examination of witness by commission.—A case being put out for trial, motion by the pursuer to examine a witness by commission, on the ground of the dangerous illness of his wife, refused, the defender objecting, and offering to consent to postponement of the trial.

SEE ante, vol. xviii., p. 862.

In this case, the following issue was adjusted on 23d May 1856:—"It being admitted that, on 27th July 1855, and at or near Cove station, on the defenders' line of railway, one of the ordinary passenger trains on the said line came into collision with an excursion train, then standing at or near the said station, in consequence of which, the pursuer (a passenger by the said excursion train) sustained a fracture of both bones of the left leg, immediately below the knee, and a severe contusion upon the knee and other parts of the left leg—

"Whether the said collision occurred through the fault of the defenders, to the loss and damage of the pursuer?"

The case was put out for trial at the sittings on 22d December current, and was now enrolled, on the motion of the pursuer, for a commission to examine the medical man, resident at Aberdeen, who attended the pursuer after the accident. The reason assigned was, that the witness would be unfit to attend the trial in consequence of the dangerous illness of his wife. No medical certificate was produced. The motion was made on the receipt of the country agent's letter, stating the circumstances.

Millar, for the pursuer, admitted that there was no precedent for the application. It was not expressly provided for by the Act of Sederunt of 16th February 1841; but he appealed to the *nobile officium* of the Court to grant it.

Gordon, for the defenders, objected—That the case did not fall within the Act of Sederunt. Besides, it was important for the defenders to have this witness at the trial; and, rather than dispense with his attendance, they would not object to the trial being postponed. In these circumstances it would be a dangerous precedent to grant the motion, besides unjust to the defenders, even if the Court had the power to grant it, which, however, was doubtful.

LORD PRESIDENT.—Even as presented to us—independently of the element of the defenders' consenting to delay the trial—this case is not brought up to the point at which we could grant this motion, but more especially when the defenders do not oppose the remedy which the pursuer has by delaying the trial.

LORD IVORY.—I concur. As to how far the Court may go where an extreme case is brought out, I will not say. There may be cases where no compulsitor of any Court could bring a man from the deathbed of a near and dear relation.

LORD CURRIEHILL.—I concur.

LORD DEAS.—I also concur. But I do not wish to go upon the position of the witness being insufficient to excuse his attendance, but upon the inexpediency of taking proof by commission, where there is, as in this case, a consent to postpone the trial.

MOTION granted.

JOPP & JOHNSTONE, W.S.—WEBSTER & RENNY, W.S.—Agents.

GAVIN SCOTT, Pursuer.—*Fraser*.
CHRISTIE'S TRUSTEES, Defenders.—*Cook*.

No. 49.

Jury trial—Process—Postponement of trial.—Jury trial postponed on the ground of change of agency for the pursuer a few days before the trial, the pursuer being

No. 49. — Dec. 18, 1856. Scott v. Christie's Trustees. — 1st Division. Ld. Mackenzie L.

incarcerated, and the materials for the trial being considered by the new agent insufficient to enable him to do justice to the case.

Issues had been adjusted in this case, and the case put out for trial at the Christmas recess. The pursuer now moved to have the trial postponed. An affidavit was produced by Mr Sprott, W,S., setting forth that, a few days ago, the solicitor who up to that date had acted as the defender's agent had given up his agency:[1] that the pursuer was in jail, one of his incarcerating creditors being his landlord: that he, Mr Sprott, had since been applied to by the pursuer and some of his principal creditors to conduct the case, but that the materials for the trial prepared by the former agent were not complete; that there was a very insufficient precognition; and that although furnished with the names of intended witnesses, he was not aware where he might find them; and that the short interval till the trial would not suffice for the purpose of the necessary enquiries: that the papers were numerous and complicated, and the case was such that in the circumstances it was impossible for him to undertake to bring the case forward for trial at the ensuing Christmas recess.

Cook, for the defenders, opposed the motion. This new agent had been acting in the case for one of the pursuer's creditors for a long time, and unless the mere change of agency were to be held a sufficient ground for postponing the trial, there seemed nothing else to call for the interference of the Court. Much procrastination had already occurred in the case.

The Court pronounced the following interlocutor:—" Having considered the notice of motion for Gavin Scott, No. 221 of process, with the affidavit by Mr Sprot, his present agent,—Discharge the order for trial at the next sittings, and appoint the trial of the cause for the Spring sittings."

Thomas Sprot, W.S.—J. A. Robertson, S.S.C.—Agents.

David Burt, Pursuer.—*Pattison.*

No. 50. Margaret Burt or Henderson and Others, Defenders.—*Macfarlane—Scott.*

Dec. 18, 1856. Burt v. Burt.

Process—Summons—Objection that all parties not called.—In an action of count and reckoning against the representatives of a party alleged to have been sole executrix, the plea was taken that there were co-executors whose representatives ought also to have been called, but were not, and could not, in respect all claim against them was extinguished by the negative prescription,—*Repelled*, so far as insisted in as preliminary (affirming judgment of Lord Handyside).

1st Division. Ld. Handyside L.

David Burt of Arngask brought this action against his sisters, Margaret Burt or Henderson and Beatrix Burt or Baxter, and their husbands for their interests, as executors-nominate and universal disponees of the deceased Isabella Low or Burt, their mother. The action concluded for exhibition of Mrs Burt's intromissions from 1807 till 1816—when the pursuer attained majority—with the estate of her husband, as sole accepting executrix, in order that the amount of the residue of his moveable means and effects, and the share thereof bequeathed and due to the pursuer, might be ascertained.

The defenders stated that they had no personal knowledge of the amount or nature of the moveable estate left by their father at his death, which took place nearly fifty years ago; that they never heard that the pursuer alleged any claim against his father's executry until they were served with the present summons. The executors were all dead before the action was raised; but from the inquiries which the defenders had made, they had ascertained various circumstances, which they narrated at length, and, *inter alia*, that

[1] Supra, p. 178.

their father in his settlement nominated two other persons to be executors besides his wife, and that they all accepted. They therefore pleaded;—"That the action being brought against the representatives of the deceased Mrs Burt, as sole executrix of her husband, and there being two other executors who accepted and acted, the action fell to be dismissed. The pursuer cannot now insist on his claims against the representatives of one of the executors, in respect he has allowed his claim against the representatives of the other two executors to be extinguished by the negative prescription. All parties are not called, and the action cannot be proceeded with, as the other parties who should be made defenders cannot now be called, the long negative prescription being in any view run so far as they are concerned."

No. 50. — Dec. 18, 1856. Pearston v. Wilson.

The Lord Ordinary pronounced the following interlocutor:—"Having heard parties' procurators upon the preliminary defences, repels the same so far as insisted in as preliminary; and the defenders intimating that they do not mean to acquiesce, Finds the pursuer entitled to expenses," &c.

The defenders reclaimed, and prayed the Court to sustain these pleas so far as preliminary, and dismiss the action.[1]

Counsel for the respondent were not called on.

LORD CURRIEHILL.—The action is laid on the sole liability of the defenders, and therefore it is out of the question that any one else should be called.

LORD DEAS.—That view may be more favourable to the defenders than if we were to sustain their plea.

THE COURT adhered, with additional expenses.

JAMES BELL, S.S.C.—MORTON, WHITEHEAD, & GREIG, W.S.—Agents.

No. 51.

JOHN PEARSTON, Pursuer.—*Macfarlane.*
WILSON AND M'LEAN, Defenders.—*Penney—Gordon.*

Implied Discharge.—Circumstances in which *held* that a party, who tendered delivery of goods as on the order of a copartnery, had agreed to make the furnishings as one to a new firm that succeeded the other in its business, and to take the new firm as indebted to them, and had discharged their claim for the price against the original copartnery.

Obligation—Delegation.—*Question,* whether the circumstances here amounted to delegation?

PEARSTON raised this action against the firm of Wilson and M'Lean, and Robert Wilson and John M'Lean, individual partners, concluding for payment of L.59, 17s., the price of certain glazed press paper "sold and delivered by the pursuer to the said firm of Wilson and M'Lean, and to the said individual partners of that firm, defenders, on or about the 19th day of September 1853."

Dec. 18, 1856. — 2d DIVISION. Sheriff of Lanarkshire. I.

In October of that year the firm was dissolved, M'Lean retired, and a new company was formed under the name of Wilson, M'Mutrie, and Paterson. In March 1854 this new firm was also dissolved, and Wilson became bankrupt, and his estates were sequestrated. In the present action judgment was allowed to go against him; but defences were given in by Maclean, who admitted, 1st, that the goods were ordered, the following being the terms of the order which was addressed to Pearston, and dated 14th April 1853:—"Please order eight gross pasteboard glazed as sample, size 37 + 25½, at 3d. per lb., to be ready in July.—WILSON and M'LEAN." And 2d, that they were sent on 19th September to the premises of Wilson and Maclean, and invoiced to them; but he said he (the defender), for his said firm, declined to receive them in implement of the order, although at the pursuer's request,

[1] *Defenders' authorities.*—Geils v. Geils, 1 Macqueen, p. 36; Ross v. Baird, 18th July 1848, ante, vol. x. p. 1493; Munro, 26th Feb. 1829.

No. 51. — Dec. 18, 1856. Pearston v. Wilson.

and for the pursuer's convenience, he allowed them to be temporarily deposited at the pursuer's risk, and at the same time he returned to the pursuer the invoice of the goods, with a notice written thereon of his refusal to receive them as under said order, and that they would lie at the pursuer's risk; that the pursuer having failed to remove the goods from said premises, the other defender (Wilson) requested the pursuer to charge them against himself, or his new firm of Wilson, M'Mutrie, and Paterson, and the pursuer agreed to do so, accepted them as his debtors, giving them credit therefor, and applying to them for payment; and farther, that on the dissolution of the partnership of Wilson and M'Lean, Pearston had rendered and accepted payment—partly in November 1853, the balance on 3d March 1854—of his account, in which, although the last entry was

"September 30th, To goods, . . . L.0 4 6,"

there was no charge made for the price of the goods sent on 19th September, and that it was only after the dissolution of the firm of Wilson, M'Mutrie, and Paterson, that the claim was made as against Wilson and Maclean. A proof was led, after advising which, the Sheriff-substitute (Steele) found, *inter alia*, "that the order was executed and the goods actually delivered into the defenders' place of business, and kept there, on or about 19th September, and while the partnership still subsisted and carried on business: That the defenders were duly debited in the pursuer's books at the time with the price of the said goods, and that an invoice was rendered to them accordingly: No sufficient proof that the pursuer did then or afterwards agree to abandon his claim against the defenders, and to substitute as his debtors the firm of Wilson, M'Mutrie, and Paterson, which ultimately succeeded to the business carried on by the defenders, which firm does not appear to have been formed, or at least to have commenced business, at the time the goods were delivered;" and therefore decerned in terms of the libel.

The Sheriff-depute (Alison) pronounced an interlocutor taking a different view of the facts, in which, *inter alia*, he "Finds that the defenders declined to take the goods as they were not delivered in time, and as in the interim it had been agreed to substitute a new firm in place of the defenders who first ordered the goods: . . . Finds it proved that the invoice was the same day returned with a pencil marking on the back of it, to the effect that the defenders would not take in the goods: Finds, that upon this the pursuer called on the defenders, when Mr M'Lean continued his refusal to take the goods, and the pursuer agreed with Mr Wilson on the part of the proposed new firm to take the goods: . . . . . Finds it admitted that the new firm used the goods: Finds, in these circumstances, in point of law, that the defenders were justified in refusing to take delivery of the goods ordered, on the ground of *mora*, and that the pursuer accepted the new firm as the real purchasers of the goods;" and therefore he sustained the defences.

A note of advocation was presented by Pearston, and taken directly to the Second Division, who arrived at the same conclusion with the Sheriff-depute, but, differing from him as to the import of the proof, pronounced an interlocutor containing the following findings in fact:—"Find, in point of fact, that the goods in question were ordered from the pursuer by Robert Wilson, the partner of the defenders' firm, by the document No. 3-7, during the subsistence of the copartnery: Find that the order was executed, and the goods were sent by the pursuer to the defenders' place of business, along with an invoice, as goods furnished to Wilson and M'Lean: Find that, at the time of delivery, a proposal was made to the pursuer by Wilson, as well as by the defender who received the goods, that as the firm of Wilson and M'Lean was just to be dissolved in a few days, and a new company to be founded by Wilson, as Wilson, M'Mutrie, and Paterson, the pursuer should take that new company as his debtors for the said goods: Find that the pursuer then opened a new account in his ledger in the name of Wilson,

M'Mutrie, and Paterson; in the first entry in which he debits that new company with that furnishing and the price thereof as on September 19, 1853: Find that such entry stood uncancelled* for a very long period; and that, on the 3d of March thereafter, the pursuer received from the defender payment of an account due by Wilson and M'Lean, including the last furnishing to them, ending 30th September, in which the goods in question were not entered: Therefore find, in point of fact, that the pursuer did agree to make the furnishing as one to Wilson, M'Mutrie, and Paterson, and to take them as indebted to him for the price of the same."

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At advising,—

Lord Justice-Clerk.—We have to decide this case upon the evidence, and not upon the findings of the Sheriff; and I arrive at the same result as he has done, although I think he has fallen into some mistakes in his findings. There is no doubt that the goods were ordered by Wilson and M'Lean, and that they were sent to them with a regular invoice, and, in point of fact, were retained on their premises. But M'Lean states, in defence, that the goods were in reality charged against another firm, namely, Wilson, M'Mutrie, and Paterson, and were used by them. That is a defence which must be very clearly made out; and M'Lean says, it is established by the pursuer's own books, and neither party availed themselves of an opportunity we gave of supplementing the proof led in the Sheriff-court. Upon that proof the Sheriff-depute has found that, between the date of the order and the delivery, there was an agreement that the new firm should be taken in place of Wilson and M'Lean;—but of this I find no evidence whatever.

M'Lean perhaps did not expect the goods to arrive, as they did, before the dissolution of his partnership, and demurred to receiving them, and sent back the invoice, and said that Pearston, who called at the time, had arranged that the new firm should take the goods. Now, if supported by the evidence, that is a perfectly good defence.

The defender appeals to the pursuer's ledger, in which Wilson, M'Mutrie, and Paterson are charged with these goods, as of date 19th September. On the other

* The following is an extract from the pursuer's own deposition as a witness:—
"I exhibit my ledger, which contains the following entry:—

" Wilson, M'Mutrie, and Paterson. *Dr.*

1853.					
Sept. 19.	To goods,	These two entries were scored.	L.59	17	0
" 30.	" do.		0	4	6
Oct. 3.	" do.		0	4	6

The account continues after that. The above two entries are delete in the books, as in the excerpt. I produce an excerpt of another account in that ledger, under the title, 'Wilson and M'Lean.' I keep the books. The item at the top of said account, dated '19th September,' was made there a considerable time after said date.† The entry dated '30th September,'‡ at the bottom of the account, was made on 3d March 1854, when the account was squared. In my day-book, which I now exhibit, the goods now sued for are charged to the debit of the defenders. I think the reason why the entries that are now delete were put into Wilson, M'Mutrie, and Paterson's debit, was because the old page in the ledger of the defender's account was written fully up, and as the new concern succeeded the old, and we were commencing a new account, these goods were just put in there by mistake, and not intentionally. The posting of these items took place after I had commenced to deal with the new firm. I never rendered the new firm any account for these goods, and I have no original entry therefor against them. I made the entries in the day-book when the invoice was sent off. The entry that is deleted was not made in consequence, or in compliance with the request in Wilson's note. There is no doubt that it relates to the goods sued for. In the day-book, the entry of goods furnished on 3d October is debited to the defender, but in the ledger it is posted to the debit of the new firm, and paid by them."

† It debited Wilson and M'Lean with L.59, 17s.

‡ This was the 4s. 6d. above noticed.

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hand, in the day-book, they are charged to the debit of Wilson and M'Lean. Now, I cannot take the pursuer's explanation of the entry in the ledger, that it was made in a hurry, because Wilson and M'Lean's account was full. That could be no reason for passing over 40 pages to open a new account in name of Wilson, M'Murtie, and Paterson. If this was done by Pearston himself, it is binding on him; if by a clerk, how could he dream of making out a new account, if he had got no instructions from Pearston?

Then, these goods are not entered in the account rendered to Wilson and M'Lean; although, in that acount, as settled on 3d March, there is an entry of 4s. 6d. which is taken from the account, in name of Wilson, M'Murtie, and Paterson, when the L.59, 17s. was also standing.

I do not say that parole evidence might not have taken away the effect of these entries, but Pearston's evidence certainly cannot do so.

It is clear to my mind, that Wilson having left the new firm, and it never having acknowledged the debt, Pearston became anxious, and deleting the entry in their name, makes a new one in name of Wilson and M'Lean.

Lord Murray.—We must deal with the case on the evidence before us. Nothing can be fairer for the pursuer than to take his own books, and they are against him.

Lord Wood was absent.

Lord Cowan.—This case must be decided on the evidence. The original debtor must prove that the new debtor was taken as a substitute. Now the Sheriff-principal found that there was here an effectual delegation, and the question is, was he right or wrong in so doing? I am not going over the facts. My first impression was in favour of the judgment, but the counsel for the advocator carried me round, and it was only a minute criticism of the books that brought me back again to my first impressions. Wilson's statements all go to support the defence, and to shew there was an understanding that the new firm was to take the goods. Besides, I cannot help thinking that there is a great deal in this, that the goods were actually taken and used by the new firm. On the mere parole evidence there would have been great difficulty, but then there are the books, and M'Lean is not charged with these goods till 3d March. Now that is a strong fact. We find also in the ledger an account opened with the new firm, and the goods charged there. It is said these entries are deleted, but he gives us no explanation either of the time or mode of such deletion.

Lord Justice-Clerk.—I do not regard this as a case of proper delegation. I hold the conference which took place at the delivery to have been part of an original transaction, and it was there settled who was to be the debtor.

The Court pronounced the following interlocutor:—(After the findings in fact given above) "Therefore find, in point of law, that he discharged the claim previously competent to him against M'Lean as partner of Wilson, by whom the goods had been originally ordered as for the firm of Wilson and M'Lean: Therefore advocate the cause: Alter the Sheriff's interlocutor: Assoilzie the defender from the conclusions of the action: Find him entitled to expenses in this and in the inferior Court, and remit," &c.

John Leishman, W.S.—John Ross, S.S.C.—Agents.

No. 52. John Hay (Inspector of the Poor of the City Parish of Edinburgh), Pursuer.—*D. F. Inglis—A. R. Clark.*

Andrew Craig Simpson (Inspector of the Poor of the Parish of South Leith), Defender.—*E. S. Gordon—Hector.*

Poor—Statute 8 & 9 Vict. cap. 83, sect. 71—Repayment of aliment.—In an action for repayment of aliment to a pauper at the instance of the disbursing parish against the parish of the pauper's settlement;—*Held* (altering judgment of Lord Neaves), that the inspector of the parish of settlement having in reply to inquiries respecting the pauper written a letter to the pursuers, wherein, after giving the reason why the pauper had been struck off his roll, he said,—" You should either send her to the

House of Refuge, or offer to take her into your workhouse, of course at our expense,"—this amounted to a contract or agreement, which being acted on by the pursuers, attached liability to the parish of settlement, apart from the statute, and which superseded the necessity of statutory notice; and also *held*, that the claim was not affected by delay in making it, and that it was as much the duty of the parish of settlement to inquire whether the authority had been acted on, as of the other parish to intimate that it had been acted on. No. 52. — Dec. 19, 1856. Hay v. Simpson.

THE Parochial Board of the City Parish of Edinburgh brought this action against the Parochial Board of the Parish of South Leith for payment of L.55, 13s., expended by them for the maintenance and support of a pauper, Christian M'Donald or Paterson, from 24th March 1846 to 1853, with the exception of the period from 10th November 1852 to 28th November 1853. The following letter was addressed by the assistant inspector of Edinburgh to the inspector of Leith—it bore the post-mark of 25th March 1846:—"*Office of Parochial Board, Edinburgh*, 1846.—John Lyon, Esq., Inspector of Poor, South Leith.—Christian M'Donald or Paterson.—Dear Sir,—The above individual, who appears to be about twenty-two years of age, and who is evidently an imbecile, applied here to-day for parochial relief, and informed me that she had aid from your parish for many years, which was discontinued about a year ago. She resides in Toddrick's Wynd. Let me know what you know of her, and if her statement is correct.—Yours truly." (Signed) "JOHN MACKAY." 1st Division. Lord Neaves. C.

The following reply was sent by Mr Lyon to Mr Mackay:—"*Leith*, 25*th March* 1846.—Dear Sir,—If Christian M'Donald is the female, I know (for she has a great many aliases, and was known to us chiefly by the name of Christian Paterson), she is much older than you suppose; and is, I suspect, more rogue than fool. The reason she was struck off from our roll was, that I ascertained that she kept a house for bad women, and it was resolved that she should be sent to the House of Refuge. She refused to go thither, and her allowance was stopped. You should either send her to the House of Refuge, or offer to take her into your workhouse, of course at our expense. The probability is, she will refuse to go to either. Treat her as you would do one whose history is as above."

On 2d December 1853, a statutory notice was given by the pursuer to the defender that the pauper was in receipt of relief, and the defender thereupon acknowledged that the parish of South Leith was liable for her support, and requested that she should be sent to South Leith parish, which was done. The question now was, whether the parish of South Leith was liable for the aliment prior to 1853.

The defender pleaded non-liability, in respect there had been no statutory notice prior to 1853 that the pauper had become chargeable. He also founded on a settlement of mutual accounts in 1852, of "cases admitted or determined to belong to your parish," and on the *mora* of the pursuer in making the claim, while the parish of South Leith were allowed to make their assessments in ignorance of such a claim being competent. As to the settlement, the defender stated, that in January 1850 the pursuer made a claim against the parish of South Leith on account of relief afforded to several paupers, for whose support it was alleged South Leith was liable, extending over a period of about eight years prior to 1850. It was understood that this claim included all demands competent to the parish of Edinburgh against South Leith parish. After some litigation, in 1852 a settlement of accounts took place between the pursuer and defender as representing their respective paupers, which it was understood embraced all their mutual claims as at the date of the above action. In this action and settlement no reference was made to any claim as competent to the pursuer against the defender on account of Christian Paterson.

The pursuer founded on the above correspondence as amounting to a special

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mandate and admission of liability to reimburse the city parish, and in virtue of which authority the pursuer had expended the sums now sued for.

The Lord Ordinary pronounced the following interlocutor: — " Finds, that the claim of relief here insisted in, cannot, in the circumstances of the case, be sustained, except from and after the 2d day of December 1853, the date when notice of the pauper having become chargeable was given to the defender in terms of the statute: *Quoad ultra*, Finds and declares in terms of the libel, subject to the limitation above mentioned, and decerns against the defender for payment of the sum of 8s. 2d. sterling, with interest from the 19th day of December 1853, till paid: Finds the defender entitled to expenses," &c.*

The pursuer reclaimed, and pleaded;—That he had satisfied the statute by giving notice that the pauper had become chargeable, the terms of the letter of March 1846 being sufficient for that purpose; but farther, no notice was necessary, or, if necessary, the parish of South Leith were barred from taking the objection, in respect they had undertaken to guarantee the expenses necessary for alimenting this pauper. The statute did not prescribe the form of notice. It might be made in any terms, provided only it conveyed the information that the pauper had become chargeable. But if

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* " NOTE.—The Poor Law Statute 8 & 9 Vict. c. 83, sec. 71, enacts, that any parish alimenting a pauper may recover from the parish to which he may ultimately be found to belong,—' Provided always that in all cases in which relief shall be afforded by one parish or combination to a poor person having a settlement in any other parish or combination, written notice of such poor person having become chargeable, shall be given to the Inspector of the poor of the parish or combination to which such poor person belongs; and the parish or combination affording relief shall not be entitled to recover for any charges or expenses incurred in respect of such poor person, except from and after the date of such notice.'

" This is an action for relief or reimbursement under this clause; but the express condition of the enactment has not been complied with. The claim goes back to 9th April 1846, but no notice that the pauper had become chargeable was given to the defender's parish, till 2d December 1852.

" In answer to this objection, the pursuer maintains,—1st, That the condition of the statute was virtually complied with; 2d, That he alimented the pauper at the defender's desire, which made any notice unnecessary.

" 1. A compliance with the statutory condition by means of equivalents, seems unsafe and inadmissible. It is intended that explicit written notice of the pauper having become chargeable should be given; such notice can always be easily given and there seems no good reason, but the reverse, for ever dispensing with it. But besides, it does not here appear that any equivalents existed. The letter of 25th March 1846, is not notice of chargeability. It asked a question, and no other letter was ever written, intimating the result. The first relief given to the pauper bears to be dated 9th April 1846, but no notice was then given.

" 2. The plea that the defender asked the pursuer to aliment the pauper, seems not supported by the facts; and in order to have any relevancy, as between parish and parish, would need to be laid on much more special grounds than are here alleged.

" Altogether, the Lord Ordinary has held that the enactment of the statute requiring notice, ought to be strictly adhered to; and he thinks that there cannot be a better illustration of the necessity of doing so than the fact, that in repeated settlements of mutual accounts, this claim was never brought forward, and that the present ratepayers of South Leith are now sought to be subjected in arrears, which ought to have been claimed and paid as they arose, and as to which no statutory notice of liability was to be found in their records. The conduct of the pursuer or his predecessors or constituents, has, in more ways than one, been lax and informal, and it seems right that they should bear the natural penalty.

" If the Lord Ordinary's views are correct, the action should not have been brought, and therefore expenses have been allowed to the defender."

there was any doubt as to the meaning of the pursuer's letter, that doubt was removed by the manner in which it had been received by the other party. Again, it could not be said that the absence of notice implied an absolute forfeiture of the claim; and therefore anything in the shape of an agreement or arrangement between the two parishes, as to the way in which the pauper was to be dealt with, equally superseded the necessity of such notice; for such an agreement proceeded on the assumption of the pauper's chargeability, and the liability of the parish for it.

The defender pleaded;—That no proper notice had been given; that if the pursuer intended to act on anything contained in the correspondence, he ought to have intimated this to the defenders; that not having done so, the subsequent settlement of claims, and the delay in making this claim, now barred the pursuer from insisting in it.

LORD PRESIDENT.—This claim of relief is resisted on the ground that there had been no intimation in terms of the statute, and also because of the delay in making it, and of an intermediate settlement of accounts between the pursuer and defender. It is quite true, that by section 76 of the Poor Law Act there is a provision applicable to the recovery of aliment given by one parish to a pauper having a settlement in another, and which limits such demands by providing that the parish affording relief shall not be entitled to recover it, except from and after the date of notice. That was intended as a protection against old demands being reared up in cases where aliment having been furnished for a length of time, a demand is suddenly made on the parish of the pauper's settlement after the rate-payers had been changed; and many such cases at one time did arise, demands being made for reimbursement after a long interval of time. The defenders here claim the protection of that clause of the statute. They say that no statutory notice of their liability was given them prior to December 1852. The pursuer says there was sufficient statutory notice given by the letter of 1846, which bears the post-mark of 25th March, and which is admitted to have been written on that date; and he pleads, that whatever may be the terms of that letter, whether containing all that the statute requires or not, the defender, by his answer, recognised it as sufficient; and farther, that whether it be sufficient as a statutory notice or not, at least that the defender's letter recognised this person as a pauper for whom the parish of Leith was responsible, and gave both authority and instructions to the Inspector of Edinburgh to send her to the House of Refuge, or workhouse, at the expense of the parish of Leith;—that she was sent accordingly, and there remained. The Lord Ordinary has found that this position is not tenable as a defence, and he has also refused effect to the other grounds of action.

Looking first to the second ground of action, which is apart altogether from the statute, I must say that I have great difficulty in holding that there was not here sufficient recognition of this pauper as properly chargeable on the parish of Leith. I think that the defender's letter amounts to such a recognition of liability, and gives authority to the pursuer to aliment the pauper at the defender's expense. "If Christian M'Donald is the female I know (for she has a great many *aliases*, and was known to us chiefly by the name of Christian Paterson), she is much older than you suppose, and is, I suppose, more rogue than fool." The letter then states the reason why she was struck off the roll, thereby acknowledging that she was a recognised pauper. Then it proceeds: "It was resolved that she should be sent to the House of Refuge." That still recognises her as a pauper. "She refused to go thither, and her allowance was stopped." "You should either send her to the House of Refuge, or offer to take her into your workhouse,—of course at our expense. The possibility is she will refuse to go to either. Treat her as you would do one whose history is as above," that is, as a pauper of Leith, and to whom you ought not to give aliment out of doors, but should send to the workhouse at our expense. And the pursuers did send her to the workhouse, and they now say they did so at the expense of the parish of Leith, and they demand repayment of their disbursements, under the authority which they say was given them by the defenders. That letter was a complete recognition by the defenders of this pauper as one for whom they were liable, and an authority to the pursuers to deal with her at the expense of the

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parish of Leith. I do not see any escape from their consequent liability under this action, except it be found in the transactions which took place subsequent to the date of that letter. Within two weeks after that date she was sent to the House of Refuge, and then to the Charity House, where she remained till 1852. There is no question as to the aliment of 1853. During all that time, there was no demand by the parish of Edinburgh upon the parish of Leith, for payment of this aliment furnished under the authority of that letter of 1846, and, in the interval, there was a certain settlement of accounts between the parties.

It cannot, I think, be maintained that the claim was lost by the mere delay in making the demand; and, in regard to the settlement, I do not think it was made clear that it was intended to comprehend all cases to the exclusion of all others not embraced in it. The demand therefore made by the parish of Edinburgh upon the parish of Leith is maintainable upon these grounds, which appear to me sufficient. That being my view, it would follow that the interlocutor of the Lord Ordinary should be recalled, and that the parish of Edinburgh would be entitled to decree against the parish of Leith.

It is said that the parish of Edinburgh ought to have intimated to the parish of Leith that they had acted on the authority contained in the letter of 1846. It would have been better had they done so, but their not doing so does not exclude the demand. It was a hardship on the parish of Leith that the demand was so long delayed, but they having given that authority, were themselves somewhat to blame in not having inquired whether it was acted on or not. They cannot complain on that account. It may be a question how far the failure of the parish of Edinburgh to make the demand for so long a time may not have put the parish of Leith into the reasonable belief that it did not exist, and so far it may affect the question of interest. But the delay cannot affect the demand itself.

As to the other ground of defence, that this letter cannot be regarded as a proper statutory notice, I cannot come to the conclusion that it is a proper statutory notice, and I am not disposed to admit of loose and equivocal statements in letters of this kind as an equivalent. The letter was intended merely to make some inquiry about this pauper, whether she was chargeable upon the parish of Leith or not. Upon that ground, I would have concurred with the Lord Ordinary but upon the other ground I think his interlocutor must be recalled. There is a clause in the statute which says that aliment shall not be recovered prior to the date of the statutory notice—that is, the mere fact of having alimented the pauper is not of itself sufficient to establish a claim. But the statute does not say that if an agreement be entered into between two parishes, such aliment may not be recoverable, and that is the case here. There was an agreement apart from the statute, and therefore, feeling it unnecessary to decide anything about statutory notice, I give no opinion upon it. Statutory notice should always be simple, and cannot be too much so.

Lord Ivory.—I am of the same opinion, and I am for resting the judgment on the ground of the contract. It is impossible to read the defenders' letter of 184 without seeing that they intend the parish of Edinburgh to undertake the mainten ance of this pauper. If the question had arisen at a nearer date to the contra itself, is it possible to say that from the day the pauper was put into the workhous there was not an attaching obligation on the parish of Leith to defray her aliment This contract was begun to be put into effect, and liability commenced as i 1846. But if liability then commenced, and could not have been resisted, as at th date, is there anything to discharge it by mere lapse of time? The parish of Lei having given the necessary warrant for the commencement of such liability, we themselves bound to make enquiry, and see whether it was acted on or not. they did not so inquire, *sibi imputet;* they are more to blame than the other paris There is nothing here from which to presume or infer a discharge of that liabilit and as to the lapse of time, if there had been statutory notice, *mora* would not ha been of sufficient consequence to affect the claim; and if there is a contract whi supersedes such notice, it has equally little effect. The case does not rest on st tutory notice, but on arrangement, and I agree that the more simple a statuto notice is, and the more precisely in terms of the statute, the better for all parties

Lord Curriehill.—With regard to the statutory notice, I concur in thinki that if we must decide that question, it must be according to the interlocutor

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the Lord Ordinary, for we are here dealing with statutory proceedings, and the direction of the statute is express and specific that a claim of relief is not to be given effect to, except on condition that written notice shall be given that the pauper has become chargeable. But I also think it unnecessary to go into that question, for without receiving notice, the parish of Leith gives an express written mandate to the parish of Edinburgh to advance the funds for the relief of the pauper, and if relief is given, how can they refuse to repay it?

Then the question is, have they been relieved of this by delay in the demand for repayment, or by settlement? I do not think that on either of these grounds the parish of Edinburgh are precluded from insisting in their claim.

LORD DEAS.—I concur in the result at which your Lordships have arrived, and I do not know that there is any real difference in the grounds on which I do so. The statute requires written notice to be given, but prescribes no formula for the notice. Here a letter was written in March 1846, in terms which certainly are not explicit, and which, if no answer had been given to it, the defender might fairly enough have said he had neither understood, nor was bound to understand as the statutory notice. But I think the answer shews that he did truly understand the letter as importing not merely that the pauper had become "chargeable," which is the phrase used in the statute, but that she had become chargeable on South Leith. For the answer not only states that she had been upon the roll of that parish, and struck off for a reason which implied, in place of repudiating, the fact that South Leith was the parish of her settlement, but the writer of the letter gives positive directions as to how she was so be disposed of, which he could have had no right to do if she had not been a pauper chargeable upon South Leith; and then he says that what was to be done is to be, "of course, at our expense." He adds, "Treat her as you would do one whose history is as above,"—that is to say, as one who is entitled to relief from the parish of South Leith, subject to the observations about her character and habits, which rendered it proper to send her either to the House of Refuge or to the Workhouse. I am, therefore, disposed to think that, as in a question with this defender, he must be regarded as having held and recognised the letter sent to him as a sufficient statutory notice.

But, in the next place, I have no doubt that the defender might dispense entirely with the statutory notice, and that this could not be more effectually done than by a direct undertaking, as here, to be liable for the pauper's maintenance. It is true, as the Lord Ordinary observes, that the liability of each parish ought to appear on the face of its records. But this is not a statutory requisite, and the parish of Edinburgh had no power over the records of the parish of South Leith. The Inspector of South Leith might fail to enter in its records either a direct statutory notice or a direct undertaking of liability, but that could not affect the rights of the parish of Edinburgh, either in the one case or the other.

I hold, therefore, that we have a sufficient foundation for this claim, if it has not been cut off by *mora*, or discharged by the settlement which took place in November 1852. Now, to take this last point first, I confess the objection founded on the settlement of accounts seemed to me, at first, to be formidable; seeing that the settlement bears to be applicable, in general terms, to "cases admitted or determined to belong to your parish." But it has been explained (and the explanation has not been gainsaid) that all the cases settled were cases in which not only liability, but the *amount* due had been admitted, which was not the situation of this claim, the amount of which might have been disputed as extravagant, or repudiated *in toto*, on the ground that the instructions given as to the mode of treating the pauper had not been observed. I do not, therefore, think that the claim, if it ever existed, has been discharged by the settlement.

There remains only the question whether, by mere delay, the claim, which would otherwise have been good, has been lost. Now, I am not prepared to say that the delay, although I do not see any good excuse for it, can have this effect. The other party was also to blame in not inquiring what had been done, or whether anything had been done, upon his own mandate. He had authorised the treatment of her as a pauper who had a settlement in the parish of South Leith, and at the expense of that parish, and he was, at least, as blameable as the Inspector of the parish of Edinburgh in inquiring no farther. In this state of matters, and no pre-

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I concur, however, in holding that we should allow no interest except after the date of citation.

The Court pronounced the following interlocutor:—"Recall the interlocutor of the Lord Ordinary reclaimed against: Decern against the defender, the Inspector of the parish of South Leith, for payment to the pursuer of the principal sum contained in the account pursued for, being L.55, 13s. sterling, with legal interest thereof from the 22d day of February 1854, being the date of citation in the action, till paid: Find no interest due preceding the date of citation: *Quoad ultra*, Find, decern, and declare in terms of the libel: Find the pursuer entitled to expenses of process," &c.

James Morgan, S.S.C.—William Anderson, S.S.C.—Agents.

No. 53. James Purdon and William Allan Woddrop, Pursuers.—*D. F. Inglis—Pattison.*

John Rowat's Trustees and Others, Defenders.—*Penney—Patton.*

Process—Reduction—Error—Bill of Exceptions.—1. A party granting a deed in error is entitled to reduce it, although he is liable to be compelled by legal process to grant a deed in similar terms. 2. A party granting a discharge which he believes to include "all his claims," is entitled to reduce it on its turning out that there were at the time competent to him claims of which he knew nothing;—*Exceptions*, involving a contrary view of the law, disallowed.

Jury Trial—Verdict.—Where a jury, under direction by the presiding Judge, have endorsed on their verdict a finding on a matter not directly embraced by the issue, this cannot be founded on with a view to a new trial by way of an exception to the Judge's charge, whatever objection there may be to the entering up of the verdict.

Issues—Fraud.—Form of issue in a reduction on the ground of fraud, under which the presiding Judge held that the jury could not competently find for the pursuer unless fraud, the act of one of the parties named in the issue, were proved.

Dec. 19, 1856. 2d Division. Jury Cause. Lord Justice-Clerk, presiding Judge. R.

Robert Purdon raised an action (which, after his death, was insisted in by his eldest son, James Purdon), along with a party who had acquired an interest from him, in which they sought to reduce a deed of ratification, conveyance, and commission, granted by Purdon with consent of his trustee for behoof of his creditors in favour of John Allan Rowat, Joseph Rowat, Gavin Rowat, and Thomas Rowat, the object being to set aside the conveyance of certain oxengates of land which it was alleged Purdon had been under no obligation to convey. It was farther alleged that the deed had been granted in error as to its effect, and had been obtained by fraud.

The whole circumstances of the case are thus narrated in the opinion delivered by Lord Cowan as the joint opinion of Lord Wood and himself:—

"The narrative of the deed under reduction, in reciting the consideration in respect of which it was granted, brings forward with sufficient prominence the more material facts which it is important to have in view in disposing of the bill of exceptions, and the motion to set aside the verdict.

"It first sets forth that *John* Allan of Elsrickle, who was proprietor of the lands and others described in the deed, had executed, a short time previous to his death, on 29th August 1829, a general disposition of his whole property in favour of John Rowat, represented by the defenders, and which deed was brought under reduction, in actions at the instance of Robert Purdon and of Mrs Alison, heirs of provision and of line to the said John Allan.

"The narrative goes on to state, that after considerable procedure, and a remit to the jury to try certain issues, 'an arrangement took place on the 22d of January 1834, by which it was agreed a verdict should be returned for the defenders in said actions, and that the defenders should pay the pur-

suers the sum of L.4000 at the terms therein specified—the pursuers granting the defenders a full discharge against the said John Allan's estate—which sum was paid, and discharge granted accordingly.' No.53.

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"And it is then farther narrated, that Robert Purdon had claimed from the defenders, notwithstanding the above discharge, the further sum of L.500, as one-half of the sum of L.1000 provided by bond of annuity and provision, dated in July 1773, and executed by Joseph Allan the younger, to be paid to himself and Robert Allan, his brother, their heirs and assignees, at the first term after the said John Allan's death without issue, the said Robert Purdon being the heir to the extent of one-half of said sum of L.1000, both of Joseph Allan the younger and Robert Allan. And, with regard to this claim, it is set forth that the defenders, to avoid litigation and purchase peace, had 'agreed and arranged, on receiving the discharge executed of equal date herewith of the one-half of the said sum of L.1000, interest and consequents, and a full ratification and confirmation of the unentailed property, heritable and moveable, which belonged to said John Allan, or his brother, Joseph Allan the younger, at their respective deaths, and of the titles thereof, to pay to me, the said Robert Purdon, and my heirs, the sum of L.225 sterling, in full of my claim under said bond, and of all claims I in any way had, or could pretend to have, to any of the property, heritable or moveable, which belonged to said John Allan, or Joseph Allan the younger, at their respective deaths.'

"On this narrative, and in consideration of the payment made by the Rowats, 'in terms of said arrangement,' Purdon and his trustees 'ratify, approve of, and confirm to and in favour of the said Joseph Rowat, Gavin Rowat, John Rowat, and Thomas Rowat, according to their respective rights, and their heirs and successors, the whole unentailed heritable property, situated in Scotland, which belonged to the said John Allan at his death foresaid, or which he was then in possession of as proprietor.' And further, Purdon, with consent of his trustees, dispones and makes over to and in favour of the said parties, according to their respective rights, 'all and every right and claim I or my heirs have, or may have, or can pretend to have, to all and every part of the heritable or moveable property which belonged to the said John Allan, or Joseph Allan the younger, at their respective deaths, or which they were respectively in possession of as proprietors, with power to my said disponees, if they consider necessary, to make up titles to the same in my name, as heir to the said John Allan, or Joseph Allan, and to vest me therein,'—Purdon being taken bound thereafter to convey the same to the said disponees at their expense. And there follow special conveyances of particular heritable subjects to and in favour of these parties, with a clause of absolute warrandice on the part of Purdon, and of warrandice from fact and deed by his trustees.

"The substance and effect of this deed was to substitute the Rowats in Robert Purdon's place, as regarded every right and claim competent to him, not merely against John Allan's estate, but every claim and right which might be competent to him as the heir, or as in right of Joseph Allan, junior, the brother of John. The entailed lands of Elsrickle belonged to Joseph Allan the elder, upon whose death his second son, Joseph Allan the younger, succeeded to these lands, which he possessed till his death, in 1797, when his brother, John Allan, succeeded. Besides the entailed property, however, Joseph Allan, the younger, was infeft in certain unentailed lands,[1] and to these also John Allan succeeded, but did not complete, as is alleged, any proper feudal title, at least as to some of them—his possession being simply by his apparency. Any property in this situation could not be carried by

[1] These are the oxengates of Elsrickle, referred to in the 5th and 6th exceptions.

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John Allan's general disposition to the defenders. It formed no part of John Allan's estate, which he could alienate to the prejudice of Robert Purdon, entitled to take it up by service, as heir to Joseph the younger, without any reduction of the general disposition of John Allan, on the ground of deathbed, or any other. But, by the deed of ratification and conveyance, every such claim stands excluded and abandoned by Robert Purdon. It ratifies the right and title of the Rowats to the whole property which belonged to John Allan at his death, and which he was then in possession of as proprietor, and gives over to them every right and claim competent to Purdon, to all and every part of the heritable and moveable property which belonged to the said John Allan, or Joseph Allan the younger, at their respective deaths, or which they were respectively in possession of as proprietors. The substantial error alleged on the part of Purdon, under which he laboured when he executed the deed, was, that it had the effect now mentioned upon his rights and claims to and regarding the estate of Joseph Allan the younger. The deed, as to that part of it, he contends, was granted without value, and in error as to its substance and effect. And this contention the jury have affirmed by their verdict on the second issue.

"At the trial a great deal of documentary evidence was laid before the jury, both by the pursuer and by the defenders; and there was also parole evidence adduced by the pursuer. So much of the evidence as had regard to the matters set forth in the narrative of the deed, and to the circumstances in which it was granted by Purdon, may be generally noticed.

"There was, in the first place, laid before the jury the minute of agreement, embodying the arrangement at the trial on 22d January 1834. The terms of that agreement, after setting forth the payment of L.4000, to be made to the pursuers of the actions, Robert Purdon and Mrs Alison, are as follows:—'The pursuers granting a full discharge of all claims against Mr Allan's estate (that is, *John* Allan's estate), and guaranteeing the defenders against any action, at the instance of any party, for reducing the deed of the late John Allan;' and the discharge granted, in pursuance of this obligation, upon payment of the L.4000, was also laid before the jury. The terms in which that deed should be expressed became the subject of much correspondence, and they were ultimately adjusted, only after judicial procedure by suspension. That correspondence, with the judicial proceedings, and the interlocutor of Lord Cockburn, sanctioning the view taken by the advisers of Robert Purdon and Mrs Alison, as to the terms of the deed, form part of the evidence set forth in the bill. The correspondence establishes, in the clearest manner the position taken by Purdon and his advisers, and to which they adhered, viz., that Purdon and Mrs Alison were to discharge nothing beyond what was contained in the two actions of reduction—this being in their view the true import of the compromise; and they, therefore, resisted all attempts on the part of the defenders and their agent, Mr Gebbie, to introduce into the discharge any words which might have a more enlarged effect, or which might prevent the minute of compromise from being construed and given effect to upon its own terms. Now, this is just what was done by the discharge. By that deed, thus carefully adjusted, Robert Purdon and Mrs Alison, upon the narrative of the settlement effected by the agreement of January 1834, and of the sums paid in terms thereof, exonered and discharged the Rowats of said sum; 'and also we hereby grant a full discharge' to the said Rowats 'of all claims against the estate of the said John Allan, all in terms of said minute of agreement produced in the said two actions; declaring it to be the meaning of the parties hereto, that this discharge is granted in conformity with said minute of agreement, and that, should any question arise hereafter betwixt the parties, with regard to the intent and meaning of these presents, the same shall be determined by the terms of the said minute.' By the execution of this discharge, the arrangement of January 1834 was carri

fully out, and, accordingly, the deed of ratification and conveyance, in reference to this very matter, sets out, 'which sum was paid, and discharge granted accordingly.' No obligation therefore, *ex concessis* of the parties themselves, remained incumbent on Robert Purdon to grant any other deed to the Rowats, than that which he thus granted, discharging all claim against the estate of John Allan. No. 53. — Dec. 19, 1856. Purdon v. Rowat's Trustees.

"Another portion of the evidence before the jury, had regard to the transactions of the parties relative to the claim of Robert Purdon, under the bond of provision for L.1000. The memorandum of agreement, setting forth the terms on which the compromise of that claim was effected between Robert Purdon and John Rowat, who acted in the matter for himself and the other defenders, is set forth in the bill. It is dated 11th April 1836. It narrates the bond—the death of John Allan in 1829, when the amount became payable—the general disposition of John Allan, in favour of the Rowats, and the arrangement effected in January 1834—the claim advanced by Robert Purdon, as 'the descendant and lineal heir of Margaret Allan, who was the sister of Joseph Allan the elder, and, as such, the heir to the extent of one-half of the said sum of L.1000, both of the said Joseph Allan the younger, and Robert Allan,'—and the resistance of that claim by the Rowats, on the ground of its being embraced under the arrangement in January 1834. The deed then states, that to avoid litigation and purchase peace, and without, in any shape, recognising the claim as legal and obligatory, John Rowat, as acting for himself and the other defenders, had arranged with Robert Purdon 'as follows, viz., the said second party (Rowat) agrees, on receiving the discharge underwritten, to pay to the said first party (Purdon) and his heirs, the sum of L.225, in full of his half of said bond for L.1000, above narrated, and interest of said sum since John Allan's death, and in full of all claims competent to said first party, or his heirs, under or in virtue of said bond of annuity and provision above mentioned.' And, on the other hand, the said first party engages and obliges himself, on receiving payment of said sum, to grant, execute, and deliver in favour of the Rowats 'a valid, formal, and regular discharge and renunciation of the one-half of said sum of L.1000 sterling,' contained in said bond of annuity and provision, with the interest thereof, 'and also of all claims due and competent to the said first party or his heirs, in any manner or way, under or in virtue of said bond of annuity and provision above narrated, and shall make up all titles that may be necessary for this purpose at his expense.' This is the agreement in implement of which the deed of discharge and renunciation afterwards obtained from Robert Purdon, of equal date with the deed of ratification and conveyance, was granted.

"The terms of that discharge and renunciation will be found in the bill of exceptions. It narrates the different matters which have been noticed, adverting to the memorandum of agreement as to the bond of provision in these terms:—'They (the Rowats) arranged and agreed, on receiving the discharge underwritten (and a ratification and conveyance executed of equal date herewith), to pay to me' the sum of L.225, and so forth. And the deed then proceeds to discharge, in usual terms, the Rowats, of all claim whatever competent to Purdon, in reference to the bond of provision. The execution of this deed exhausted Purdon's obligation under the memorandum of agreement. That memorandum, however, contains no words to the effect of those within the parenthesis in the above quotation from the deed of discharge, viz., 'and a ratification and conveyance of equal date hereof.' These words, as appears from the parole evidence, were introduced after the draft had been revised by the agent for the trustees of Purdon's creditors, and returned by him to be extended by Mr Gebbie, who acted for the Rowats.

"From these statements it will be seen, that the narrative of the deed of ratification and conveyance was not justified by the actual agreement of

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parties, when it set forth that, besides the discharge of the bond of provision, Purdon had agreed and arranged, 'upon receiving payment of the L.225, to execute a full ratification and confirmation of the unentailed property, heritable and moveable, which belonged to the said John Allan, or his brother Joseph Allan, the younger, at their respective deaths, and of the titles thereof.' No such agreement or arrangement did in fact exist between the parties.

"With regard to the circumstance attending the execution of the deed by Purdon, it was proved that the agent, Mr Montgomerie of Glasgow, who had throughout acted for Purdon, was not consulted at all as to this matter; that Mr Pollock, Ayr, who acted as agent for the trustees, while he had the draft of the discharge sent to him by Mr Gebbie for revisal, had no draft submitted to him of the deed of ratification and conveyance; that the draft of the discharge which Mr Pollock revised, did not contain any reference to such a deed, although, when extended and sent for execution, there was inserted in the narrative a statement, that not merely the discharge, but also a ratification and conveyance, were to be granted by Purdon in consideration of the payment of the L.225; that it was only on the 13th December 1836, that the extended deeds, the discharge, and the ratification and conveyance, were sent to Mr Pollock for the purpose of being executed by Purdon and the trustees; that this was the first time that any ratification of the Rowats' titles had been mentioned to Pollock; that in the belief and understanding of Pollock, the object of the ratification was merely to carry out the settlement in January 1834, but which agreement he had never seen, and the effect and purport of which he did not understand; and that the deed of ratification was submitted by Pollock to Purdon for signature, and was executed by him along with the deed of discharge, on 14th December 1836, in the belief impressed on him by Pollock, that it was merely to carry out what had been previously settled.

"Farther, it was proved that Purdon was a person incapable of fully understanding the effect of such a deed as that which he executed; and that Montgomerie, who had been Purdon's adviser all along, had he been consulted, as he was not, would never have allowed him to execute such a deed; while Pollock, on whose information as to its effect Purdon must have relied, stated, in his deposition: 'If I had been aware that effect of ratification was to bar, or probably bar, a claim which was not included in the agreement of 1834, I would not have allowed Purdon to grant it; nor if I had known that there was any dispute as to the meaning of the agreement.' 'I understood, from Purdon, he had no other claim but L.1000 and that was his last claim against the Rowats. I proceeded entirely on assumption that all claims closed, and so I thought the deeds proper deed for Purdon to grant.' 'I understood the separate deed was to carry ou what was previously settled.' 'I did not understand, and could not under stand the bearing, or probable bearing, of the ratification and conveyanc on certain questions which might arise under the minute of agreement c 1834; I had never seen it.'

"But, while this was the belief and understanding of Pollock, an through him of Purdon also, the documentary evidence, as already notice demonstrates that there had been a great deal of discussion as to the mea ing and effect of the minute of agreement, 1834—that the attempt on t part of the Rowats, to hold it a general discharge of all claims whatever the part of Purdon, had been repeatedly and even judicially repudiated Purdon's legal advisers—that the idea of claims competent to Purdon, heir of Joseph Allan, junior, being discharged, and a ratification and c veyance being granted, which would have the effect of barring any s claims, had never been broached or thought of—that all this, altho unknown to Pollock, was known to Gebbie, the agent of the Rowats—t

Gebbie had become aware, so long before as 1835, from negotiation which he had with Messrs Mitchell and Company of Glasgow, with reference to a proposed loan over the subjects, of the propriety of a ratification of the title by the heirs-at-law, and that in the opinion of his correspondents, 'the only safe mode will be to connect them (the Rowats) with the last valid infeftment in favour of Joseph Allan;' and finally, that this notwithstanding, without previous notice or communication, Gebbie prepared and sent for execution this deed of ratification and conveyance, in alleged implement (as set forth in the narrative) of the agreement under which the payment of L.225 was made, and the receipt of which was acknowledged by the discharge executed *unico contextu*."

In order to determine the questions of fraud in procuring, and error in granting this ratification, the following issues were adjusted, and tried before a jury in January 1856:—"I. Whether the defenders, Joseph Rowat, Gavin Rowat, Thomas Rowat, and the deceased John Rowat, otherwise John Allan Rowat, or any of them, by themselves or himself, or by another or others, did, by fraud, induce the deceased Robert Purdon to grant the deed of ratification and conveyance dated the 14th December 1836, No. 6 of process?

II. Whether the said deed of ratification and conveyance was granted by the deceased Robert Purdon without value, and under error as to the substance and effect of the said deed?"

The jury returned a verdict, in which, "in respect of the matters before them, they find for the defenders on the first issue; but further find the deed of ratification and conveyance mentioned in the issue was obtained by unfair practices on the part of Mr Gebbie, their agent, unduly taking advantage of the situation of Robert Purdon in the absence of his legal adviser;—and find for the pursuers on the second issue."

The case now came before the Court on a motion for a new trial, on the ground that the verdict was contrary to evidence, and on a bill of exceptions.

The following were the exceptions:—

1. "The Lord Justice-Clerk told the jury, in regard to the matters which they had to consider, 1st, That they would inquire and decide, whether Purdon knew that he was discharging any claims which he had not previously discharged beyond the right under the bond; and 2d, That if they thought he believed that he was thereby discharging all his claims, it was still competent for the jury to take into view, in deciding whether he was in error as to the substance and effect of the deed, the questions which it appears might arise as to the rights competent to him, but not known to him at the time.

"The counsel for the defenders excepted to this direction,

2. "And asked that the following direction should be given to the jury:—'That the jury, in considering the issues sent to trial, were bound to take into consideration the construction and meaning of the said agreement of 22d January 1834; and that if they were satisfied on the evidence, that in the contemplation of the parties at that time, the estate of Mr Allan, as referred to in the said agreement, comprehended all of which he was in the possession at the time of his death, whether as heir of Joseph Allan or otherwise, they must in that case hold the deed of ratification, in point of law, to have been granted in due implement of the said agreement, and the jury should therefore find for the defenders.'

"The Lord Justice-Clerk declined to give this direction to the jury, to which refusal to direct, the counsel for the defenders excepted.

3. "The counsel for the defenders further asked the Lord Justice-Clerk to direct [illegible] follows:—'That if the jury were satisfied upon the evidence, [illegible] Purdon, in subscribing the deed under challenge, intended [illegible] all claims competent to him against the defenders in

No. 53. respect of the property which had been possessed by John Allan at the time of his death, there was, in point of law, no error on his part in regard to the substance and effect of the deed.'

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"The Lord Justice-Clerk declined to give the direction craved; to which refusal to direct, the counsel for the defenders excepted.

4. "The Lord Justice-Clerk directed the jury, that 'they were bound to find for the defenders on the first issue, there being no evidence before them of personal fraud on the part of the Messrs Rowats individually, who are named in that issue; but he left it to them, if they were satisfied on the evidence, that the deed under challenge was procured by unfair practices on the part of Mr Gebbie, as the agent of the defenders, and by his taking undue advantage of the position of Purdon, to add a finding to that effect if they thought proper to do so.' *

"To this direction, in so far as the Lord Justice-Clerk left it to the jury, if they were satisfied on the evidence that the deed under challenge was procured by unfair practices on the part of Mr Gebbie, as the agent of the defenders, and by his taking undue advantage of the position of Purdon, to add a finding to that effect if they thought proper to do so, the counsel for the defenders excepted, on the ground that no such finding was competent.

5. "The counsel for the defenders further excepted to the charge, in so far as his Lordship declined to give any direction whatever as to the legal validity of the titles to the two oxengates of Elsrickle produced in evidence.

6. "The counsel for the defenders asked the Lord Justice-Clerk to give a direction to the jury as to the legal validity of the titles to the two oxengates of Elsrickle produced in evidence, and farther asked the Lord Justice-Clerk to direct the jury that a valid personal title to these oxengates was vested in John Allan, and transmitted by his general disposition of 1829 to the disponee under that deed, and the jury were bound to hold this in point of law, and to decide the case on this footing.

"The Lord Justice-Clerk declined to give any direction as to the legal validity of these titles.

"The counsel for the defenders excepted, in so far as the Lord Justice-Clerk declined to direct the jury as to the legal validity of these titles, and in so far as he declined to direct the jury that a valid personal right to the oxengates was vested in John Allan and transmitted to his general disponee."

Although all of these exceptions were discussed at the hearing, the argument was at last confined to the first three.

The defenders maintained ;—There was no idea in 1834 that there was any defect in the titles to Allan's estate, the whole of which was then supposed to be embraced in the reductions then in dependence, and the meaning of parties in entering into the agreement of 1854 was that every claim of every sort should be surrendered. On the other hand, the pursuers' view seemed to be that if any flaw whatever in Allan's titles could be discovered it might be taken advantage of, and that nothing was included in the agreement to which Allan had not an unexceptionable feudal title—a view which might have rendered the agreement entirely worthless. The deed of ratification under reduction was undoubtedly founded on the former of these

* "NOTE.—The counsel for the pursuers excepted to the Lord Justice-Clerk's direction in point of law, that the jury were bound to find for the defenders on the first issue, because the pursuers had made out no case of personal fraud on the part of the Messrs Rowats individually, who are named in the first issue; and, on the contrary, asked his Lordship to direct the jury, that if they were satisfied on the evidence that William Gebbie, as agent for the said defenders, did by fraud obtain from Robert Purdon the deed under reduction, such fraud would warrant a verdict for the pursuers affirmative of the first issue."

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views, and was granted in implement of the agreement, bearing to be "in full of all claims;" true, Purdon did not know of the various claims which had since emerged, founded on defects in Allan's titles, but neither (it was contended) did the defenders, and their emergence could not affect the generality of the agreement, which implied the discharge of all claims whatever, whether Purdon knew of them or not—so that Purdon's knowledge or ignorance of the effect of the ratification would not affect the case, if their view of the original agreement was the sound one. This being so, the direction first excepted to was imperfect, and that asked from the presiding Judge was essential to the guidance of the jury, for at the date of the ratification, Purdon was indubitably bound by the terms of the agreement of 1834. That, therefore, and its import, ought to be considered by the jury along with the whole surrounding circumstances. If, indeed, the deed was to be considered alone, then it would be for the Judge to construe it, but that was not the case here. The whole circumstances of the litigations arising out of Allan's settlement, and their compromise, had to be looked to as throwing light upon the intention of parties in entering into the agreement. The Court were dealing only with the verdict on the second issue, and that with *fraud* now out of the case, as the verdict on the first issue was for the defenders, so that nothing but error remained. The same view of the law applicable to the case which supported the exceptions, showed that the verdict was contrary to the evidence.[1]

For the pursuers it was replied;—The agreement embraced nothing but what there was a feudal possibility of Allan conveying, and the claims they were dealing with here were not properly emerging claims, for they existed at the date of the agreement. The direction, to the giving of which exception had been taken, was unquestionably sound—1st, To consider whether Purdon knew that he was enlarging the agreement; 2d, Assuming that he had no objection to discharge all his claims, whether he did not, in point of fact, discharge rights of which he was ignorant. It had been denied that the defenders or their agents suspected these rights, but that was entirely beside the question, for if it could be shown that Purdon knew not that he was discharging them, then there would be legal error.

As to the second exception, that the jury, in considering the issues (*i. e.*, both of fraud and error), were bound to look to the construction of the agreement of 1834, the answer was that Purdon might have been under it bound to grant the ratification, but still, if obtained by fraud or under essential error, the deed was good; but, at any rate, a counter issue would have been requisite to give effect to such pleading, and the agreement of 1834 was not properly before the jury, and would at any rate be for construction by the Court, not by the jury, just like all written instruments. The agreement was as to the compromise of two actions. What could be more unsuitable for a jury? Writings there might be which would come before a jury; thus, in the case of a foreign document, if there were different views of the translation, it would be for a jury to settle the translation, but for the Judge to interpret that translation. So in patents, intelligibility was for the jury, construction for the Court. Libel fell under a different category altogether. The agreement of 1834 was not a deed where there were surrounding circumstances to be considered. Moreover, no evidence of that sort had been tendered, or would have been competent;

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[1] Starkie on Evidence (ed. 1853), p. 786; Smith v. Thomson, 8 C. B. p. 44; Moore v. Girdwood, W. H. and G. vol. iv. p. 681; Grieve v. Wilson, 26th Jan. 1828, Sh. vol. vi. p. 454—H. of L., 19th Aug. 1833, W. and S. vol. vi. p. 543; Howkins v. Jackson, 30th Jan. 1850, H. and T. Ch. Cases, vol. ii. p. 301.

No. 53. therefore the proposal to leave it to the jury to construe by the light of the evidence was absurd.[1]

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Lord Justice-Clerk.—I am desirous to state, pretty fully, the views I took of this case, which have given rise to the exceptions now before us, both in regard to the law which I did state to the jury, and the directions which I refused to give.

The case became a very embarrassing one at the trial. The special terms of the issue as to fraud, different in its terms from other issues in similar cases, appeared to me to require proof of some acts of fraud, and of unfair practices, on the part of the individuals named in the issue. A very slight change in the collocation of the words, would have made the issue apply to fraud practised by others acting for them, and for which they would necessarily be responsible. But, looking to some decided cases, and contrasting the peculiar way in which the terms in this issue are placed, in reference to the parties, I felt bound to tell the jury that personal acts of fraud, or knowledge of the same, on the part of the individuals named in the issue or some of them, must be established. This, of course, rendered the simple issue of fraud unavailing for a verdict, and the disposal of the second issue a more difficult and more important matter. But, on the other hand, if the deed was obtained by the unfair practices of their agent, and by undue advantage taken by him of the ignorance of Purdon, it did not follow that the defenders could avail themselves of the deed so obtained, or that in this action, it might not be found to be void and null. I had several cases in view, as well as the general clause in the statute, in telling the jury, therefore, that if they thought the deed was so obtained, by the unfair practices of the agent acting for the defenders, they might add that finding to the verdict, which I thought they were bound to give for the defenders. As fo the objection, that Mr Gebbie had not been put on his trial, I look upon that a mere idle declamation, and accordingly, that ground was not taken up by the senio counsel. The whole record, and all the productions, pointed to Mr Gebbie as th active person, whose fraudulent acts were complained of, and necessarily the sub ject of inquiry; and although, under the precise terms of the issue, the defende could not be made responsible, yet, for him and his acts, they were in law respon sible, when they stand by, and found on, the deed he so obtained.

It was natural for the defenders to protest, in the way and at the time they di as to the course I took. But, Mr Penney candidly admitted, that the finding o the jury would properly be objected to, not on a bill of exceptions, but afterward when the verdict is to be applied, and any motion shall be made, founded on th finding.

I need say no more at present as to this point.

But, the result of the construction of the first issue did by no means throw frau out of the case. The verdict is not that there was no fraud at all practised o Purdon. Quite the reverse. It was, therefore, a great mistake to say that the fac more directly applicable to the first issue were to be thrown entirely out of vie in considering the second issue as to error. On the contrary, they form an essen tial part of the *res gestæ* and of the history of the case. The way in which erro in any case, has been induced—the representations, on the faith of which a de has been obtained, and as to its execution being held out as a mere matter of for arising out of antecedent obligations or transactions—concealment as to the re object of the deed, and artifices resorted to, to throw a person off his guard, as we as the degree of intelligence of the individual himself—are all most important, judging whether there was error as to the substance, and, still more, the effect the deed, and what was the state of mind and knowledge of the individual by wh the deed was granted. This holds still more strongly, if the deed has not be previously arranged and adjusted; but is, on a sudden, brought about by the age of the party obtaining the deed, who himself arranges the whole thing for employer, and, without previous notice, sends it at once for execution, as a perfe unobjectionable form,—in the full knowledge himself, that any such deed has be most strenuously and peremptorily rejected by the advisers of the party, when p

[1] Starkie on Evidence, p. 786; Taylor on Ev. vol. i. p. 56; Neilson v. Harfo 26th June 1841, M. and W. viii. p. 806; Hill v. Thompson, 15th Dec. 18 Merivale, vol. iii. p. 630.

posed at a prior time to them. It is in this light that the question of error is to be viewed in such a case as the present, and hence, a general belief that a deed might discharge all claims, is not by any means a sufficient or satisfactory test, whether the party was in error as to the substance and effect of the particular deed in question; for, first, there must be the inquiry, of what claims had the party any conception, and in what character did he suppose any claims to be competent to him; and, further, what had the other party or his agent in view in putting before him a new deed, and what object did they propose to effect thereby—putting that in contrast to any notion the party granting the deed could possibly entertain. The object of the one party may be complete proof, in many cases, of the error of the other. Hence, in this case—whatever it may be in others—a general belief that all claims were to be discharged, could not be taken as the only or conclusive test of error. But, on that view one portion of the exceptions is substantially dependant. And in this will be found the substantial objection to the law excepted to, and to one of the directions asked.

The discussion on the bill is now greatly narrowed; for, it was admitted by the senior counsel for the defenders, that he could not maintain that at this trial a discussion, either as to the titles of John Allan to one portion of the oxgates of land, or as to his personal right to the other portion, could be required. These would have been two separate issues in point of law, wholly collateral to the issues to be tried, or rather quite extraneous, and on which no opinion that might be formed, could be of any avail to prevent the future discussion, in separate proceedings, as to the right of John Allan to convey, by his general disposition, the right to the lands in question.

But this concession is of importance, as it shews that the question at issue, in this trial, in no degree depended on the rights in point of law, competent to either party, but on the validity of the ratification of the defenders' titles, as sufficient to exclude any challenge, even though these titles, or the right under John Allan's general disposition, might be defective and unsound. But, on the same ground, it will be found, that the effect in point of law, of the right construction of the agreement of 1834, was equally foreign to the question as to the validity of the deed of ratification, which is founded on, to exclude any question as to the effect of that agreement, or the rights competent to Purdon, notwithstanding its terms—should be construed favourably for him,—the ratification being, it is said, in its terms, a renunciation of everything which, notwithstanding that agreement, he might nevertheless have claimed, but has renounced. If the ratification stands, and is effectual, then no question can arise as to the construction of the agreement of 1834; for then the ratification would exclude all claims by Purdon, which he could otherwise have shewn were, notwithstanding that agreement, competent to him. If the ratification is set aside, then will arise the question as to the import and construction of the agreement of 1834, and that question must be tried in separate proceedings.

I think, the first matter to be considered, is the direction which was asked, for that proceeds on a view of the case totally different from the view of the questions embraced in the issue, on which the law stated to the jury was founded. The consideration of this matter in the first instance, will help to bring out very clearly what the true question to be tried under the issues really was, and thus to lead directly to the law applicable to the issues under trial.

The view of the case to be tried, on which the direction asked for is founded, is that of antecedent obligation, and due implement of a prior agreement. To the terms of the direction (a matter less important, though it may be as conclusive a ground of objection), I must afterwards advert. But the general view on which the direction asked for is founded, mixes up with the propriety and fitness of the law stated to the jury, even though the direction asked for, as framed, might be objectionable. Hence, I wish to consider that general view by itself, in the first instance.

The direction asked for was applicable to both issues, though, perhaps, intended more especially to apply to the second issue. Now, when a deed is challenged, on the ground that a party was induced by fraud to execute it, the question is one of actual fact, and the claims of the one party to demand, in point of law, such a deed from the other, cannot affect the question in the most remote degree. So also, when the issue is put whether the deceased granted a deed, under error as to

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the substance and effect of that deed, the question is also one of proper fact. Did the party understand the effect of the deed in regard to the objects and purposes for which the other who obtained it has proposed to use it? In each case the question does not relate to any antecedent obligation. It is not whether there was an acknowledgment of any obligation, and of the duty of the party to implement and fulfil such. On the contrary, the obligation is averred to be unknown, and the question to be tried is—Whether the party ignorant of the claims against him on the one part, and of the rights and claims competent to him on the other, did execute a renunciation of rights and interests, which he knew nothing of? That question depends upon the actual facts, and in many cases, as in this, on the way the transaction was carried through, and the aid he had, or the absence of any advice, at the time. An overkeen party may be well founded in his claims; but, fearing want of success, if the matter is brought to trial, or knowing that the regular and ordinary advisers of the person he wishes to deal with, are resolutely determined not to yield the point, he may take advantage of a good opportunity, and by unfair practises, to obtain the deed he wishes, and in a way and form in which he knows his real object will not be discovered by the party himself.

So also the granter may have been bound to execute some similar deed, if the question had been made the subject of legal discussion. But, still, he may have been in complete and absolute error as to the substance and effect of the deed he has been induced to sign. And, if that was the case, then the Court is to say whether a deed so granted is to be binding and effectual against him. After that is decided, the question may still be tried, whether he is not bound and may be ordained to grant such a deed, or to have the rights he had renounced, adjudged from him by the Court, after full consideration of what each party has to say. He may have been entirely deceived and circumvented in being induced by fraud to sign a deed; and yet the other party may be well founded in a legal demand for such deed. He may have been in actual and positive error as to the substance and effect of that deed, and yet the Court may afterwards find that the rights he surrendered, are not in law competent to him.

Hence, I think it quite clear that the question as to implement of an antecedent obligation, no matter how constituted, cannot, in some circumstances, in any degree enter into the inquiry under either issue—except as a matter of fact to be proved —viz., that the party well knew what he was bound to grant, and so was neither deceived nor in error. But, the question whether, however great was the deception or error, was he not after all legally bound to grant such a deed under an antecedent obligation, can afford no reply if deception or error, or both, are proved as matter of fact, however available afterwards to exclude his claims when brought forward. Thus, then, the question to which the direction asked for is directed—Whether the ratification was granted in due implement in point of law of an antecedent obligation, can never affect the case under either issue, if, in point of fact, it was granted through deception or in positive error. What the party may have been bound in point of law to grant, was not in the inquiry, and hence the consideration of any such obligation was foreign to the issues of fact—whatever may be the ultimate consequences of such obligation, when once constituted.

This view narrows greatly the law applicable to the issues.

There are many other grave objections to the direction asked for. In the first place, the jury, if favourable to the defenders, as to the alleged antecedent obligation, and if entitled to find for them on that view, might, no doubt, in that light conclude, indirectly, the question as to the party's obligation, although no one could know whether the jury proceeded on that view or on the general matters of fact in the cause. But, if the jury should adopt a view of the agreement favourable to the pursuers, the verdict would have had no effect whatever against the defenders, in excluding their right to try the question, whether the deceased was not bound, and his representative now bound, by the agreement of 1834, to ratify and convey to the effect of the deed granted in 1836. Hence the defenders asked for a direction, which could not be conclusive on the question involved in it, and which they might still have been entitled, as they are still entitled, to try in another action,—viz., whether, consistently with the agreement of 1834, the deceased, or those in his right, can claim any part of the proper estate of Joseph Allan. It is clear, on this

simple ground, that the matter involved in the direction would have raised a collateral issue, which the issues sent to trial could not warrant.

In the next place, it seems to me to be quite clear, according both to the principle and the practice of our pleadings, that if any view of an antecedent obligation was intended to be raised in answer to either of the issues, the defender ought to have obtained, if he could have got it, a counter issue, of which he would have been the pursuer; and that without an issue, the matter involved in the direction could not have been introduced at the trial, or that the plea should have been raised before trial as a question of law.

But, further, whether the defenders can introduce the matter as to any antecedent obligation in this action—on which they have no plea—there is no doubt that they could not have obtained a counter issue, on that view of the rights of parties, in order to exclude either the issue on fraud or on error. The defenders stood by the actual deed of ratification, as excluding the pursuer's claims, whether well-founded or not. If that deed was obtained by fraud, or granted in error as to its effect, and error induced by the defenders, then the first step is to get rid of that deed, and then the defenders are entitled to fall back on the supposed antecedent obligation to renounce the claims competent to the pursuer, as to the estate of Joseph Allan, or other claims. But, while they stand by the ratification as a valid deed, the two issues must be first tried as to its validity, and any such answer could not have been received as a ground for a counter issue, to exclude a verdict on the pursuer's issues. If the ratification was not truly the deed of the pursuer in the legal sense of the term, then that is to be set aside, leaving the rights of parties, under the agreement of 1834, to be determined as they stood before the ratification was granted—unaffected by the after transaction, which was tainted with such conclusive vices.

If either issue for the pursuer was established in point of fact, either that the deed was obtained by fraud, or that it was granted in error such as the pursuer must prove, it never could entitle the defenders, to exclude a verdict on these issues, to say, True, there was fraud; True, there was error; but you were, in point of law, bound, to grant such a deed, and therefore neither the proved fraud, nor the proved error, are to be found by the jury. Hence no counter issue, upon any such ground, could have been granted. In truth, such a defence required to be constituted in a regular way. And under this record, no plea had been stated, which could have warranted the introduction of such matter.

But, independently of all these general objections, the direction asked for was radically unsound. The Judge was not asked to construe or explain the meaning of the agreement of 1834. The defenders were at pains to explain that they purposely abstained from stating the construction of the agreement to the Judge, and asking any direction from him on that subject, as they considered that to be wholly a matter for the jury.

I hold that part of the proposition to be untenable. An agreement, as to the compromise of a particular action, depending, it might be, very much on the claims in that action, or on the conclusions in it, or on its *media concludendi*, and many other similar matters, was a matter, independently of any general rule of evidence, eminently unfit to be handed over to a jury, as the proper and sole judges of the construction of such written agreement was wholly for the Court, although they might or might not have asked the opinion of the jury on some matters of fact, if any such arose.

Further, the next part of the direction asked,—that if the jury "were satisfied on the evidence, that in the contemplation of the parties at that time, the estate of Mr Allan, as referred to in the said agreement, comprehended all of which he was in the possession at the time of his death, whether as heir of Joseph Allan, or otherwise, they must, in that case, hold the deed of ratification, in point of law, to have been granted in due implement of the said agreement, and the jury should therefore find for the defenders," was most objectionable. The defenders assumed, without stating ground for it, that the construction of a written agreement of compromise, could competently be affected by general evidence, to be judged of and applied to the construction of the agreement, by the view the jury might take of the [illegible] by the parties. This was the strangest proposal I ever heard, and the jury were thus to be allowed to take their view of what was con-

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templated, in order that they, the jury, might themselves construe the agreement. But, still further, see what it was they were so to consider. "That in the contemplation of parties," &c. First, what parties were here meant? Was it the two sets of parties—pursuers and defenders? Both would appear to be included. Yet, I suppose, the original pursuers alone were intended. But, then, Were Purdon, and Mrs Alison, on one side, and Mr Rowat, on the other, personally, those referred to by the expression "the parties?" That was not explained, and I own I do not yet know who were referred to as the parties, nor was that explained to us. If Purdon and Mrs Alison were here referred to, there was not one word of evidence as to Purdon or Mrs Alison before, or at the time of the agreement. Not a syllable. It was not attempted to be shown that they were present at the trial—knew or approved of the compromise, or were consulted as to the terms and expressions employed in the minute signed by counsel. If they had, the result would have been an attempt to substitute, for the terms adopted by counsel in order to adjust what was intended, loose conjectures as to what might be in contemplation of the parties themselves. If not Purdon and Mrs Alison are referred to, who were the parties? Not the counsel, I suppose—both dead, and of whose understanding there was no evidence tendered. Was it of the agents? Then that was a dispute between two agents, after the agreement—for of their views in entering into the agreement at the time of the trial, no evidence was tendered. Further, any evidence of the alleged intention of either or both parties, to affect the construction of his written agreement, was wholly incompetent. The agreement of compromise cannot be controlled by any evidence to be judged of by the jury, and, therefore, on this separate ground, the direction was most objectionable.

Then, see what it is that is to be collected as in contemplation. The agreement says—a discharge of all claims against Mr Allan's estate. That may be the subject of serious construction for the Court; but instead of these words which the Court may have to construe by aid of the legal proceedings, the defenders actually propose to say, whether it was contemplated by the parties that "the estate of Mr Allan, as referred to in the said agreement, comprehended all of which he was in the possession at the time of his death, whether as heir of Joseph Allan or otherwise." But, the conclusion from all this, is still more extraordinary,—viz., that the Court were to tell the jury, that if they adopted a particular notion as to the contemplation of parties, they were to hold the ratification, in point of law, to be due implement of the agreement. Due implement is a strange phrase, and, I suppose, it means to be only implement, or nothing but implement of the agreement. But, passing over that matter, the question, Whether a deed is granted in virtue, and as implement of antecedent obligation, is a question of law for the Court, even if any facts are to be looked to beyond the terms of the agreement itself, and the legal proceedings out of which it originated. But, it is proposed to be left in this strange way to the jury to say, that the deed was implement, upon their construction of the agreement.

But, further, taking the two parts of the proposed direction together, this strange result was to be left open and competent to the jury,—viz., that they might construe the agreement by itself not to have the meaning contended for by the defenders; but yet, that if they took up a certain notion as to what parties contemplated, different from the meaning of the agreement itself, they were still to hold the deed, as granted in due implement of that very agreement. And then, on this strange direction, the jury were to be told that they should find for the defenders. Certainly, the conclusion should have been, that the jury should proceed to find specially all the matters embraced in this direction,—viz., First, that they should fix the construction of the agreement; Second, to find whether, on the evidence, they thought the parties contemplated so and so; and, lastly, that on the latter ground, or on both grounds, the deed was in due implement of the agreement. For, otherwise, the Court could never have known on what view the jury proceeded. But, any findings to the above effect, would have been a very strange verdict;—and so the defenders asked that it should be a general finding.

As it is manifest that any consideration of the matter of an alleged antecedent obligation, was wholly inadmissible under the issues which were taken to try the matters of fact therein stated, little remains to be said as to the other parts of the

bill. A passage in the charge was excepted to, and a direction asked instead thereof. To the first part of the passage from the charge, it was admitted that no exception truly lay. The exception to the second part of the passage, and the direction asked, turned upon this point—a very important and perhaps novel question in the law as to error respecting a deed granted without value, and not as the result of any arrangement deliberately made at the time,—Is it enough to protect the deed, and so exclude challenge, that a party ignorant of the existence of legal claims arising out of a state of things of which he knew nothing, has been generally willing to grant a discharge of all claims? And is that general intention a sufficient answer, when it turns out that the deed amounts to a discharge of rights, which could not be in the most general or loose manner, within his notions of his claims? That view I think most unsound, and most unsafe in the consideration of a case of error, and peculiarly inapplicable and insufficient in such a case as the present.

There was no clear evidence as to what Purdon knew or really intended. But this is clear, that the agent acting for the other party had obtained very important information as to portions of his client's estate, to which John Allan had, or might have, no right, in respect of the absence of any feudal title in Joseph Allan; and, having obtained knowledge of such objections, it is presumable that he thought some such objection might apply to the oxgates of land, as well as the other portions. He makes the discharge and ratification apply generally to all lands to which such objections might be stated. Purdon had not even the agreement of 1834 to refer to. Nay, there is no evidence that the agreement of 1834, signed by counsel, had ever been seen at all by Purdon, who was wholly in the hands of the agents who acted for him. Pollock had never seen it, and knew nothing of the previous disputes as to the meaning of that agreement, and did not, in the least degree, understand the possible or actual effect of the discharge sent to him, on that agreement. Of such rights, arising out of the objections I have referred to, neither Purdon nor Pollock had, or could have, any knowledge. Gebbie misled them both. He represented this deed as a mere matter of form—sent it at once extended as a matter of course, with the very view to entrap Purdon into signing it, as he knew he was a common labourer, and expected that Pollock, anxious to obtain the money for the creditors, would pay no attention (as did happen) to the discharge. He states falsely the agreement in April 1836, and represents this ratification as arranged in that agreement, which had not been sent back to Pollock, and so set forth the ratification as implement of the agreement 1836. Gebbie lays a regular plan to induce error, and to mislead both Purdon and Pollock as to the object, and as to the substance and effect, of the discharge and ratification. I cannot separate the way the deed was thus obtained from the actual error so induced, and, therefore, though Purdon might intend generally to discharge all claims, that intention cannot be stated by the defenders, as excluding error in point of law, if, beyond and over and above the matters to which Purdon's intention could alone extend, there was in the knowledge of the other party, other rights of which Purdon was wholly ignorant, and to which it was specially intended by the other party, that the discharge and ratification should extend; to get quit of which, indeed, was the sole object of the agent of the other party. Error, then, in point of fact, as well as in point of law, is shewn to exist, and to have been induced by the facts as to the way the deed was obtained, if the jury thought that such was the result of the evidence, and if advantage of that error, well-known to Gebbie necessarily to exist, was taken in order to obtain the deed. To exclude challenge on the ground of error, because of any general intention to discharge all claims in any case, but particularly in such a case as the present, might lead to great injustice—in the present case, would be most unjust, and therefore could not be a sound rule in point of law. Such general intention—when there is no discussion or explanation of the party's claims—must, in most cases, extend to, and cover only such claims as he may previously have heard of, or may be presumed to have some notion of. No doubt cases may occur in which there shall be an intelligent and competent advice, full discussion of all possible claims, and in which the facts may show that the [illegible] deliberately intend to discharge all claims which might arise from which [illegible] though unknown. And this may often be the true result, when a [illegible] given for a general discharge, and after full advice is accepted,

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without the pretext for saying that there was deception by the other party. The truth is, that error must always be judged of according to the whole facts and circumstances of the case. Error in fact may often amount to error in law, especially induced by the other party. In other cases, it may not amount to error in point of law. The defenders wish to have a sort of general rule introduced, that if a party, however ignorant and unadvised, intended to discharge all claims, no matter in what state of facts, there cannot be error in point of law as to the effect of the deed. There is no such general rule, and no authority could be produced in support of such a proposition.

One material consideration in such a case is, was that intention merely the loose notion of an ignorant man signing a deed without value, as a mere matter of form, or was it the result of a regular and fair transaction? Value here there was none. The statement in the deed, that the ratification was a part of the compromise of the claim under the bond for L.1000, as I have stated, was false, but well calculated to mislead Pollock. The notion that the sum paid under the agreement of 1834 was to be taken as the value for this discharge, is a mere pretext, and inconsistent with the statement in the discharge. All the facts must therefore be looked to, and the question left to the jury, they being, as directed, entitled, in the whole circumstances, in judging of error, to look to claims of a nature of which Purdon was wholly ignorant, known by the other party to be competent to him, but concealed from him, and of which the other party knew that he was ignorant.

I doubt whether any general rule can be safely stated respecting error as to the substance and effect of a deed. To apply to the case of a simple, ignorant, weak, common labourer, unaided by any one acquainted with his claims, signing a deed as a mere matter of course, the views which apply to a person conversant with business, and fully aided and advised, and in that condition entering into a transaction for the purpose of renouncing for value, claims which may be competent to him, would be a grievous miscarriage in the administration of the law. Then, how far error in fact will be error in law, must depend on the character and extent of the error in fact—must depend upon many considerations, which may vary in each case,—and also on the way the party is dealt with, and the opportunities he has of knowing to what extent the deed is to go. Some of the older authorities do state some general views as to error in law; but their application to particular cases must always be matter of doubt. Error in the first place must be founded on error in matter of fact, else there is, generally speaking, no error in law. But then the character and nature of the error in fact varies in every case; and on the extent of that error may depend the question, whether there was error in law to ground a challenge. The error may be the result of carelessness and the neglect of the party himself, which can give him no right in law to challenge the deed. In other cases, the party obtaining the deed may be answerable for the error in fact, and therefore cannot exclude the error in law.

On the motion for a new trial, some of your Lordships, I believe, will state your views on the facts. All I need say is, that I am satisfied with the verdict on the second issue; but I think it right to add, in this case, that I think it a righteous verdict.

Lord Murray.—The first and third exceptions deal with the same matter, and may be considered after the second exception, which involves an important point of law.

This exception, taken by the defenders, to the charge given to the jury by the Lord Justice-Clerk, was, that a direction should be given to the jury to this effect:—"That the jury, in considering the issue sent to trial, were bound to take into consideration the construction and meaning of the said agreement of 22d January 1834; and that, if they were satisfied on the evidence, that in the contemplation of the parties at that time, the estate of Mr Allan, as referred to in the said agreement, comprehended all of which he was in the possession at the time of his death, whether as heir of Joseph Allan or otherwise, they must, in that case, hold the deed of ratification, in point of law, to have been granted in due implement of the said agreement, and the jury should therefore find for the defenders."

The Lord Justice-Clerk refused to give that direction, and he appears to have been perfectly right in doing so, because it was the construction and meaning of the agreement of 22d January 1834, which was entirely a question of law. It has

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been maintained, that where evidence is taken with regard to any contract or agreement, the construction of that contract resolved into a question for the jury. Some English cases were referred to, but they bear no resemblance to the present, and afford no aid in considering it. I consider it very dangerous for persons, not acquainted with the law and practice of England, which I do not profess to be, to enter upon the discussion of such cases; for, foreign lawyers can seldom do so without committing blunders, which expose their ignorance of English law and practice. The great principles of law promulgated by great English Judges, such as Lord Hardwick, Lord Mansfield, and occasionally Lord Thurlow, may be adopted and understood by lawyers of all nations.

On this important question,—the functions of the Judge, as distinguished from those of the jury, are well stated in a treatise of the law of evidence, as administered in England and Ireland, with illustrations from the American and other foreign laws, by Mr Taylor. After observing that the general principle that the Judge must determine the law, and the jury the fact, is not and cannot be disputed, Mr Taylor observes, that in the application of this principle at *nisi prius*, embarrassing questions arise from the difficulty of defining, with clearness, the obscure and shifting boundaries of law and fact.

In his statement, Mr Taylor quotes the declaration of Lord Mansfield, that the fundamental definition of trial by jury depended on the universal maxim, "*ad questionem juris non respondent juratores; ad questionem facti non respondent judices.*" Mr Taylor also refers to a not less decisive exposition of the same doctrine, by Mr Justice Story, an eminent judge and great jurist, referring to an argument that seems to have been used in the American Courts, that in capital cases the jury are judges of the law as well as of the fact. He states, that it had been his decided opinion, during his whole professional life, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case tried upon the general issue.

In the course of trials, various questions occur, some turning entirely on matter of fact, according to evidence to be adduced at the trial before the jury. In others, the facts are not disputed, or are admitted, but there is a question of law, which can alone be determined by the Court.

In this case, there was no dispute in matter of fact, and no evidence adduced, in regard to the agreement of the 22d of January 1834. There was an agreement signed by the counsel, that there should be a verdict returned in certain terms, which was reduced to a minute. And there was an interlocutor of Court, of 13th February 1834, interponing the authority of the Court to the minute. There could not be any dispute of any sort between the parties in reference to how that minute was signed and agreed to. It had become matter of record. The import and effect of the minute could never be determined by a jury, but only by the Court.

There was a strong objection, and though of a different sort, to the Court taking into consideration the import and effect of that record, I will rather call it, than agreement, at the trial. The defenders might, by an action of declarator, or by other legal procedure, have brought forward the construction of that order of Court, for which they contend. But they had not done so in this trial. The Lord Justice-Clerk did not, therefore, enter into the consideration of that matter. There was no issue applicable to it; and, if there had been one asked, it might have been matter of discussion whether there was room for granting an issue on what was purely matter of record, and where there was no dispute as to the facts.

The first exception is to the direction given by the Lord Justice-Clerk, and the third exception is to his refusal to give the direction asked by defenders' counsel. These exceptions involve the same matter, and substantially are an objection to the charge the Lord Justice-Clerk gave to the jury.

He desired the jury to consider, first, whether Purdon knew he was discharging any claims which he had not previously discharged, beyond the right under the bond; and, secondly, whether, if he believed he was discharging all his claims, they might take into view, in considering the question whether he was in error or not, the rights which might be competent to him, but which were not known to him at the time. A person may be induced to discharge rights which he was not aware he had; and, if this is done, while he thinks he is doing something else, — for instance, that he was discharging a bond, which he was bound to discharge, for a

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consideration he received,—he would be in error if he was led to discharge an other right, whether he was cognisant that he possessed such right or not. Th direction which the Lord Justice-Clerk gave, appears perfectly correct in ever respect, and is very distinct. While the direction the defenders asked for, an which forms the subject of the third exception, might have tended to mislead th jury.

Besides these exceptions, the bill brings before the Court other points, whic were made the subject of discussion by the counsel.

The Lord Justice-Clerk appears to have directed the jury, that they were to fin for the defender, on the first issue, because, there was no evidence of any intentio of fraud on the part of Messrs Rowats, individually; but if they thought there we unfair actings on the part of Mr Gebbie, the agent for the defenders, they migl pronounce a finding to that effect, if they thought proper to do so.

I confess, I should not have thought it a wrong direction, that the jury shoul have been directed, that though the defenders had not, personally, committed an fraud, it was left to them to consider whether, though originally personally inn cent, they, through the agency of William Gebbie, did, by fraud, obtain fro Purdon the deed of ratification and conveyance in question, which they have founde upon in the proceedings. The first issue is, Whether the defenders did, by them selves or himself, or by other or others. But I consider, in the actual trial an result of the case, there is no substantial difference between the one finding and th other; and, I am perfectly satisfied, that there is no sound objection to the cour which was adopted by the learned Judge, of allowing the jury, if they were sati fied that the deed was obtained by Mr Gebbie, by unfair practices, to find so i their verdict.

That was truly a fact fit for the trial of the jury; and it is the main point i the evidence, whether there was such a fraud. It is said that Mr Gebbie is n directly a party. He is not tried for this fraud, though, if he thinks he has bee ill used, the case may be freed from all doubt by being recommended to the co sideration of the Lord Advocate. There is nothing more important to the publi and to conveyancers themselves, than that deeds of conveyance should be honestl and correctly prepared, and not fraudulently interpolated. But, the whole case o the defenders rests on the attempt to show, that there was no such fraud on hi part.

The evidence is so conclusive, that I do not think it necessary to go into it i detail. The original agreement was clear and distinct, confined to the bond alone and Mr Gebbie availed himself of the ignorance of a new agent, to interpolate th deed, and to introduce the discharge of a claim which was not discussed or consi dered, and which certainly formed no part of the transaction.

Lord Wood.—I have arrived at the same result as your Lordships. I think tha the exceptions taken by the defenders ought to be disallowed, and the motion fo a new trial insisted in by them refused. But I do not intend to deliver any sep rate detailed opinion. Lord Cowan and I have consulted together since the di cussion in Court, and finding that our views coincided upon the matters to be di posed of, we agreed that his Lordship should prepare a full opinion as a joint on This his Lordship has done, and his Lordship will now deliver as such the opinio prepared by him.

Lord Cowan.—(After the narrative of the facts quoted above, his Lordship pro ceeded)—This being the state of the facts in evidence before the jury, the questio raised by the bill of exceptions are for consideration.

The direction of the presiding Judge, which is the subject of the *first* exceptio had regard to both issues, but it is in its bearing on the second alone that requires to be considered; and it may be taken, as it was in the argument, alon with the third exception, which set forth the direction that the counsel for th defenders maintained ought to have been given the jury.

There can be no doubt, that in the inquiry, whether the deed was executed i error as to its substance and effect, it was all-important for the jury to consider, o the evidence, the state of the granter's knowledge as to the claims he was dis charging by the deed. If they should hold that he was discharging no more tha he had previously discharged beyond the right under the bond, then he must hav been in error as to its substance and effect. But, if they thought that he believe

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he was discharging all his claims, it seems no less apparent, that it was still for the consideration of the jury, whether he was not equally in error as to its substance and effect, when the deed is found so expressed as to affect rights competent to him, but not known to him at the time. The direction must be considered with due regard to the facts and circumstances in evidence. The granter might be under the belief that he had no claims but those which he was discharging, when, in point of fact, he had. His mind being under this belief, his consent is obtained to a discharge expressed in general terms. But, however general in expression, the consent truly applies only to the claims which at the time he holds himself to possess. And if there were claims of a different kind, or exigible by him in a different character, and on another title, than those of which he believed himself possessed, the generality of the discharge goes beyond his true meaning and intent. There has truly been substantial error, on his part, in what he did, though he knew it not at the moment; and "those who err in the substantials of what is done contract not," 1 Stair 10-13.

This case, however, does not rest on that ground alone. The party obtaining the discharge from Purdon, knew he had or might have such other claims, but concealed the fact. He well knew generally, that there might emerge claims competent to Purdon as heir of Joseph Allan, junior, which he was under no express obligation to discharge. The state of the title made him aware of this. Moreover, any belief in Purdon's mind, that he was called on and bound to discharge all claims, of whatever kind, was induced by the false narrative of the deed itself, that it had been, when it was not, a condition of the agreement under which he received the L.225, that he was to grant such a deed as that submitted to him for subscription. His legal right to maintain that he was in substantial error as to the effect of the deed, cannot, therefore, be affected by his belief, at the time, that he was discharging all claims he had, when that belief was induced by the party obtaining the deed, in the knowledge that there actually were or might be competent to the granter, claims more or less valuable, which the generality of the discharge might debar,—the consent truly given to it never having been intended to have that effect.

It is a mistake to think that, whatever might be the opinion of the jury on the first issue as to fraud, the whole circumstances in which the deed was obtained were not for their consideration in disposing of the issue on the ground of substantial error. In all questions of the kind, the facts are to be carefully examined to ascertain whether the error has been induced through the deceit of the party obtaining the deed. The evidence which established Gebbie's knowledge and concealment of that of which Purdon knew nothing, was legitimately before the jury, and proper for their consideration in the question of error.

On the one hand, therefore, the presiding Judge was correct when he stated it to be competent for the jury to take into view the questions which it appeared might arise as to the rights competent to Purdon, although not known to him at the time, and, on the other hand, the general direction asked by the defenders' counsel, that if Purdon had intended to discharge all claims competent to him in respect of the property possessed by John Allan at his death, there was in point of law, no error, was erroneous. He might intend to do so in the state of his belief at the time, falsely impressed on him, or from his ignorance of that which the party with whom he was transacting well knew, and yet be in error as to the substance and effect of the deed, as operating the discharge of other and different claims which he had then no ground to believe that he did in fact possess.

And here it may be observed, that assuming the view we have taken of the first and third exceptions, so far to be correct, we cannot hold that it can in the slightest degree be weakened or affected by any argument founded on the alleged meaning and import of the agreement of 1834. Supposing it were now clear that the defender's construction of it is the right one, and that it could therefore be shown that by the deed under reduction, Purdon went no farther than he could have been compelled to go by the agreement of 1834, that would by no means prove that he was not however as to the substance and effect of the former. It obviously does not follow that because Purdon only did what *ex hypothesi* he was bound to do according to the true meaning of an obligation granted by him (but the meaning and extent of which had always been matter of contention between the parties,

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Purdon and his advisers studiously resisting the attempts which were made to lead him to sanction the defenders' construction, and insisting that everything should be left entire upon the terms of the agreement itself), he could not be in error as to the substance and effect of the deed by which it was done. On the contrary, that Purdon did no more than he would be compelled to do may be true, but it may be not the less true that he did it in error—that although he believed he was discharging all his claims, he was in error in so far as the deed had the effect of discharging claims in respect of rights then competent to him, but not known to him at the time; the error as to the substance and effect of the deed not depending on whether he was thereby doing what he might be bound to do, but on the state of his mind when the deed was executed,—the effect which he believed was to be produced by the general discharge thereby taken from him as contrasted with the effect attributed to it by those who procured the deed, and the circumstances under which it was obtained. If Purdon, when believing that he was discharging all his claims, intended only to discharge claims which were known to him, his belief applying therefore to these claims only, if he intended to do no more than confirm the discharge he had previously granted in reference to the compromise of the actions (and the general words of the discharge are said to go farther and to exclude all those claims, be they good or bad, which that discharge would not have excluded, and to bind Purdon to their abandonment), it is manifest that on his part there may have been so far the most complete error as to the substance and effect of the deed, although it could be shown that truly the claims were not open to him, all of them having fallen within the compromise of 1834, and that therefore he had only discharged claims he was bound to discharge. It may be so, but that cannot prove that in granting a deed surrendering these claims, he did not do so in error, inasmuch as, whether good or bad, it formed no part of his intention to give them up.

We shall have occasion again to advert to this matter of the meaning and import of the agreement 1834, in reference to the second exception, which we now proceed to consider.

The construction and meaning of the agreement of January 1834, the evidence shows, had been the subject of repeated discussion. It was so when the terms of the discharge were adjusted, upon the payment made to Purdon of the L.2000. It was again under discussion, when the claim under the bond of provision was advanced by Purdon, and the sum accepted in compromise was paid, and discharge granted. The parties were at variance as to the legal effect and meaning of the instrument. Now, the proposal of the defenders, in asking for this direction, was, that it should be left to the jury, upon the evidence, to construe the agreement, and to say whether, in the contemplation of the parties at its date, the estate of John Allan comprehended all of which he was in possession at the time of his death, whether as heir of Joseph Allan or otherwise; and then, if satisfied of this, they were to be directed, in point of law, that they must hold the deed of ratification to have been granted in due implement of said agreement. Had the presiding Judge given that direction, he would have delegated to the jury matter that was within his own province and duty. It was not for the jury, but for the Court, to construe the agreement. Evidence there might have been tendered of the circumstances in which the agreement was entered into, as by production of the records in the actions of reduction. This was not attempted. Whether, if it had, such evidence would have been admissible, it is not necessary to inquire. But supposing there had been evidence of that description, still it must have been for the Court to construe the written instrument, with the aid of whatever evidence of the kind might have been held competent or admissible.

The agreement in itself is in expression sufficiently simple:—"The pursuers, granting a full discharge of all claims against Mr Allan's estate, and guaranteeing the defenders against any action at the instance of any party for reducing the deed of the late John Allan." Purdon's view of this agreement was, that it applied to no estate that was not so vested in the person of John Allan by sufficient title, as to be disposable by his deed; that it was only as to such estate that John Allan's deed required to be set aside, seeing that the deed could only prejudice the heir-at-law, as a conveyance of the estate, which, by feudal possibility, John Allan could convey; that all that was involved in the compromise of the actions, was the setting

up of the deathbed deed, and securing to the defenders all the rights which that deed could give them, and no more; that that was the extent of the compromise; and that it was that deed, and the rights it gave against the challenge of which, by any party, the defenders were alone to be guaranteed; but that the compromise and agreement had no reference to any estate or any claim to it, which John Allan could not convey by any deed of his, and that to such estate or claim the guarantee did not apply. Nevertheless, the contention of the defenders was, that the discharge of all claims against Mr Allan's estate had a more extensive meaning, and applied to estate which could not be carried by the deed, but of which he was in possession merely as heir-apparent of his brother Joseph. The correctness of this construction of the instrument it was that the defenders wished to leave altogether in the hands of the jury, on the general evidence in the cause. This was palpably erroneous. It was the province of the Court alone to determine that matter, and the direction sought was therefore rightly refused.

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But, farther, we think the direction was also rightly refused, on the ground which we have already noticed,—that the meaning and construction of the agreement of 1834, was not relevant matter in reference to the second issue, inasmuch as, even adopting the construction for which the defenders contended as the true one, it could not legitimately bear upon or affect the question, of whether in discharging all his claims, Purdon was in error as to the substance and effect of the deed under reduction. The construction and meaning of the agreement, therefore, were matters beside the issue on which the jury were to return their verdict. The just answer to it in no respect depended upon its meaning and construction, and the Judge would have been in error to have given any direction to the jury in regard to it, as a subject for their consideration, and in reference to which it was his duty, by direction, to assist them in forming their opinion.

Indeed, even assuming it to have been itself matter relevant to the issues to be tried, it may be doubted whether the defenders had placed themselves in a position to entitle them to avail themselves of it. We rather think that could only have been done by putting the meaning and construction of the agreement in issue, by a counter issue on their part; and, supposing them to have done so, we think it would not have been thereby made part of the case, so as to form matter for consideration in regard to the question embraced by the second issue, or which could legitimately affect the verdict to be returned on it. It would have afforded no ground for negativing what the pursuer there put in issue. On the contrary, it would have been an issue proceeding on the assumption of the truth of the pursuers' plea, and could only have been founded on as affording—if the verdict upon it had been a verdict for the defenders—an answer to the conclusion of the action in this way. *Esto* that there were essential error, as maintained by the pursuer, and found by the verdict for him on the second issue, that is of no consequence, inasmuch as the deed challenged was only one which the pursuer was bound to grant, and of which he, therefore, has no interest to obtain decree of reduction.

But independent of this, and assuming that, as the case was actually shaped, the construction and meaning of the agreement was properly part of the defenders' case, we hold that, both in relevancy and form, the direction sought was, nevertheless, rightly refused, for the reason we have previously given—viz. that, as stated from the bar, the Judge was not asked to construe the agreement, or direct the jury as to its construction, with reference to the view that might be taken by them of the evidence in regard to it (had there been any such evidence), it having been the distinct purpose of the counsel for the defenders not to ask any such direction, and, on the contrary, to ask that the Judge should, by his direction, leave the construction and meaning of the agreement wholly to the jury.

On these grounds we are of opinion that the first, second, and third exceptions must be disallowed.

The matter of the fourth exception is not within the present discussion, as parties admitted at the bar; and the fifth was passed from at the discussion.

There remains to be disposed of, the motion to set aside the verdict: but after the full statement of our views as to the import of the evidence in its more material parts, which has been already given, it is unnecessary to enter into any detail of the grounds on which, as it appears to us, the motion ought to be refused.

That the deed was granted without value, cannot be seriously disputed. The

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narrative is not only silent as to value having been specifically given to any extent whatever—it sets forth the cause of granting to be the agreement between the parties under which Purdon's claim, in respect of the bond of provision, was compromised for L.225. The agreement thus referred to, demonstrates that there was no such undertaking on the part of Purdon, but simply a discharge of his claim under the bond. Neither can the agreement of January 1834 be urged to afford proof that the deed of ratification was granted for value. All that it stipulates for is a discharge by Purdon and Mrs Alison, and, on payment of the L.4000, that was granted at the sight of the Court. Therefore, clear it is on the proof, that the ratification and conveyance was granted without value.

Then with regard to its having been granted by Purdon, under error as to the substance and effect of the deed, this is obvious, on the face of the evidence, documentary and parole. The more material parts of that evidence have been noticed. It is not necessary to go more minutely into the proof. There was indisputably ample enough ground to justify the finding of the jury. We would only observe, that, in our apprehension, the false narrative contained in the deed itself, setting forth an obligation to grant it, which had no foundation in fact, was an element, in the circumstances in which the deed was obtained from and executed by Purdon, of the greatest weight in the question which the jury had to try. Taken along with the rest of the evidence, we think it conclusive against the motion for setting aside the verdict as contrary to evidence.

The Court pronounced the following interlocutor:—"The Lords having heard counsel for the parties, disallow the bill of exceptions, and refuse the motion for a new trial: Find the pursuers entitled to the expenses of the discussion, and remit to the Auditor to tax and report, on the principle of only one account of expenses for the bill and motion."

Rankin, Walker, & Johnston, W.S.—Campbell & Smith, S.S.C.—Agents.

No. 54. Mrs Lucy Thomson or Davidson and Spouse, Pursuers.—*G. G. Bell—Young.*

William Mackenzie, Defender.—*D. F. Inglis—Ross.*

William Tankerville Monypenny, Defender.—*Moir.*

Matthew Forster Conolly, Defender.—*Patton—Fraser.*

Records—Inhibition—Error—Statute 6 *Geo. IV. cap.* 120, *sect.* 51.—The Cour having held that an inhibition was not duly recorded, and was therefore ineffectua the inhibiting creditor brought an action against the Keeper of the Register o Inhibitions for damages to the extent of the debt contained in the inhibition. Th defence was, that the inhibition, by reason of prior defects, was inoperative an null when presented to be recorded. The relevancy of that defence was called i question, but the Court proceeded first to dispose of the objections to the validit of the inhibition. These were all repelled, and judgment on the relevancy wa therefore not pronounced; but opinions of Lords President, Ivory, and Curriehi (contra Lord Deas), that the defence was irrelevant.

The objections so repelled (*diss.* Lord Deas, and altering his judgment), were— (1), The bill on which the letters of inhibition proceeded, commenced,—"M Lords, &c., Shews," and ended, "Herefore, letters of inhibition." *Objected*, th there was no intelligible address, or prayer.

(2), The inhibition was executed edictally. In the *bill* the debtor was n designed as furth of the kingdom, and the prayer contained no application f authority to cite him as furth of the kingdom. *Objected*, that a warrant to ci edictally, which was introduced into the *letters*, was without authority, and that t messenger had therefore no valid authority to cite the debtor edictally.

(3), The execution of the messenger bore that he lawfully inhibited the debto and that he left a full double of the will, with copy inhibition, for the debtor the record office, in terms of the statute. *Objected*, that the execution did not s forth anywhere that the debtor was abroad, and that there was nothing to sh why the messenger adopted the mode of edictal citation instead of the ordina mode of citing him personally, or at his dwelling-place.

(4), The execution bore that the messenger inhibited the lieges only at the market-cross of Edinburgh, Pier, and Shore of Leith. *Objected*, that that mode of publication had been abolished by the 6 Geo. IV. cap. 120, sect. 51, so that there had been truly *ex facie* of the execution no available publication to, or inhibition of the lieges at all.

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Defences repelled, so far as founded on these alleged irregularities of the inhibition and execution.

This action was raised in 1847 by Walter Malcom, writer in Edinburgh, against William Mackenzie, W.S. It concluded for payment of L.1271, 19s. 7d., being the amount of a debt incurred in 1829 by Major Anstruther of Carplie and Thirdpart to the late James Thomson, W.S. In 1830, Mr Thomson raised an action, and obtained decree against Major Anstruther for that amount. On the dependence he raised letters of inhibition, which were duly published, and given in to be recorded. The decree, debt, and letters of inhibition were afterwards assigned to Mr Walter Malcom.

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In a ranking and sale of Major Anstruther's estate, the Northern Reversionary Company, who were subsequent creditors, challenged the validity of Mr Thomson's inhibition—and which was then held by Mr Malcom—on the ground, *inter alia*, that a blunder had been committed in the recording, by changing the sum mentioned in the letters from L.1271 to L.1221. The Court, on 8th July 1846, held that the inhibition was not duly recorded, and that it was therefore ineffectual.[1]

Pending that competition, Mr Malcom had intimated to Mr Mackenzie, the keeper of the Register of Inhibitions, the objections which had been stated to the validity of the inhibition. He had also intimated, that if the objection founded on the error in recording should be sustained, he would hold Mr Mackenzie liable for all accruing loss and damage. Mr Mackenzie did not interfere in the competition, but when the judgment of the Court was pronounced sustaining the objection, he entered into a minute of agreement with Mr Malcom for the purpose of taking that judgment by appeal to the House of Lords. By that minute it was agreed that the appeal should be conducted in name of Mr Malcom, although in reality by Mr Mackenzie, he having the power of prosecuting or abandoning it. It also provided, that the expense should be defrayed by the losing party, and nothing in the minute was to be construed as admitting Mr Mackenzie's liability—the arrangement being entered into without prejudice to the rights and pleas of both parties.

An appeal was accordingly entered against the judgment of 8th July 1846; but the House of Lords, on the 26th March 1849, dismissed the appeal, and affirmed the judgment of the Court of Session, with costs.

In these circumstances, the present action of relief was raised in February 1847, by Mr Malcom against Mr Mackenzie, as Keeper of the General Register of Inhibitions, concluding for payment of the principal sum of L.1271, with interest—in all L.1886, as the amount of the loss and damage sustained in consequence of the defective recording of the inhibition. It also concluded for payment of the expenses incurred by the pursuer in the discussion with the Northern Reversionary Company, and the pursuer's whole expenses in rendering his claim effectual, he being ready to convey to the defender his whole grounds of debt and diligence at the defender's expense.

The action was laid on the Act 1693, cap. 114, which provides, "that the Keepers of the Register of Sasines, Inhibitions, &c., shall keep minute-books of all writs presented to them, and to registrate in their several registers, mentioning the day and hour when, and the names and designations of the persons by whom the said writs shall be presented, and that the said

[1] Ante, vol. viii. p. 1201.

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minute be immediately signed by the presenter of the writ, and also by the Keeper, and patent to all the lieges who shall desire inspection of it, gratis, and that the writs shall be registrate exactly conform to the order of the said minute-book, all under the pain of deprivation of the Keeper of the Register." The Act further declares "the said Keepers not observing the premises liable to the damages of the parties prejudged by the not due observing of the present Act." By the statute 1696, cap. 18, actions of damages are declared to transmit against the heirs and representatives of the clerks, though not commenced in the clerk's lifetime.

Mr Thomson, to whom the debt had originally been incurred, died in 1831. He was succeeded by his only child, Lucy Thomson, now Mrs Davidson, who was the general disponee and executrix of her father, and who, as such, had assigned the debt and inhibition to Mr Malcom. On 24th November 1853, she and her husband were sisted as parties pursuers in this action, having acquired right from Mr Malcom by translation and retrocession to the whole claims embraced under this action.

Mr Mackenzie's defence was, that the inhibition was defective in various respects, and null when presented to be recorded.

The circumstances under which the inhibition was raised and executed, were as follows:—In 1830, Major Anstruther was an officer in the British army, and his regiment was stationed at Malta. He came to Scotland on leave of absence early in January 1830, and remained there for a few months, removing from place to place chiefly on visits to friends. The pursuer averred that he never had any residence or domicile in Fife—within which county the entailed estate of Thirdpart was situated—or in any other county of Scotland: That the summons at Mr Thomson's instance was dated and signeted the 24th March 1830, and was executed against Major Anstruther personally by an Edinburgh messenger on the 7th April 1830: That on the same day, Major Anstruther wrote to his agent, Mr Thomson Paul, that he intended immediately to leave Scotland to join his regiment at Malta, and that in about two days thereafter, he left Scotland for that purpose.

On the 12th of the ensuing month of May 1830, a bill for letters of inhibition was presented to the Bill-Chamber, and passed at Mr Thomson's instance against Major Anstruther, bearing to proceed on the dependence of the action. The letters were executed edictally, by leaving a copy at the Record Office. After his departure, Major Anstruther remained abroad for several years, his regiment being on a foreign station. The letters were published at the market-cross of Edinburgh, and pier and shore of Leith, and also at the Record Office. They were then, with the executions, presented to Mr Mackenzie, to be recorded, and the letters were afterwards returned to Mr Thomson's agent, with an attestation, in these terms:—"*At Edinburgh, the 13th day of May* 1830.—Presented by John Elliott, writer in Edinburgh, and registered in the General Register of Inhibitions, conform to Act of Parliament." (Signed) "WILL. MACKENZIE."

The pursuer set forth the error in the recording, and the result of it, as narrated above, and he pleaded;—That in virtue of the statutes and regulations under which the defender exercised the office of Keeper of the Register of Inhibitions, he was liable in the whole damages and expenses in consequence of the error in transcribing the inhibition in the register, whereby the diligence was found to be ineffectual.

The defender, in his answers to the pursuer's statement, did not admit that Major Anstruther was furth of Scotland when the inhibition was executed against him; but he did not explicitly deny it, or aver that he was within Scotland at that date. Both parties renounced probation as to the fact.

Mr Mackenzie pleaded;—A mere error in transcribing the inhibition did

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not impose upon him a liability, such as the pursuer contended for, even supposing that, if correctly transcribed, the inhibition would have been effectual; but he pleaded farther, that there were such errors in the inhibition as rendered it ineffectual before it was presented to be recorded. "(1.) That it was not duly and regularly expede. (2.) That it was not duly and regularly executed against the debtor; and, (3.) That it was not duly and regularly executed against, and published to the lieges.

"More particularly, the inhibition was irregular, null, and inept, in respect—(1.) That the bill on which the letters are alleged to have proceeded, contained no address and no prayer, or at least no correct and intelligible address, and no correct and intelligible prayer for letters of inhibition at the instance of the creditor. (2.) That the bill contained no prayer for warrant to execute the letters as against a debtor forth of Scotland. (3.) That the letters bore to authorise execution against the debtor as furth of Scotland, and are alleged to have been so executed, although no warrant had been craved or granted to that effect in the bill and deliverance thereon, and the letters and executions were in this and in other respects unauthorised, and *ex facie* disconform to their warrants. (4.) The debtor was not designed in the bill, letters, or executions, by his profession, nor by his residence, nor stated to be forth of Scotland, nor to have no residence or domicile therein, nor was it set forth in the executions that the messenger could not find him personally. (5.) The letters were not executed or published at the market-cross of the head burgh of the debtor's domicile, nor at the market-cross of the head burgh of the shire in which the debtor's lands lay. Nor were the letters in any view duly published to, or executed against the lieges."

The bill on which the letters proceeded was as follows:—"My Lords, &c. —Shews your servitor James Thomson, writer to the signet, that I have raised and intented summons and action before your Lordships against Captain Robert Anstruther of Thirdpart, concluding that the said Captain Robert Anstruther ought and should be decerned and ordained, by decreet of your Lordships, to make payment to me of the sum of L.1271, 19s. 7d. sterling, being the balance due to me by the said Captain Robert Anstruther on accounts-current between us, composed of business charges performed by me, and payments made by me to the said Captain Robert Anstruther, on the one side, and sums received by me on account of the said Captain Robert Anstruther on the other, conform to account-current between us, commencing on the 1st day of August 1827. . . . . And the said Captain Robert Anstruther knowing perfectly that I will obtain decree against him in the said action for payment of the above sums of money, and then to sist all manner of execution against him for payment thereof, he, in manifest defraud, hurt, and prejudice of me, intends, as I am informed, to sell his lands," heritages, &c., "and to contract and take on debts, and to grant bonds and other securities therefor, unless remeid be provided thereagainst, as is alleged. Herefore, letters of inhibition. A. Monypenny's bill. *Edinburgh, 12th May* 1830.—*Fiat ut pr*,—Because the Lords have seen the dependance. (Signed) Ja. Mercer."

The letters of inhibition run as follows:—"Whereas it is humbly meant and shewn to us by our lovite James Thomson, writer to our signet, that he has raised and intented action before the Lords of our Council and Session at his instance against Captain Robert Anstruther of Thirdpart, concluding that the said Captain Robert Anstruther ought and should be decerned and ordained, by decreet of our said Lords, to make payment to the complainer of the sum of L.1271, 19s. 7d. sterling."

The writ then proceeded according to the usual form, and concluded—"Our will is herefore, and we charge you that on sight hereof ye pass, and in our name and authority inhibit and discharge the said Captain Robert

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Anstruther, personally, or at his dwelling-place, if within Scotland, and if furth thereof, by delivery of a copy hereof at the Record Office of the Keeper of the Records of the Court of Session, in terms of the statute thereanent, that he in no way sell, alienate," nor dispone any of his lands and others, in usual terms, to the hurt and prejudice of the complainer; "and that ye also inhibit and discharge all and sundry our lieges, and others, whom it effeirs, by open proclamation at the market-cross of and other places needful, and if necessary, by open proclamation at the market-cross of Edinburgh, and pier and shore of Leith, and by delivery of a copy hereof at the Record Office aforesaid, in terms of the said statute."

And the writ concluded, " which to do we commit to you, &c. *Ex deliberatione dominorum concilii.* (Signed) ALEX. MONYPENNY. Written by John Elliot, my apprentice."

The messenger's execution of this inhibition was as follows:—"Upon the 12th day of May 1830 years, by virtue of the before written letters of inhibition raised at the instance of the before designed James Thomson, complainer, against the also before designed Captain Robert Anstruther, and against All and Sundry his Majesty's lieges and others whom it effeirs, I, Erskine Conolly, messenger-at-arms, passed, and in his Majesty's name and authority, lawfully inhibited and discharged the said Robert Anstruther, that he in no ways sell;" and so forth, in usual terms; "and also, by virtue and in name and authority foresaid, I passed to the market-cross of Edinburgh, and pier and shore of Leith, respectively and successively after other, and at each of these places, after crying three several oyeses, open proclamation, and public reading of said letters, I lawfully inhibited and discharged All and Sundry his Majesty's lieges, and others whom it effeirs, that they nor none of them presume, under any colour or pretext, to," take from Captain Anstruther any dispositions, or lend him any money, or do any deed, directly or indirectly, to the fraud of the complainer, &c., conform to the tenor of the letters of inhibition; "a full double whereof to the will, with a just copy of inhibition to the effect foresaid, thereto subjoined, for the said Captain Robert Anstruther, and the like just copy of inhibition also thereto subjoined, for All and Sundry his Majesty's lieges and others whom it effeirs, I left for the said Captain Robert Anstruther, and said lieges and others whom it effeirs, at the Record Office of the Keeper of the Records of the Court of Session, in terms of the statute thereanent, within the General Register House, Edinburgh; and the like just copy of inhibition in virtue and to the effect foresaid, I affixed and left for All and Sundry his Majesty's said lieges and others whom it effeirs, at and upon each of the said market-cross of Edinburgh, and pier and shore of Leith, after using the solemnities," &c.

On 2d March 1853, the Lord Ordinary (Robertson) pronounced the following interlocutor:—" Before answer, remits to Mr James Hope, Deputy-keeper of the Signet, or his assistants, to examine the bills for letters of inhibition kept at the Signet Office, during the forty years preceding 12th May 1830, and up to this date, and to report how far the bill No. 15 of process is conformable to the ordinary style and practice in regard to such bills, and specially, 1st, whether the introductory address of the said bill No. 15, and the prayer thereof, or either of them, is agreeable to the form in use, or if not, in what respect it differs therefrom; and 2d, whether, when the letters of inhibition are to be executed against a party as furth of the kingdom, it is usual, in such bill, to design the party in the body thereof, as being so furth of the kingdom, and to pray for a warrant to cite him accordingly,—and also to report on any other matter of practice which may appear from the said bills kept at the Signet Office, as important for the decision of the present case. Further, remits to Mr William Robertson, one of the Keepers of the Records, or his assistants, to examine the Register of Inhi-

bitions so far as in his custody, for the forty years preceding 12th May 1830, and up to this date, and to report whether the executions of letters of inhibition are so recorded, as to enable him to state what is the common form thereof, and whether the execution No. 12 of process is conformable to such usage, and specially whether, where the execution is directed against a party as furth of the kingdom, he is so designed in the letters of inhibition, and whether the execution bears in express terms that a copy of the letters of inhibition was left at the market-cross, pier and shore of Leith, or left at the office of Edictal Citations, for the said party, as being furth of the kingdom."

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But the examination was afterwards limited to at least one week in each year, from 12th May 1790 to the 2d March then current.

In November 1853, the Lord Ordinary (Deas) pronounced the following interlocutor:—"Before further answer, remits of new, to Mr Hope or his assistants, to report specifically with reference to the period embraced in his former search, and report whether it be according to usual practice, for the prayer of a bill for letters of inhibition to be expressed in the words of the prayer of the present bill, or in words of similar import, and if not usual for the prayer to be so expressed, whether any, and if so, what instances occur within the foresaid period of the prayer being so expressed."

The Deputy-keeper's report, in obedience to Lord Robertson's remit, bore,—(1), That the bill, No. 15 of process, was not in accordance with the prevailing or more general practice with reference to bills for letters containing warrant to execute as furth of the kingdom.

(2), That, although in many cases the introduction was in full, the prevailing practice in regard to bills for inhibition, and all other letters passing the Signet requiring bills, was an abridged form of introduction somewhat similar to No. 15 of process, and on this point, the agents for the parties were so satisfied, that they considered it unnecessary that the reporter should make any detailed report on the subject.

Under the second head of the remit, that on examining nearly 200 bills for inhibitions, he found that in by far the greatest number of any one class of the bills examined, one or more of the parties were not only designed as furth of the kingdom, but the writs contained a prayer for a warrant for edictal execution; and he stated, as his own understanding of the practice, that in order to authorise warrant for edictal execution to be inserted in letters of inhibition, one or other of the parties should be designed in the bill as furth of the kingdom, or that the bill should contain a specific prayer for edictal execution.

Lastly, according to the reporter's understanding of the practice, as appearing from the bills kept at the Signet Office, and examined as before mentioned, in order to authorise warrant for edictal execution to be inserted in letters of inhibition, one or other of the parties should be designed in the bill as furth of the kingdom, or, that the bill should contain a specific prayer for edictal execution. A simple prayer for inhibition in common form ought not, according to the reporter's view of the practice, to authorise warrant for more than ordinary personal execution; but if the party is distinctly designed in the body of the bill, as furth of the kingdom, reporter was of opinion that, agreeably to practice, a prayer for inhibition in common form, would carry a warrant for edictal execution.

"Your reporter begs further to observe, that while the foregoing report has reference to bills for inhibition merely, he has no doubt that a similar practice prevails with regard to all other letters requiring bills passing the Signet, expede against parties furth of the kingdom. This conviction your reporter has arrived at, from an inspection of several bills for hornings and adjudications, &c., which was made during the course of the foregoing investigation."

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Mr Drysdale (in place of Mr Robertson) returned an elaborate report, in which he stated, as the result of his examination, that the execution in question was not conformable to the common usage of such executions.

The additional report by the Deputy-keeper of the Signet, in obedience to the remit by Lord Deas, was as follows:—" Your reporter begs to report as follows:—1. That his former search embraced a period of fully sixty-three years, commencing in January 1790. That in each year, there were examined several bills for letters of inhibition, which he had reason to suppose had actually been executed edictally. 2. That only one instance has occurred in the bills formerly examined, of the prayer of a bill being expressed in precisely similar words to the one in question. 3. Twenty-eight instances occur within the foresaid period of prayers being expressed in words of a similar import, such as, 'Herefore, inhibition and arrestment,' 'Herefore, &c.,' 'Letters of inhibition, &c.,' 'Herefore, &c., inhibition and arrestment, &c.'

" *Note.*—In the course of the examination of the above mentioned twenty-eight bills, it appeared that in about two-thirds of them, the parties inhibited were designed as furth of the kingdom."

On 31st January 1854 the Lord Ordinary (Deas) pronounced the following interlocutor:—" Having considered the closed record and productions, with the reports lodged under the remits of 2d and 19th November 1853, and whole process,—Sustains the defences to the extent and effect of holding the inhibition libelled on to be inept and ineffectual, from irregularities occurring prior to the erroneous entry thereof in the record, and consequently that the defender is not liable in loss, damage, and expenses as libelled: Assoilzies the defender from the conclusions of the action, and decerns: Finds him entitled to expenses." *

* " NOTE.—In May 1830 the late James Thomson, W.S., raised and executed letters of inhibition on the dependence of an action at his instance against Robert Anstruther of Thirdpart for a debt of L.1271, 19s. 7d. In the record of inhibitions the debt was erroneously entered as L.1221, 19s. 7d, and in respect of this error the inhibition was held by the Court (8th July 1846), and by the House of Lords (26th March 1849), not to be duly recorded, and consequently to be ineffectual. The object of the present action is to have the keeper of the record found liable for the debt, in consequence of this error.

Besides a plea, for which the Lord Ordinary sees no ground, to the effect that the keeper is not responsible for such an error in the record, the substance of the defence comes to be, that, in respect of one or more of several irregularities in the bill, letters of inhibition, and execution, the inhibition would have been at any rate ineffectual, and consequently that no loss has been sustained by the error in the record.

" The Lord Ordinary entertains no doubt of the relevancy of this defence. As Mr Bell observes (1 Com., 461), 'The responsibility can extend only to the amount of the injury specifically caused by the act of carlessness or unskilfulness for which reparation is due.' 'So if a writer has committed an error which annuls the diligence, but it turns out that this diligence would on another ground have been ineffectual, he will be freed from responsibility.' Accordingly no doubt was entertained as to the relevancy of this kind of defence in the late case of Cooke v. Falconer, 26th November 1850.

" The question here, therefore, comes to be, whether there are such errors in the diligence as would have rendered it ineffectual, although it had been duly recorded.

" The Lord Ordinary thinks that there are, and these errors having preceded the error in the registration, he conceives them to be sufficient to relieve the defender from liability.

I. The inhibition was executed against the debtor edictally. Now it is not pretended that a messenger can resort to edictal citation without a special warrant to that effect in the will of the letters; and such warrant is accordingly inserted in the

The pursuers reclaimed. It then appeared to the Court to be proper that the representatives of the late Alexander Monypenny, W.S., by whom, No. 54.

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form given by Lord Stair, (iv, 1, 4), and is contained in the will of the letters in the present case, which bear to authorise the messenger to inhibit the debtor personally, 'or at his dwelling-place, if within Scotland, and if furth thereof, by delivery of a copy thereof at the record office of the Keeper of the Records of the Court of Session, in terms of the statute thereanent.'

"But to authorise this will, there ought to have been a corresponding fiat upon the plack bill, which forms the petition upon which the diligence proceeds. The letters in this case accordingly bear as usual to be granted '*ex deliberatione dominorum concilii;*' 'because the Lords have seen the dependence above-mentioned.' And this form shews, as Lord Stair observes (iv, 50, 5), 'that inhibitions were not granted by the Lords of course.' Nor are they so even now, for every necessary document must be exhibited and specially enumerated in the deliverance on the back of the bill (Ivory's Forms of Pro., v. i, p. 89); and although the clerk's signature has by statute 53 Geo. III cap. 64 sect. 17, been made sufficient in the ordinary case, the Lord Ordinary must still be resorted to in cases of doubt or difficulty. 'The will of the letters is always measured by the prayer and deliverance of the bill, which is just the draft of the letters' (Beveridge, p. 168, also p. 170); 'and whenever any variety in the diligence occurs, whether as to its own nature, or to the situation of the debtor or defender, as residing furth of Scotland, or otherwise, it is necessary to take care that the prayer be framed in a sufficiently broad manner to warrant a suitable will in the letters or summons.'

Directions are accordingly given, both in Bell on deeds and in the juridical styles, wherever warrant for edictal citation is required, to add to the prayer of the bill a craving to that effect. In the necessity for asking and obtaining this special warrant, all our other formalists concur.—1 Ross' Lectures, 202 and 293-4; Darling's Office of a Messenger, p. 31; 1 Shand's Practice, 127-8 and 243.

"In like manner, in criminal cases, where there is to be edictal citation, Mr Hume says (v. ii. p. 259), 'special authority for this purpose must be asked in the bill for the criminal letters.' A similar course was in use to be taken in the case of lawless parties within the kingdom having no fixed residence, or secured in fastnesses, where they could not be safely approached. The necessity for a special application, and special authority in both classes of cases, seems to rest on the same principle, viz. the extraordinary nature of the remedy sought, which was not introduced either directly or indirectly by any statute, but solely by custom; and of which custom the special application and special warrant have always formed part and parcel.

"It appears from the report of the Deputy-keeper of the Signet, made under a remit in this cause, that the general practice has been in conformity with this rule.

"The object in view is attained in practice in one of two ways. Either, first, by distinctly designing the debtor, in the body of the bill, as furth of the kingdom, in which case the prayer for letters of inhibition in common form is understood to include a prayer for authority to cite the debtor in the manner usual when parties are furth of the kingdom; or, second, by inserting in the bill, a special prayer for authority to execute the letters edictally.

"In the present case, neither of these modes was adopted. The debtor is not designed or described in the bill as furth of the kingdom, and the prayer, if it can be called a prayer at all, (of which afterwards,) contains no application for authority to cite the debtor as furth of the kingdom. At the best, the prayer can only be read as a prayer for letters of inhibition in common form; but this prayer attached to a bill which does not describe the debtor as furth of Scotland, is not in practice regarded as a prayer for warrant to cite edictally.

"This being so, the Lord Ordinary is of opinion that the will of the letters, in so far as it bears to authorise edictal citation, must be held to be a will without any corresponding warrant, and consequently ineffectual. If so, the messenger had of course no valid authority to cite the debtor edictally, and the diligence is inept, apart altogether from any objection to the mode in which it was recorded.

"The case of Elliot v. Johnston, 26th June 1829, and the more recent cases of Forbes v. Gallie, 4th March 1847, 9 D. 806; Burleigh, &c., v. Horwood, 20th

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as agent, the bill and letters of inhibition had been prepared, and also the representatives of the messenger by whom the letters had been executed,

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July 1848, 10 D. 1512; and Wilkie or Smith v. Flowerdew, 5th March 1850, 12 D. 818, shew that the Court are not disposed to relax the strict rules applicable to a diligence of this nature, either as regards irregularities in the letters, or in the plack bills on which the letters proceed.

"In Burleigh's case the unanimous opinion of the consulted Judges distinctly recognised the necessity of a special warrant in the will of letters of inhibition, to authorise the citation of a debtor furth of the kingdom at the market-cross of Edinburgh and pier and shore of Leith, and bore that 'without such warrant, an edictal citation at these places would have been null.' The opinion further bore, —'The title *Execution* in the Dictionary shews in innumerable cases, what critical objections are sufficient to cut down diligence, and in none more remarkable than in regard to inhibitions.'

"But if the edictal citation would be null without the warrant in the will, the will itself must be null if not preceded by the necessary warrant in the deliverance on the bill.

"Edictal citation is an extraordinary remedy, and admittedly rests solely upon custom. To support the citation, therefore, in the present case, the pursuer would require to shew, that the custom has been to introduce the warrant into the will of letters of inhibition, without applying for and obtaining authority to do so in any other manner than was done here. But this he cannot do. For although a few exceptions may have occurred in bills for inhibitions, the validity of which cannot be assumed, the general custom has been opposed to the view contended for by the pursuer, and as he has admittedly nothing but custom to rest upon, it does not appear to the Lord Ordinary how his plea can prevail.

"Various cases—some of them not unimportant—were quoted and commented upon on both sides, which the Lord Ordinary does not think it necessary here to refer to, farther than to say, that he carefully considered the whole of them, but that such consideration only tended to confirm the view he has now stated.

"As to the pursuer's argument founded on section 22d of the Act of Sederunt 11th July 1828, the Lord Ordinary has no idea that by prescribing a form for the will of signet letters against parties furth of Scotland, it was intended to supersede the necessity for a warrant for such will, where a warrant was previously required.

"II. The observations which have now been made, proceed upon the assumption that the bill is to be held as containing a prayer for letters of inhibition in common form. But the Lord Ordinary greatly doubts whether this can be so held.

"The whole prayer consists of the words—'Herefore, letters of inhibition.' Assuming the address to be to the Lords of Council and Session, it may be conjectured—or it may even be very probable—that the applicant meant to beseech their Lordships for letters of inhibition at his instance in the premises in common form. But, in point of fact, he has neither prayed in appropriate terms for letters of inhibition, nor has he prayed that they should be in common form. He begins a sentence, but he does not conclude it. Or, if he meant it for a concluded sentence, it is not an intelligible one. He might have added, if he had chosen, 'ought not to be granted,' and craved some other remedy. Or, after adding the word 'ought to be granted,' he might, in place of craving that the letters should be in common form, have gone on to say, as indeed he ought to have done if he wanted warrant for edictal citation, that they ought to be in some special form. In short it seems in vain to conjecture how the applicant meant to conclude, or might have concluded, the sentence, assuming it to be unfinished; and in a matter of diligence such as inhibition—than which nothing has been more critically dealt with by the Court—the Lord Ordinary does not see how one conclusion of the sentence can be held to have been meant, rather than another.

"If, again, it be assumed, that the words used were intended to form a completed sentence, and consequently a completed prayer, the observation occurs that they are in themselves altogether unintelligible, and that the Court cannot be called upon in so grave a matter to guess at the meaning of a party who has not expressed it.

and the cautioners of the messenger, should be made parties to the process. No. 54.
On 13th July 1854, their Lordships therefore pronounced an interlocutor —
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"In the case of Brownlee v. Donald, decided by Lord Corehouse, 24th January 1829, as well as in the case of M'Laren v. Symers, decided by the Second Division, 19th November 1836, 15 S. and D. 51, it was clear enough that what the applicant wanted, was suspension in common form; but the bill was in each case refused notwithstanding, because the prayer was not in the usual and appropriate style. The Lord Ordinary cannot see, that because a plack was at one time the clerk's fee for bills of this kind, whereby they have got the name of plack bills, this ought to make any such difference as to render the decisions now alluded to inapplicable. On the contrary, the argument arises, *a fortiori*, that if, in bills of suspensions, which are mere modes of staying procedure or seeking review, so strict a rule was enforced, much more ought it to be enforced as to the prayer of a bill, which is only a petition for diligence.

"From the additional report of the Deputy Keeper of the Signet, it appears that in the search made by him over a period of sixty-three years, he found only one instance of a bill for letters of inhibition containing a prayer in precisely similar words with the present. He found a few others with the prayer loosely worded—generally with the addition of '&c.,' which shewed that something more was meant than was expressed, and admitting therefore, more easily than here, of the usual words of style being supplied. But there has obviously, in no view, been any such course of practice as can be held to sanction the unintelligible form of prayer here used, and the Lord Ordinary sees no reason why so slovenly a procedure should ever be judicially recognised and sanctioned for the first time.

"III. The execution of the messenger bears, that he lawfully inhibited and discharged the debtor, that he should in noways sell or alienate his lands, &c., and that he left a full double to the will, with copy inhibition to that effect for the debtor, at the record office, in terms of the statute. This is the substance of the execution, so far as it concerns the debtor, and (laying aside in the meantime any objection to the warrant), it might have been a good enough execution of citation of the debtor, if it had appeared, *ex facie* of the proceedings, that the debtor was then furth of Scotland.

"The solemnities necessary in executing inhibitions against a debtor 'are the same which are prescribed in the execution of summonses and letters of horning, 1541, cap. 75.'—Ersk., 2, 11, 4; *vide* also H., 2, 5, 55; Bank[t]., 1, 7, 136; Stair, 4, 50, 13. But by the statute 1540, cap. 75, execution against parties, by leaving a copy at their dwelling-house, is only allowed 'gif they cannot apprehende them personallie,' and the statute is silent as to the mode of execution against debtors who are abroad, which being, as already observed, an extraordinary remedy, has always, so far as the Lord Ordinary can discover, been held in practice to require a special warrant.

"If, therefore, this extraordinary mode of citation be adopted, it would seem to be requisite (apart altogether from any objection to the will of the letters as unauthorised), that it should appear *ex facie* of the messenger's execution, or of the diligence to which the execution refers, why he did so; much in the same way, as the messenger, when he cites at the dwelling-house, always adds, that this was done in respect he could not find the debtor personally. It may be sufficient for this purpose to design the debtor as furth of the kingdom in the execution, either expressly or by special reference to the letters, if these contain such designation. But in one way or another, it ought to appear on the face of the diligence, that the debtor was abroad, so that he could neither be cited personally nor at his dwelling-house, and this fact is accordingly set forth *ex facie* of the form of execution applicable to such a case, given in Bell on Deeds, v. 6, p. 381, and by Darling in his Office of a Messenger, p. 141. The report of Mr Drysdale, made under the remit already mentioned, shews that the usual practice is in conformity with the rule here laid down.

"But in the present case, it is not set forth anywhere that the debtor was abroad. There is nothing from beginning to end of the diligence, including in that term the messenger's execution, to shew why the messenger adopted the extra-

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superseding the case till the pursuers should have an opportunity of bringing "a supplementary action against the representatives of Mr Monypenny and the messenger."

A supplementary action against these parties was accordingly raised, and a record having been made up, the Lord Ordinary (Mackenzie), on 19th July 1855, in respect of the dependence of the principal and relative cause in the Inner-House, made great avizandum to the Lords of the First Division.

These actions were conjoined, and the relevancy of Mr Mackenzie's defence founded on his technical objections to the validity of the inhibition, as well as these objections themselves, were then discussed at great length in the summer session of 1856, and again in November 1856. The pursuers and Mr Mackenzie alone took part in the discussion.

The pursuers pleaded;—I. As to the validity of the defence: That the relative position of the parties was important. This inhibition was *ex facie* regular. It was delivered by Mr Mackenzie as properly and regularly registered. Thomson believing it to be so, ranked ón the estate. His preference was cut down solely by the neglect of Mr Mackenzie, who himself admitted that it was set aside on the ground of defective registration alone. The present objections taken to its validity had not been proponed in the action of ranking and sale. But it was necessary not only to aver the objections, but to satisfy the Court that they would have been sustained, if stated in the competition. That had not been done.

The judgment in the case of Cooke did not establish the competency of the defence. The point could not arise in that case, for the diligence was objected to in a competition, both on the ground of the invalidity of the diligence itself, and also on the ground that it was not well registered. Both heads of objection were sustained. In that state of matters, the creditor selected the party whom he supposed to be the first wrong-doer, viz.,

ordinary mode of citation which he did, in place of the ordinary and primary mode of citing the debtor personally, or the alternative mode of leaving a copy at his dwelling-house.

"IV. It remains to notice a further objection taken to the messenger's execution, viz., that it bears that he inhibited the lieges only at the market-cross of Edinburgh, pier and shore of Leith; which mode of publication has been, it is said, abolished by the statute 6 Geo. IV., cap. 120, sect. 51, so that there has been truly, *ex facie* of the execution, no available publication to, or inhibition of the lieges at all.

"If it can be held, as was assumed in argument on both sides before the Lord Ordinary, that section 51 of the statute applies to the act of inhibiting the lieges or in other words, to the act of publication, and consequently, that in the case of inhibition against a debtor abroad, all that was formerly done at the market-cross pier and shore, must now be done in the office for edictal citations, the Lord Ordinary would be disposed to think this objection entitled to great weight. For the execution certainly does not bear, that the messenger any where inhibited the lieges except at the market-cross of Edinburgh, pier and shore of Leith, and, as the words in regard to inhibiting and discharging the lieges, are the usual and established words of style for expressing publication of an inhibition, the want of them, as applicable to the proper locality, would seem to be fatal to the diligence.

"But the enactment refers to publication, citation, &c., as against persons forth of Scotland, and as the publication in question is to the lieges who are within Scotland, although some of them may be abroad, the Lord Ordinary is not altogether satisfied that the enactment is applicable. On the other hand, if the publication although made to the lieges, can be held to be publication 'as against' the debtor who is forth of Scotland, there can be no doubt that the enactment applies. The point may deserve further elucidation, if, upon a reclaiming note, the Court think it necessary to go upon it."

the writer of the diligence, and so that there was no room for the writer pleading the error of the Keeper, who was not called. That case was therefore quite different from the present. The principle of law here applicable was this—Wherever a claim of debt had been lost or imperilled by the wrongful acts of an official, the liability attending it was the payment of the debt itself. The wrong-doer might obtain an assignation to all the rights which the creditor held, but that did not affect the right of the creditor to recover payment, in the first instance, of the whole debt. It was said that this doctrine was only applicable to the case of a messenger who had failed to incarcerate, or Magistrates who had failed to detain debtors; and that the doctrine applied, because it was uncertain whether the incarceration or detention might not have enforced payment. But that was not so.[1]

The case of Campbell v. Clason shewed that the above rule was held to form a portion of our law. Its applicability to that particular case alone was doubted. If the Keeper were entitled to take such objections as the present to a diligence, he would equally be entitled to take all other objections to it, and propone reasons of reduction, founded *e. g.* on the bad registration of a sasine. But it was not for him to plead such a defence, for it could not be made out either that these objections would have been proponed, or that they would have been successful.

There was an exception to the general rule, which, however, it strengthened. Magistrates were entitled to plead the illegality of diligence, but there a messenger was not entitled to do so. The principle was, that as the execution of an illegal diligence against the person would in itself be an illegal act, the Magistrate was not bound to perform it.[2]

There was this distinction between a magistrate and a messenger, that the creditor did not properly employ the magistrate. Magistrates were only named functionaries to do a certain act, in respect of their office. But the messenger being employed to execute the diligence, was not called on to examine its validity, and could not competently refuse to execute it on the ground that it was illegal.

The defence could not be brought within the exception, because the defender could not say that if he had correctly recorded this inhibition, he would have been doing an illegal act, which would have subjected him to damages. That was the principle on which the case of the Magistrates was rested. It was Mr Mackenzie's duty simply to record this diligence; and having failed to do so, his liability followed. Therefore, on the assumption that these objections to the diligence were fatal, the defender was not entitled to plead them. But,

II. As regards the objections themselves,—the two first did not appear *ex facie* of the diligence, but were said to be found in the plack bill which was the warrant of the diligence. (1.) The prayer was—"Herefore, letters of inhibition." The first objection was that this was not a prayer—that the sentence was either unintelligible or irreverent, and in either case invalid. There was great uncertainty as to the origin of plack bills. It appeared to have been originally a supplication for an extraordinary privilege or remedy,

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[1] Lillie, 13th Dec. 1816, F. C.; Atkinson, 3d Dec. 1756, M. 13,965; Ross, 16th Dec. 1776, 5 Sup. 577; Murray, 6th Dec. 1797, Hume, p. 323; King, 3d Dec. 1807, Hume, p. 344; Dougan, 3d July 1817 (Mandate), Hume, p. 356; Chatto, 11th Jan. 1821, F. C.; Macmillan, 2d March 1820, F. C.; Grahame v. Hunter's Trustees, 4th March 1831, 10 S. & D. 543; Haldane v. Davidson, 3d March 1836, 14 S. & D. 1016; Campbell v. Clason, 20th Dec. 1838, ante, vol. i. p. 270.

[2] Gilchrist, 1776, M. 8892.

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and, accordingly, when a pursuer wished to dispense with the ordinary *induciæ* of calling, it was necessary to present a bill to the Court for authority to do so. That became an abuse, and the Act of Sederunt of 21st June 1672, determined what summonses should be privileged.

Again, where an extraordinary remedy against a debtor was desired, a bill was necessary. So also where the debtor was furth of the kingdom, a creditor intending to sue diligence against him presented a petition for edictal citation. Thus bills came into our practice, and continued to be used when the necessity for them had ceased,—but still, only where extraordinary privilege or remedy was sought for. The bill was thus often framed without much attention to style at all; so that in practice, if it did pray for the particular remedy or warrant which was required, that was held sufficient to entitle the party to obtain it.

It was said that this prayer, "herefore letters of inhibition," was incomplete and unintelligible, and that if it had gone on it might have been "herefore letters of inhibition ought not to be granted." But the enquiry here was, did Mr Thomson present this bill as for letters of inhibition? If so, the bill was quite right. The Court understood it to be for letters of inhibition. That was conclusive. This objection could not therefore be sustained.

(2.) Another objection was, that this plack bill was bad, because it did not specially pray for warrant for edictal citation in the letters of inhibition. There, again, there was no statute enjoining that a party intending to use personal citation against a debtor, either in diligence or summons, must pray for express warrant in the bill. The decision in the case of Braco was against the necessity of any such prayer.[1]

The authorities, however, were at variance. Each writer quoted his own practice and views. Continuous practice there was none, and such as it was, it was discrepant and variable. This shewed that there was no fixed form of style. But practice ought not to be received as establishing form, unless that form be necessary. But, whatever the propriety of a craving for warrant for edictal citation might have been when edictal citation was not established as part of our law, that necessity had now ceased. The foundation of the supplication formerly was, that the remedy was an extraordinary one; that the Court would examine the grounds of the supplication; and that the Court had the power to grant or refuse it. It passed *ex deliberatione*. But edictal citation, so long ago as 1747, had become a part of our consuetudinary law, and so part of the law of the kingdom;[2] and it now made part of our public statutory law, being recognised by the Judicature Act of 1825, sec. 51. Letters of inhibition still remained an extraordinary remedy, and could only be got by plack letters to the Court. But edictal citation having become part of the public law, a petition for warrant in the bill was now unnecessary. This objection was without foundation, because the remedy was not now an extraordinary one. Investigation into the fact whether the party was furth of the kingdom or not was unnecessary. The Court could not refuse the remedy when asked.

(3.) The third objection to the inhibition applied to the execution. There was no proper statutory form of execution. The inference was, that it might be framed in various modes, provided it stated all that was necessary to support the act of execution itself. Although there was no statute on the subject, Lord Stair's authority was against setting forth in the execution

[1] Lord Braco v. Brodie, 22d July 1747, M. 3690.

[2] Ross, vol. i. p. 293. See Petition drawn by Lord Kaimes against the first interlocutor in the case of Braco v. Brodie. Hope's Minor Practice (Ed. of 1734 by Spottiswoode), p. 14.

against a party furth of the kingdom, the actual fact of his being out of the kingdom.[1] In the same way, if it plainly appeared on the face of the execution that the messenger was citing the party as furth of the kingdom, it was not requisite that he should state in express words that the debtor was out of the kingdom.[2]

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Even in competition where the greatest strictness was observed, it had been held that specification of the dwelling-house where copies had been left was not necessary. Further, the messenger could not, of his own knowledge, set forth that the debtor was furth of the kingdom. Whatever was within his province or duty, he must so state it, but where it was not within his duty, he could not undertake to speak as of his own knowledge. His employer must take his own risk that he had correctly informed the messenger on the subject. It could not therefore be a fatal objection to the diligence that the messenger did not set forth that fact as of his own knowledge.[3]

(4.) It was said that there had not been proper publication against the lieges. That objection turned on the sound construction of the statute.[4] It would have been sufficient if a copy had been left at the Register House, but the messenger did more. Publication at the market-cross was plainly abolished by the statute, and all that required to be done might be done, and well done, at the Register House. Therefore, the messenger did right in inhibiting the debtor at the Register House, as well as by publication at the market-cross in the old form.[5]

The defender pleaded:—(1) As to the relevancy—This was an action of damages laid on the Act 1693. The material question therefore was, whether the pursuer had been "prejudged"? The objection to the relevancy meant that the facts and inferences from them on which the defence was rested were not available to the defender. But there was nothing objectionable in his statement and plea. Therefore the question was, whether the Keeper was to be liable, although the diligence, when presented to him, should be absolutely null and worthless.

It would be strong to hold the Keeper liable for not recording a thing which, being null in itself, could not be put right by registration. Therefore, as a question of *principle*, the plea could not be supported. It could only be supported on *authority*.

Where there was a plain neglect or violation of duty, no matter by whom, of so gross a kind as to infer liability, by which a debt, or means of recovering a debt, was lost to the creditor, the Court no doubt would never enquire what were the probabilities of recovering that debt as regarded the solvency of the debtor or the sufficiency of the property against which the diligence was used, and for this plain reason, that you could not tell with any certainty what would have been the effect of that diligence, had it been well gone about. But in all that class of cases, the grounds of liability were assumed or proved before coming to the consideration of the question of principle, as regarded the ascertainment of the quantum of damages. The rule estab-

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[1] Stair, B. 4-50, 13.

[2] *Voce* Execution, M. p. 3748-9; Creighton, 8th Feb. 1684, p. 3750; Scott v. Fisher, 2d Dec. 1825, 4 S. p. 261.

[3] Robertson v. M'Culloch, 10th June 1836, 14 S. 950; Duke of Hamilton v. Castlemilk, 27th Jan. 1682, Dict. 3727; Anderson, 1st Feb. 1684, Dict. 3695, *voce* "Competition;" Baillie, 22d Dec. 1710, Dict. 3704; Gorry v. Donaldson, 16th Nov. 1756, Dict. 3699; 5 Br. Sup. 383.

[4] Juridical Styles, vol. iii. p. 328.

[5] Gall v. Magistrates of Forfar, 11th Feb. 1748, Dict. 11738; Pearse v. Ross, 1st Feb. [illegible], Dict. 3721; Earl of March, 3d March 1750, Dict. 3718; Blackwood, 9th June 1752, Dict. 3400; Campbell, 19th June 1744, Dict. 3697.

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lished by these cases referred entirely to the *extent* of the liability, not to the *grounds* of the liability, and there lay the distinction between the cases referred to by the pursuer and the present. The fault being completely established, the total amount of the debt was taken as the quantum of liability. In all these cases, it was simply a question of the measure of damages, and not of the ground of liability. Here we have nothing to do with the measure of liability, but everything with the ground of liability.[1]

Wherever there was uncertainty whether a document which had been bungled would be availing, the Court fixed liability. But when there was a certainty that it would not be available, then no liability attached.[2] Such was this case.

II. It had not been contended that a plack bill was not an essential proceeding, nor that there was any mode in which diligence could be expede, except by letters proceeding upon bill. That being so, the bill was an indispensable part of the diligence, and therefore must be correctly framed. It was said that a bill was only necessary in applying for an extraordinary remedy. It was admitted that diligence by inhibition was an extraordinary remedy, but it was contended that edictal citation was not, for it was said that it had been long in our practice.[3] It was on immemorial custom that the validity of diligence by inhibition edictal citations depended. But it was nevertheless an extraordinary remedy. Therefore the antiquity or frequency of the practice did not make it the less an extraordinary remedy. (2.) Then as to the mode in which this was gone about. There was no statement in the body of the letters of inhibition that the debtor was not residing at Thirdpart, where his residence was, nor an allegation that he was beyond seas, but, being designed as a Scotsman resident at his own dwelling, the will proceeded to charge the messenger to cite him personally, if within Scotland, "and if furth thereof," then edictally, so that it depended on the fact whether the debtor was out of Scotland or not that the messenger had authority to cite him edictally or not. It was conditional authority that he had, and so also as to the publication. It was only in the event of the debtor being furth of Scotland that the messenger was to proceed to the market-cross of Edinburgh, and pier and shore of Leith. Now, first, the framer of these letters of inhibition had no authority so to frame them. His only warrant was the bill, and the authority of the Court was contained in the fiat which was the granting of what was craved. What was craved?—"herefore letters of inhibition," and that was appended to a bill, which stated tha Mr Thomson had raised inhibition against "Captain Anstruther of Third part." It was not said that he was out of the kingdom, nor did the bil crave warrant to cite him as out of the kingdom. That was one flagrar discrepancy between the letters and the bill. Further, it did not address th Lords of Council and Session, and contained no intelligible prayer, yet th was the whole authority to Mr Monypenney for drawing these letters.

Now, in the first step in diligence, the application to the Court must b formal and complete. In principle, there was no reason why a bill shoul not be as carefully framed as a summons. And the same principle had bee applied to bills of suspension, in which a defect in the prayer had been four to be fatal.[4]

So also, a petition not addressed to the Lords of Council and Session wou not be entertained, nor one where the prayer was unintelligible. The pra tice was certainly rather in favour of the abbreviated form of address, whic

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[1] Lillie, 13th December 1816, F.C., affirmed 1 Bligh, 336.

[2] Bell's Commentaries, 1, p. 461 (5th rule); M'Lean v. Grant, Bell's Illustr tions, vol. 1, p. 130 (sequel of case); Adam v. Baillies of Ayr, M. 3748.

[3] Hope's Minor Practicks, p. 14.

[4] Davidson v. The Magistrates of Burntisland.

therefore, if it stood alone, might be little open to objection; but, when combined with the total absence of an intelligible prayer—which was not consistent with practice, and which no practice could justify,—that was a totally different question, for the prayer was the material part of the writ. It was its essence, without which the bill was of no avail. If so, what better was a prayer which was in itself unintelligible, by which you might conjecture that the party intended to apply for letters of inhibition in common form, but which did not apply for them? The mere addition of words written in a different line and in a different character from the body of the writ would not make a prayer. There must be something more, and that could only be a good and intelligible demand. There was no practice to justify the contracting of the main body of the application, so as really to express no meaning at all. Farther, confessedly the party wanted not only letters of inhibition, but also warrant for edictal citation, and therefore, even if it should be held that he had expressed himself intelligibly as to the former, it was impossible to say that he had asked for the latter. If capable of being read at all, the prayer was that the party wished to have letters applicable to Captain Anstruther of Thirdpart as resident in Scotland, and therefore it could only be read as desiring letters applicable to that state of matters. The agent could not draw letters in broader terms than the bill. The letters must echo the bill, otherwise the diligence is destroyed.[1]

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It was said that this had not been made the subject of express decision, and that no opinion had been given on it by any institutional writer. That might be true, and yet many things were fixed in law by inveterate usage, which had not been the subject of decision, and which were not noticed by any writers. But writers on practice were unanimous in stating the rule to be that when you want a warrant for edictal citation, you must ask for it. Again, this was not a matter of practice in the execution of an Act of Parliament, for it stood on custom, and therefore the practice and the modes of doing it were of still more importance.

The regulations of 1672 were a warrant to a Writer to the Signet to expede certain kinds of writs without a bill. The Act applied to summonses. But these were to be distinguished from the present case; and in all classes of cases not referred to in these regulations, you must have authority for every word contained in the letters, and which you can only obtain by bill.

(3.) The messenger's execution was liable to two objections. The warrant for citation in the letters was a conditional warrant. The messenger was not entitled under it to cite the debtor as furth of the kingdom, unless he really were so. The messenger did not say that the debtor was furth of the kingdom as substantive matter of fact. Nor did he say that he so cited him as being furth of the kingdom: the real meaning of the execution was that the messenger so cited the debtor as being in the kingdom; for no man was presumed to be furth of the kingdom; and, therefore, to say that you have edictally cited a man whose natural and ordinary residence was in Scotland, was to say that you had done an illegal thing. The execution was therefore not applicable to the warrant on which it proceeded.[2]

(4.) Further, there was no proper execution against the lieges. The messenger did not say that he inhibited the lieges, nor anything equivalent to that. The execution of a summons or diligence, which merely contained the statement that certain forms were gone through, without saying that the person was cited, was a bad execution. The messenger must say that by virtue of his

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[1] 1 Beveridge, Form of Process, pp. 167-175.

[2] Statute 1540, cap. 75; Office of Messenger, 1753; Thomson's Treatise, 1790, Ersk. B. 1, T. 2, sec. 9; Cribbes v. Ross, 15th July 1851, ante, vol. xiii. p. 1369; Menzies Lectures, p. 285-6.

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warrant he lawfully summoned the debtor by leaving a copy at his dwelling-house, because he could not find him personally. The mode of doing the thing was subordinate. It must be stated. But the fact that the messenger did lawfully summon the debtor was the material part of the execution. Now, here there was no statement that he inhibited the lieges. According to the existing state of the law, the form of publication adopted here was abolished. Upon all these grounds, this diligence, when it came into the hands of the Keeper, was truly worthless and unavailing, for these defects were of such a character as necessarily to annul it.

Lord President.—This case has undergone an unusual amount of discussion, partly owing to the natural anxiety of the parties, and partly from the anxiety of the Court. It seems to have been fully discussed before the Lord Ordinary, in whose note all the cases and authorities referred to are reviewed; and we have since had the case argued first generally, and then separately, on the particular points which pressed themselves on the consideration of the Court, and on which they desired to have further light before giving judgment.

The case comes before us in the form of an action of damages against the Keeper of the Register of Inhibitions; and it is laid upon the ground, that he having committed an error in recording an inhibition by reason of which error the diligence was, by a final judgment of Court in a question of competition, cut down, is therefore liable in damages to the party who was in right of the inhibition, and whose claim of debt was intended to be protected by it. That damage is said to have consisted in various things set forth as consequences of the cutting down of the inhibition.

There can be no doubt that the error committed in recording the inhibition wa a fatal error. That is not disputed. That the inhibition was set aside and effect denied to it in the competition, in respect expressly of that error, is also beyond question. It does not distinctly appear in the record whether there were or wer not, any other objections then stated to the inhibition. None are set forth in the record as having been stated; and it is admitted that the only ground on whic effect was denied to the inhibition was the error committed in recording it. Th party in right of the inhibition, and who failed in his endeavour to support it i the competition, appears to have entered into a transaction with the Keeper of the Register of Inhibitions, whereby the judgment of this Court denying effect to the inhibition was made the subject of appeal to the House of Lords. It does no appear from the record, whether at that stage any other objections to the inhibitio were stated or suggested. Notice to the Keeper of the Register had been give previous to the competition. It does not appear that he then stated any reaso why he should not interpose; nor does it appear that when the agreement wa made that the case should be appealed, he then, as Keeper, stated any objection a all. The agreement, however, did not admit his liability. On the contrary, as read it, the agreement was, that in the event of his being eventually found liabl for the loss, he would bear the expense of the appeal. If not ultimately subjecte he was to be relieved of that expense. In the meantime he was to disburse i The House of Lords affirmed the judgment of this Court denying effect to th inhibition, and now the claim of damages is made against the Keeper of th Register.

If there were no objections stated against the inhibition other than the error i recording it, I see no ground for holding that the Keeper would not be liable. H pleads, indeed, that he is not liable for any consequences that may have resulted fro the misrecording, and contends that the error was not of a kind for which he is respo sible. That defence has not been supported by any authority or by any argument which we can give effect. But the Keeper defends himself upon other grounds. H says that the demand upon him is for damage said to have been sustained through wrong act of his; but that truly no damage was sustained by reason of any err committed by him, nor could there be any in reference to the inhibition in questio because that inhibition was invalid when it was brought to him, owing to defects the preparing and executing of it, committed by the agent who prepared it and t messenger who executed it—that the defender did not spoil the inhibition or rend it invalid—that he could not have done so, because it had been destroyed, and w

invalid when brought to him to be recorded—that he could not, by the most perfect accuracy of recording, give to it validity, nor by any inaccuracy of recording deprive it of a validity which it did not possess, or frustrate the attainment of results which it was incapable of attaining—and, consequently, that no damage has, or could have, resulted from his actings. He tells us in what respect it was invalid at the time it was brought to him. He says that certain errors had been committed by the agent employed to prepare the inhibition, and that certain errors were committed by the messenger employed to execute it. We have heard a lengthened argument upon these objections to the inhibition. The messenger and agent have been called in a supplementary action. No. 54. — Dec. 20, 1856. Davidson v. Mackenzie.

In regard to the objections to the validity of the inhibition thus stated by the Keeper of the Register, and which have been given effect to by the Lord Ordinary, I have anxiously applied my mind to them after hearing the argument submitted to us, and I have formed an opinion upon them, which I shall now state. Perhaps the best order to take them in is to begin at the beginning of the proceedings. The proceedings begin with the writer or agent employed to prepare and obtain the letters of inhibition. The error which he is said to have committed is this: that he prepared the letters of inhibition containing a warrant to the messenger for executing the inhibition as against a party furth of the kingdom, without having obtained the requisite authority for expeding the letters in that form—that the bill which he had prepared and presented, and upon which the letters of inhibition proceeded, was defective, in as much as it did not state that the party was furth of the kingdom, or expressly pray for letters of inhibition against a party furth of the kingdom, and hence that the authority adhibited to that bill to expede the letters was not applicable to such a state of matters,—therefore, that although the letters did contain an instruction or warrant to the messenger to execute the inhibition as against a party furth of the kingdom, such instruction was unauthorised and of no use. We have had before us evidence of the practice in regard to this matter, and have heard an argument upon it. The conclusion at which I have arrived in reference to that objection is, that I think it too critical to cast the inhibition in this case. The prayer of the bill is undoubtedly very elliptical—more so than in almost any instance I have seen; but an elliptical prayer is of frequent practice, and it is a question of degree whether the prayer of this bill was so elliptical as to be altogether unavailing, or whether it was sufficient to cover the case of inhibition applicable to the event of the party being furth of the kingdom.

I notice, that in the narrative of the bill for letters of inhibition, it is not said that the party is furth of the kingdom. He is called "Captain Robert Anstruther of Thirdpart." But nothing more is said about him; and the prayer is, "Herefore, letters of inhibition." That abridged prayer is very general and comprehensive. There is practice for not filling up the full prayer, but merely enough to indicate the particular kind of diligence wanted. The prayer of the bill in question is perfectly general, and admits of being read as asking letters of inhibition of the most comprehensive character; and the bill having been passed, it was not incompetent for the writer to expede letters of inhibition of the most comprehensive character—that is to say, letters of inhibition with a warrant to the messenger to execute the inhibition against the party as either within or furth of the kingdom, as the case might be, suiting the warrant to the alternative position of matters.

That being the opinion which I entertain in regard to the bill and the preparation of the inhibition, I come now to consider the objections taken to the execution. The letters of inhibition instructed the messenger to "inhibit and discharge the said Captain Robert Anstruther, personally, or at his dwelling-place, if within Scotland, and if furth thereof, by delivery of a copy hereof at the Record Office of the Keeper of the Records of the Court of Session;" and, of course, the inhibition had also to be executed against the lieges, as it is called, or, more properly, published to the lieges. The messenger receiving that warrant was entitled to execute it against the party, if within Scotland, at his dwelling-place, or, if furth of Scotland, by that species of edictal citation referred to in the letters by delivery of a copy at the Record Office of the Keeper of the Records of the Court of Session, in terms of the statute. The messenger, according to his return, executed the diligence by delivery of a copy at the Office of the Keeper of the Records of the Court of Session, "in terms of the statute thereanent, within the General Register House,

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Edinburgh; and the like just copy of inhibition in virtue and to the effect foresaid, I affixed and left for all and sundry his Majesty's lieges and others whom it effeirs, at and upon each of the said market-cross of Edinburgh and Pier and Shore of Leith, after using the solemnities foresaid." He does not say that Captain Anstruther was furth of the kingdom, and that he executed it against him as furth of the kingdom. But, in effect, his return says "the warrant contained in the letters of inhibition instructed me to execute it against Captain Anstruther personally, or at his dwelling-place, if within the kingdom; and if furth thereof, by delivery of a copy at the Record Office of he Keeper of the Records of the Court of Session; and I tell you that acting upon that warrant, I executed it by delivering a copy at the Record Office of the Keeper of the Records of the Court of Session, in terms of the statute." That is the return he makes. There is no positive statement by him that Captain Anstruther was furth of the kingdom. The letters of inhibition themselves implied that he might or might not be so, and the messenger was told that in the one case he was to adopt one course, and in another event he was to adopt another course. He adopted the course of leaving a copy at the Record Office, in terms of the statute. The plain meaning of that is, that he executed the inhibition against Captain Anstruther, not as being within Scotland, but as being furth of Scotland.

Now, it is contended, and with great force, that the alternative of executing the inhibition against the party as furth of Scotland was a sort of *dernier resort*—that the messenger was bound to state a reason for not going to the dwelling-house of the debtor,—that it was the messenger's duty to state that he had recourse to the other alternative *because* the party was furth of the kingdom. I do not think it is made out as clear matter of practice that the return made by a messenger, when he executes inhibition against a party as furth of the kingdom, contains any positive statement that the party was actually furth of the kingdom. The words I find in most styles do not necessarily imply that. They admit of being read otherwise—they admit of the construction that the diligence was executed as is done in the case of persons furth of the kingdom. The messenger cannot be called upon to make a positive assertion that the debtor is furth of the kingdom, though he is not entitled to execute the inhibition against the debtor as furth of the kingdom if he can find him within the kingdom, and may incur serious responsibility if he does so. But the objection here is to the form of the execution returned by the messenger. Is it wanting in statement that the debtor was furth of the kingdom, and is such omission fatal to its validity? I do not think it was necessary that the execution should contain a positive statement that the debtor was furth of the kingdom. The messenger might know that he could not find any trace of hin within the kingdom without being in a condition to assert positively that he wa furth of the kingdom. There are some things that the messenger must state, an in regard to which, if he states a falsehood, he is liable to the pains of perjury. do not think that this is one of them. If he has executed the diligence against th debtor personally, he must state that he gave the copy to him personally; and i the fact be that he did not give it to him personally, then his statement that he di so is a falsehood, and he is liable to the pains of perjury. And so, when the dil gence is executed by leaving it at the debtor's dwelling-house, the messenger statement that he did so leave it must be in strict accordance with the fact. An there are other circumstances, being all within his own knowledge, which he is als bound to state with strict accuracy, but it is not necessary for him to make th assertion under the responsibility of the pains of forgery, that the party again whom he executes the diligence is furth of the kingdom. He must state how h executed the diligence, and it must appear that he did so in the same way as done in the case of a party furth of the kingdom, and if he has not made du enquiry on the subject, he may be liable to serious consequences. But that a different thing from casting the execution on the ground of want of formalit It is very usual to introduce into the execution some such words as I have referre to, viz., that the diligence was executed against the debtor "as furth of the kin dom,"—that is to say, as is done in the case of a party furth of the kingdom. The words are not in this execution. But they are only descriptive of the mode which the diligence has been executed against the debtor, and the messenger h here described the mode in which it was executed against Captain Anstruthe

which we see was as in the case of a party furth of the kingdom. It speaks for itself. Therefore, I think that, so far as regards the execution against Captain Anstruther, it is a return made to the will of the diligence in terms of the warrant, and may be sustained. I am disposed to sustain it as a valid execution against Captain Anstruther, as furth of the kingdom.

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There are other objections taken to the execution of this diligence in reference to the manner in which it was published to the lieges. These objections also are too critical to be sustained. There is sufficient statement of publication. The publication was made in two ways, at the Pier of Leith, and at the office of the Keeper of the Records. It appears to me that the objections stated against the publication at these places are not fatal to this inhibition. The mode of publication is a matter as to which there may have been looseness—not a strict adherence to the best forms; but still I am not disposed to regard the objections as fatal to this execution.

That being so, I am of opinion that the Keeper of the Register of Inhibitions has not made out his case against this inhibition as being invalid and ineffectual before it was presented to him to be recorded. The questions raised in regard to it are nice, and afford room for difference of opinion, and it was not without much consideration that I came to the conclusion I have now stated. But that being the conclusion at which I have arrived, it is perhaps not necessary for me to go farther in reference to this part of the case. It is not necessary, in my view of the matter, to decide whether, if these objections to the validity of the inhibition had been established to our satisfaction, that would, in the circumstances of this case, have been a sufficient answer on the part of the Keeper to the claim of damage made against him, and would have relieved him of all liability. It is not necessary for me to consider that question, as the objections are not, in my opinion, of that fatal character. I shall only say in regard to that question, that it involves great nicety, and involves great complication of considerations. The error in respect of which this inhibition was cast is an ascertained fact. That, beyond all doubt, was a fatal error, and was the ground on which effect was denied to the inhibition. Whether effect would have been denied to it upon any of the other grounds now brought forward, or all of them, if they had been stated in the competition, may be a question of some difficulty now to solve. It may, perhaps, be assumed that the opinion the Court now arrives at in law in regard to these objections is that which the Court would have arrived at in the competition, if the same objections had been stated there, and in that view, the question may perhaps be solved. But whether any party would have considered it worth their while to bring them forward, and to run the gauntlet of a litigation in regard to them in the competition, is and must remain a matter of uncertainty; and therefore, it may be contended, that it is and must remain matter of uncertainty that any damage ever would have arisen to this party if the error in the recording of the inhibition had not been committed.

Other difficulties, too, present themselves for consideration. The liabilities of all the parties brought into the field in this litigation do not rest on the same principles. The liability of the Keeper of the Register may not admit of the same grounds of defence as the liability of the agent or of the messenger. The liability of the Keeper rests upon his failure in the due performance of a statutory duty, which the party in right of the inhibition was by force of statute obliged to resort to him to get done, and which he, by his position, was bound to do properly. The claim against the agent arises from employment voluntarily given to him, and the duty thereby imposed on him to apply a certain amount of professional skill, intelligence, and care in the execution of that employment; but it does not follow that every blunder fatal to the object in view will subject the agent in damages. There are various errors which have been held not to indicate such want of care or want of skill as to infer such liability. The same may be said of the messenger. Their liability therefore rests on a different principle from that of the Keeper, and there is difficulty in sustaining the relevancy of the defence here maintained by the Keeper, even on the supposition that the Court should come to the conclusion, upon the whole, that this inhibition was previously defective. Doubts may be entertained as to the relevancy of that defence. I have great difficulty in regard to that question. I entertain great doubt of the relevancy of all these critical objections to the [illegible] grounds of defence to be urged by the Keeper. I doubt his

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right to compel the holder of the inhibition to try all these nice points with him whose ascertained error was the ground on which the inhibition was actually cast. Some objections may be plainly such, that, if stated, they would be sustained, and the Court might not think it necessary to go farther. If it had been said that the diligence had not been executed at all, or that it had been executed at the market-cross and nowhere else, or that it had not been published to the lieges,—if these objections had existed, and still more, if they had been stated and given effect to along with objection to the recording, that would have been another matter. But I do not think it necessary to go into that. The circumstances of this case are not such.

I have been assuming all along that Captain Anstruther is to be held as having been furth of the kingdom, for this execution could not have been sustained against him on any other footing. Upon that matter there is no admission in the record. There is a statement that he was an officer in the army, and that his regiment was stationed in Malta, and so forth; but the parties are more or less at variance as to whether he was abroad or not at the time of the executing this diligence; and they have both renounced probation in regard to that. I think that, where there is a positive statement on the part of the pursuer of this action, that Captain Anstruther was only temporarily in Scotland, and never had a domicile there;—that he had left Scotland a month before this diligence was executed—when inhibition is raised against him, and executed against him as furth of Scotland,—and when there is no positive statement on the other side that, at that date, he was in Edinburgh, or anywhere else in Scotland—I think that, in these circumstances—the party not undertaking to instruct that he was in Scotland, not even making any positive statement that he was in Scotland, the presumption is that the messenger did right in executing the inhibition against Major Anstruther as furth of Scotland. If the pursuer can prove that Major Anstruther was actually in Scotland at the time, he may be able still to reduce and set aside the execution in a proper action of reduction on that ground.

In these observations I have not alluded to any of the decided cases. It would take more time than I am disposed to occupy now to go over them in detail. I have examined them all, and I cannot say that I have found in any one of them, or in any class of them, anything that absolutely solves this case. There are principles and *dicta* to be found in several of them, but none that directly solve this case. The diligence of inhibition is to be strictly examined, and especially in cases of competition; and that rule was present to my mind when I said that I hesitated as to the relevancy of this defence; but I do not find any case which gives a clear ground for sustaining such objections as are stated in the present case. Two cases of suspension have been referred to, one which came before the Inner-House, and another before Lord Corehouse in 1829, in which a defective bill was refused. They are not in point, and they were a good deal trenched on by the subsequent case of Russell.

Then, again, in regard to the case of Cooke, I do not think it was decided on a principle applicable here. It was there held, that Falconer had done all that was incumbent on him to do. That was the substance of the defence. As to the case of Maclean and Grant, I cannot say that I have at any time regarded it as clearly establishing the principle that a man might wipe out one fault by committing another. The case is intelligible without that; and I do not see any case that clearly covers the present. Upon the whole, I think that the objections stated to this inhibition are too critical to be sustained in a question of this kind; and I do not think it necessary to rest my judgment on any other ground.

Lord Ivory.—I am of the same opinion; and hesitate to deliver any separate opinion, from the apprehension that it will weaken the strong and distinct ground on which your Lordship has rested the judgment. This case has been to me more than once the subject of the greatest and most anxious deliberation. It has perplexed me more than most cases. I have had to consider, and I have not had the assistance from the decided cases that one would expect to find. I cannot say that even now my opinion is a very decided or positive one. I feel, in regard to various points of the case, very considerable difficulty. But I am now quite satisfied that the result at which I have arrived is a sound one. On one point or more I have had different opinions at different times. But the result is, that I have

now come to as decided an opinion on the case as I can expect to come to, and I am bound to give parties the benefit of it.

It had occurred to me to take the case in the reverse order from what your Lordship has done; and, in the first place, as to the relevancy of the defence—I have found myself involved in many of those puzzles referred to by your Lordship. The claim, in its simple aspect, is for damages in respect of a defect in the registration of the inhibition. The answer is, that there was no damage thence arising, in respect of the earlier defect in the diligence itself, and in its execution. That raises a question of very great importance, and I am not prepared, and do not think it necessary to decide it absolutely now; but it would hardly have been right to deal with this case without giving that question very deliberate consideration. If the blunder in the diligence be patent and palpable on the face of the writing presented to the Keeper of the Register, so much so as to have warranted him in refusing to register the instrument, because on the face of it it was a nullity, —then the law would be clear enough, and the party would be thrown back at once with his instrument unregistered,—there being no neglect of duty on the part of the Keeper, but an exercise of discretion in refusing to register a document which was not a diligence at all. But in such a case it might have been, that the defects he thus acted on might afterwards have been cured. The party might have betaken himself to his remedies *aliunde*, and perhaps have had his recourse on other parties against whom he might have a ready remedy. But he is put in a different situation, when the Keeper at first acknowledges the validity of the instrument, and after a long interval, when other circumstances have come out which exclude the possibility of cure or recourse against third parties,—he says, now I discover this to be defective diligence, and I am not to be liable for a blunder in its registration: I am to be excused from the effect of a fault in my own proper duty by taking advantage of these errors. That is one shape in which the question might have occurred, and in which it might have been difficult to sustain the defence.

It might next have occurred where the objection was latent, not appearing *ex facie* of any of the documents presented to the Keeper, but lurking in some of the previous papers, to which he had no ready or natural access, and it might be such as to raise questions of great difficulty—of doubtful decision, and with distant and uncertain results. Now, I have a doubt, in such a case, whether the Keeper is entitled to be placed in all respects as a creditor in a competition;—I do not say that he is;—I do not wish to be understood as having decided in my own mind that he is not. But in dealing with the question, that is an important element to consider. It is an important question, whether a person in charge of a public register is entitled to discharge himself of neglect or *culpa* in his own duty, by involving a party whose interests he was there to forward, in an extent and variety of litigation to which otherwise he would never have been exposed. The more so, where this is to be extricated in a shape where the result is not useful or binding *quoad* other parties, and only to be arrived at by incurring an amount of expense in matters totally foreign to the duties and privileges proper of registration. To hold that the Keeper is in such a situation, would be to make him a most dangerous enemy to the party going to him to have an instrument registered. He would be there to hunt out objections, and expose the diligence to dangers of a remote character. It is difficult to see how far back this would go. The diligence might be regular, not only *ex facie*, but absolutely, and the difficulty—the fatal blot—might rest on the original constitution of the debt. There might lie the source of failure. Is the Keeper then to try a question of that sort? Questions of prescription might arise which had not been previously pleaded;—is the Keeper to take them up? And so also, in questions of personal bar, compensation, and a hundred other cases, the Keeper might be in a situation and assume a position, which would expose the party to a very great disadvantage indeed. Still, and on the other hand, it is not easy to say that, where a claim is made against him of the nature of a claim for indemnity from his fault, there is to be liability, where, on any ground, it can be shown there is no loss thence arising; and yet we [illegible] of redress, where a writer or messenger has failed in diligence against [illegible] that the measure of damages has not been regulated by the [illegible] amount of the loss. It is the amount of the debt which is

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the measure of the claim, and extraneous inquiries are excluded, because it is uncertain what the pressure of diligence, even through the interposition of friends, might have realised. Therefore, I do not see my way very clearly; and I do not think that the principles connected with this branch of the case, with their limitations, have been so fully and satisfactorily brought out as I could have desired. The matter may practically come to a solution in some such way as this. As regards the present case, perhaps it may be dealt with on the footing (1) that, at all events, there must be an absolute nullity to entitle a party in the situation of the Keeper of the Register to have the benefit of it: (2) that mere defects suppliable by evidence *ultra*, as against a competitor, will not avail him. There are numerous cases where it is possible to supplement defects by extraneous proof. There have been many defences of "no process," in respect the party was not in a situation in which it was competent to execute the summons or the diligence in a particular way, yet where the defence has been obviated by proving that, although not set forth in the summons, the party was in a position which removed the objection; and (3) that where, through bad registration, this position of vantage has been lost, there is here introduced sufficiently the element of uncertainty to bring the matter within the amount of the debt as the measure of damage. But it is not necessary to go deeper into that matter of relevancy. I think it right, however, to guard myself against acknowledging that there may not be very grave considerations indeed in the question of relevancy before we could have decided in favour of the defender.

In considering the special objections raised to this diligence, I would wish to ask, (1) how stood the case as at the time of presentation of the diligence for registration? Was there then a patent and palpable nullity, or were the alleged nullities all extra to the document, and such as could not be known to the Keeper? Registration must be done instanter. Then how stood the matter here? What was presented to the Keeper were letters of inhibition. Now these, on the face of them, are correct. The question remains, whether there is a warrant for such letters? But, so far as the Keeper could see, here were regular letters of inhibition. (2) The execution, so far, on the face of it, is perfectly correct. I say so far, because everything is done and certified which was necessary to be done in the case of a debtor furth of Scotland. It is said they are not done as against a person furth of Scotland. But they are so done, and in such a way as is applicable to no other case than a debtor furth of Scotland, and they are said to be in terms of the statute,—a statute which deals with no other case than a debtor furth of Scotland; and, therefore, as regards all that is necessary to give information to the parties, everything is sufficiently done, and the objection is reduced to a mere criticism on words. The question is a bare and barren technicality, to say that other words should have been added.

Then it is (1) an edictal execution. There is execution against the lieges at the Market-cross and Pier and Shore of Leith. Copies were also left at the Record Office. Then, as to this last, the question was raised, whether the Judicature Act, sect. 51, did not make a difference, and do away with execution at the Market-cross and Pier and Shore of Leith? I think it did not. The clause has clearly nothing to do with that. It is confined to parties furth of Scotland, which the lieges are not; and, therefore, an argument on that point is out of the question. Whether the Act of Victoria made a difference on that matter or not, I do not inquire. It was of later date to this diligence, and could not have here affected this question.

The difficulty in regard to the execution turns upon the absence of the words "as furth of Scotland;" but I cannot hold these words to be *de solemnitate*, any more than, in an execution at the dwelling-house of a debtor, I could hold the words "within Scotland" to be *de solemnitate*. If these words had been there, they would not certiorate any fact. The messenger is not bound to certify a search, to satisfy himself that the debtor is furth of Scotland. A case may be in such uncertainty that the execution might be both ways,—double executions, so as to cover both alternatives; and must the messenger certify both of them? If he executes the first as against the debtor in Scotland, and certifies it, and then executes the second against the debtor as furth of Scotland, and certifies it, he would be liable to the pains of perjury. But he certifies neither the one nor the other. He certifies his procedure, and allows these alternatives to remain till it shall be seen which

of them shall apply. Just as in old election cases of making up titles by confirmation or resignation, the Court held that one or other of them must be right; and so here there may be double execution with reference to different *species facti*. All that the messenger is bound to certify is the procedure in regard to each; and, therefore, that is *probatio probata* that he has here set forth all that is necessary for him to certify.

It is difficult in such a case, therefore, to say that the insertion of these desiderated words is a necessary solemnity. I have examined all the authorities, and I cannot say that they lead to any satisfactory conclusion. They do not hang very well together, and it is not very easy to reconcile them; but that shews that, at various times, various results have been held to satisfy the law; and, if so, there again, if these words had been held to be matter of solemnity, such variance could not have arisen. It is for deliberation in each particular case whether the execution is good, and the Court has so dealt with it. It is enough in the present case that there is no express and absolute authority against the mode of execution that has been adopted.

But, then, it is said that the execution does not bear that the party either inhibited the debtor or the lieges *by doing* certain things. But, when it is said that the messenger inhibited the debtor and left a copy of the inhibition at the Record Office, it is impossible to say that that is not in substance and common sense equivalent to saying that he inhibited the debtor by leaving a copy at the Record Office. The execution, accordingly, is in substance the same as if it had contained the words "as furth of Scotland." The form of the execution necessarily implies that.

But it is farther objected that the validity of the execution must depend on the fact that the party was truly out of Scotland; and the question is raised, on whom lies the *onus* of proving that? Some nicety here arises. But both parties have renounced probation; and, on the whole, I am for repelling this ground of objection also. There is here enough to satisfy the ends of justice as regards all and sundry. I am not for straining technical difficulties perhaps to still more substantial injury than could properly arise otherwise. Practice has, accordingly, of late, been becoming more liberal. My opinion upon the other points is in accordance with that of your Lordship.

LORD CURRIEHILL.—This action is brought on the statute 1693, c. 18, whereby it is enacted that the keepers of the Registers of Inhibition, &c., shall keep minute-books, and registrate, as therein mentioned, the writs presented to them, "and that the said minute be immediately signed by the presenter of the writ, and also by the Keeper, and be patent to all the lieges who shall desire inspection, gratis; and that the writs shall be registrate exactly conform to the order of the said minute-book;" and "the said keepers not observing the premises liable to the damages of the parties prejudged by the not due observing of the present Act."

It is admitted that Mr Mackenzie (whom the defenders represent) was employed to register the inhibition—that he, as keeper of the Register, undertook the employment, and returned to Mr Thomson, the creditor, the letters of inhibition and executions thereof, with a certificate indorsed thereon in these terms:—"At Edinburgh, the 13th day of May 1830.—Presented by John Elliott, writer in Edinburgh, and registered in the General Register of Inhibitions, conform to Act of Parliament. (Signed) WILL. MACKENZIE;" that a mistake in the registration, however, was afterwards discovered to have taken place, inasmuch as the amount of the debt was wrong described; and that, in consequence of this error, effect was not given to the diligence in a competition with posterior securities on the debtor's estate. But the defenders maintain that they are not bound to pay damages to the pursuer, because the inhibition was inept and ineffectual, in respect of three errors which had been committed in expeding and executing the diligence before it was presented for registration, viz., 1. That the bill upon which the letters of inhibition proceeded should have prayed explicitly for warrant to expede letters of inhibition, whereas its prayer was expressed in these words:—"Herefore, letters of inhibition;" 2. That although the letters contained authority for executing [illegible] the debtor and the lieges, on the footing of his being furth of Scotland, [illegible] not pray for warrant for such authority; and, 3, That neither the [illegible] of the inhibition, nor even the letters themselves, set forth that the [illegible] furth of Scotland, and yet the letters were executed against

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him only in the form which is competent when the debtor is in that predicament. And the defenders maintain that these alleged errors in expeding the diligence afford him two relevant defences against this claim of damages, viz., first, that these errors rendered the diligence null, and therefor the Keeper of the Register was not under any duty or obligation to record what was a nullity; and, secondly, that in consequence of these alleged nullities, the diligence would have secured no preference to the creditor, even if there had been no error in the registration, and, therefore, he and his representatives have suffered *no damage* by that error. As neither of these views can avail the defenders, unless the diligence was invalid in respect of one or more of these objections, the first enquiry is, whether or not this was the case?

1. Although in practice it is necessary for a writer to the signet to have the authority of the Court of Session to warrant his signing letters of inhibition, and although that authority is granted by indorsing the words "*fiat ut petitur*" on a writing called a plack bill, there is no formula established, by statute or otherwise in which that bill must be framed. The report of the Deputy-keeper of the Signe shews not only that there is no invariable form for the prayers of such writing but that out of nearly 200 specimens, which he examined for ascertaining th usage, 29, or fully one-seventh of the whole, are expressed in terms substantiall similar to the one in question, and therefore it cannot be held that this objectio is supported by established, uniform, and inveterate usage. And as, moreove there is no statute, nor any institutional writer, nor any decision of the Cour which makes any more ample prayer than what is in this bill indispensabl necessary; and I see no authority for sustaining this alleged nullity.

2. For a similar reason I cannot sustain the objection that the bill does not con tain a special prayer for a warrant to cite the debtor as being furth of the kingdon Assuming it contains authority to issue letters of inhibition generally at Mr Thom sons' instance against his debtor Anstruther, why should the Writer to the Signe in preparing the letters, not insert therein the appropriate warrants for citing th debtor wherever he might be? I have heard no answer to this question. Th warrant to cite a party furth of Scotland does not require any other authority tha a warrant to cite a party personally or at his dwelling house within Scotland,—a appears from the most common class of Signet letters, viz., ordinary summonse in which warrants to cite the defenders, whether within, or furth of Scotlan are, according to daily practice, inserted without any authority from the Court The objection, therefore, is not supported on principle. Nor is it supporte on practice, for, although in bills for letters of inhibition against parties furth the kingdom a prayer for warrant to cite them edictally is commonly praye for, yet this practice is far from being uniform. According to the report of th Deputy-keeper of the Signet, in 85 out of nearly 200 specimens, being more than 4 per cent. of the whole, the bills contained no such prayer; and such a diversifie practice cannot establish an invariable rule. And, although it appears from the sam report that, in a considerable proportion of these eighty-five specimens, the parti were designed in the letters as being abroad, this only shews that such a pray was dispensed with in these cases,—not from ignorance of the fact, but intentio ally. Hence this alleged nullity is not supported by uniform and invetera usage. Nor is it supported by any statute, or institutional writer, or decision the Court. On the contrary, in the only reported case in which the objection appea to have been raised (viz., the case of Lord Braco, 22d July 1747, Mor. p. 3690 the objection was repelled.

3. The objection stated against the written execution of the letters is, th although the form of execution which was used in inhibiting both the debtor an the lieges is that applicable to the case of a debtor who is furth of Scotland, it not expressly set forth in the written execution, or even in the letters, that suc was truly the predicament of the debtor. This appears to me to be the most impo tant of the objections, and it requires deliberate consideration.

What the decision of this question appears to me to depend upon is,—wheth the law prescribes as a solemnity that, in such a case, the execution should expressl set forth that the debtor is furth of Scotland? because a failure to comply wi a solemnity in such a matter is fatal to the diligence. This is an elementa principle of much practical importance. But, on the other hand, it is a princip

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of no less importance that such solemnities are not to be introduced by courts of law arbitrarily, or without the authority of statute, or immemorial and uniform usage. But no statute has created such a solemnity. It has never been recognised as such by the Court, or by institutional writers. In practice, however, it has been very usual in such cases to set forth in the written execution that the party is cited *as being furth of Scotland*; and the question comes to be, whether, without any other authority, what has been so practised must now be found to be an indispensable solemnity? Now, what is the meaning of the statement which is said to be of this important character? Not that, *de facto*, the debtor is furth of Scotland. Generally, the executing officer is quite ignorant as to that matter; and it would be out of the question to require him to make a statement to that effect as a matter of solemnity, more especially as a false statement by him in making up his execution is punishable with the pains of forgery. And, indeed, an edictal execution against the debtor *as furth of Scotland* may be quite lawful and correct, although, at the time of the execution, he were actually within Scotland,—if, for instance, his domicile and usual residence were in Carlisle or elsewhere in England, and yet he happened accidentally, at the very hour when the edictal execution took place, to be at Annan or somewhere else on this side of the Border attending a market, or on a temporary visit. Or, on the other hand, he might be actually out of Scotland at the time when he is validly cited at his dwelling-house as being in Scotland,—if, for example, he were a domiciled Scotsman, having his only permanent residence in this country, but happened accidentally to be on the English side of the Border attending a market or on a temporary visit, on the day or hour when he was cited at his dwelling-house. The meaning, therefore, of the statement which is usually inserted in edictal citations,—that the party is cited as being furth of Scotland,—is not that, *de facto*, he is out of the kingdom at that moment, but that the mode of citation is that which is appropriate to the case of a party who is legally in that position. And, when the *res gesta* set forth in the written execution is that which is truly appropriate to such an execution, a farther statement that the execution is one of that kind is mere surplusage. Whether or not the *res gesta* embodied in the execution is the established form of citing, when the party is furth of the kingdom, must be judged of on its own merits. If it be not so, the defect will not be cured by the officer's statement affirming that that form of citation was followed by him. And, if it be so, such a statement by him is a useless form. And I do not think that, without any authority from statute, institutional writer, or decision, the Court is warranted to hold such unnecessary words to be an indispensable solemnity, the omission of which must nullify the diligence.

It is said that the will of the letters authorises the edictal mode of citation only conditionally,—viz., if the debtor be furth of Scotland,—and that it is necessary that it appear *ex facie* of the execution that the condition existed. If so, it would also be necessary that, if the debtor were cited personally or at his dwelling-house, in virtue of letters containing such an alternative warrant as that in these letters of inhibition, it should be stated *ex facie* of the execution that he was in Scotland; because in such a case the letters expressly authorise the personal or domiciliary mode of citation only conditionally, viz., if the debtor be within Scotland. But this, certainly, is not the case; and it is never done in practice. It is, therefore, not a matter of principle that, as a solemnity, the execution should set forth not only the mode in which the debtor is cited, but likewise, as matter of fact, that he was, at the time of citation, in the predicament to which alone that mode of citation is appropriate.

There is another test of this not being held in law to be a legal solemnity. Were this its character, the written execution, if it contained an explicit statement that the party was furth of the kingdom, would be probative of the matter of fact; and the contrary could only be established, not *ope exceptionis*, but only in a process of reduction-improbation. This is a trite rule in practice, and it arises from the faith, which the law of Scotland gives to such official instruments, when they are framed and authenticated according to law, and which is strengthened by the sanction that any falsification in the statement of the necessary solemnities infers the crime of forgery. But such a statement in an execution of citation, that the party cited is out of the kingdom, could not be dealt with as forgery, as that would seldom be a matter within the officer's own knowledge; and it might be disproved,

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like any other ordinary matter of disputed fact, without the form of a reduction-improbation.—See the case of Robertson M'Culloch, 10th June 1836.

In the present case, it is not proved (and both parties have declined to adduce further evidence), that Anstruther, the debtor, was within Scotland, or was in the legal position of not being furth of Scotland, when the inhibition was executed edictally. And when there is a formal execution against a party in one of the modes established by law, there is, as I think, a presumption in favour of the validity and regularity of that execution, and that the party was truly in the predicament to which that mode of execution is appropriate, although this be not expressed. For example, when the officer neither finds the party personally, nor is able to obtain access to his dwelling-house, the appropriate mode of citing him is by the officer making six audible knocks at the door of the dwelling-house, and affixing a copy of the citation thereto. And when he performs these acts, and sets them forth correctly in his written execution, such execution is valid and effectual, although it does not farther state, as matter of fact, that the officer found it impractible to get access to the dwelling-house. For although such is the only predicament in which a mode of execution in that form is competent, yet when that mode of execution is correctly set forth in the written execution, the law presumes matters to have been in the predicament to which that mode of execution is appropriate. See the cases of Sinclair, 30th July 1696, Mor. p. 3774; Srimgeour, 20th December 1705, Ib. p. 3758; and Gorie, 16th November 1756, Ib. p. 3699. On the same principle it is to be presumed in the present case that matters were in that predicament to which the regular edictal citation before us is appropriate, and we have no evidence to obviate that presumption.

I am therefore of opinion that none of the objections stated by the defenders to the inhibition in question is well founded. And this being the case, I do not find it necessary to determine whether or not these objections, or any of them, if well founded, would be relevant to support both or either of the views which the defenders have founded upon them; and, without stating any opinion on that matter, I shall only indicate generally some points I would require to have cleared up before sustaining this objection, as affording any relevant defence against this action.

In the first place, in reference to the question whether Mr Mackenzie would have escaped from his statutory liability from failing duly to register the inhibition, if the diligence had been null in respect of these objections,—is it clear that, *esto* this were the case, he would not have incurred such liability? If he had declined at the time to undertake that duty, in respect of these objections, or any of them, it might perhaps have held, on this supposition, that he was entitled to do so. But does it necessarily follow that he would be in the same favourable case, since he actually did undertake that duty, and returned the diligence, with his formal official certificate that he had performed it by duly registering it in terms of the Act of Parliament, and since Mr Thomson relied upon that registration for many years, and until after the debtor's estate was burdened with securities by which its value was exhausted? Moreover, the first two objections to the bill being latent, and not discoverable without a search for them at the Signet Office, is it clear that, as keeper of a register of inhibitions, Mr Mackenzie would have been entitled, when the inhibition was presented to him, to refuse to enter the diligence on the record, until he should institute an inquiry into all the prior steps of the progress of expeding the diligence, in order to ascertain whether or not they had been quite regular? This is the more doubtful, as the statute requires the first part of the registration, viz., the entry in the Minute-Book, to be made immediately on the inhibition being presented; and the entries in the Register-Book itself to be made in the same order as those in that Minute-book.

The other ground on which the relevancy of these objections is maintained is, that even assuming Mr Mackenzie's liability for any damage his failure in his official duty might have created, yet it could create no damage, in respect the inhibition, even if duly registered, would have been ineffectual to secure any preference on account of these objections. But the fact confessedly is, that the objection to the registration was the ground upon which, in the judgments of

this Court and of the House of Lords, the inhibition was held to be null; and that the other three objections, although also stated on the record, were not persisted in, and were not to any extent or effect the ground of these judgments. And is it now practicable to ascertain that the creditors would have persisted in trying these questions, if their objection to the registration had failed? How can it be made clear that they would have undertaken the risk, trouble, and delay of trying the new questions of law, and even questions of fact, which some of them might involve? Or how can it be ascertained that the writer to the signet, or the messenger-at-arms, who are said to have committed these alleged errors, would not have paid the loss rather than have tried such questions with the creditors, on obtaining an assignation to the debt and diligence, if the diligence had been duly recorded so as to have enabled them to endeavour to effect their relief in the competition? In this state of matters, are the defenders, in order to endeavour to escape from their statutory obligation to pay the damage directly created by their author's failure in performing his official duty, to insist on the pursuer trying such questions with them? According to the opinions of President Blair, concurred in by the Court in the case of Chatto, 17th January 1811, F. C., and followed in the case of M'Millan, 2d March 1820, F. C., it was held that defences of this character were irrelevant in answer to a demand of damages, for a clear breach of duty on a public officer or law agent, in respect of the impracticability of ascertaining that if such duty had been performed, any other objections to the diligence would have been successful, or would ever have been urged or persisted in. The case might be less difficult where the objection is, that the alleged debt for which the diligence is raised was not owing, because, as the debt is held to be the measure of the creditor's loss and damage, there can be no loss and damage where there is no debt; and also because in that case the creditor cannot perform the obligation which the law imposes on him of assigning the debt to the public officer or law agent, from whom he thus exacts payment. It appears to have been upon this ground (in the case of Sinclair v. M'Lellan, 12th Feb. 1829), an officer who had conducted a poinding, and had paid the alleged debt, was held to be entitled to repetition, on his afterwards discovering that, in consequence of vitiation in a bill which was the ground of debt, and certain irregularities, no debt was owing by the indorsers, and the implied warrandice in the assignation *debitum subesse* was incurred.

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But although I have thus indicated these doubts as to the relevancy of these defences, my opinion, as already stated, proceeds not upon these doubts, but upon the failure of the defenders to shew that the diligence is inept, in respect of all or any of the grounds stated by them.

LORD DEAS.—This case naturally divides itself into two branches. The first relates to the question whether the defences are relevant, which simply means, in this case, whether the objections now taken to the diligence, as it stood when presented at the Record Office, be pleadable by this defender? The second relates to the question whether these objections, if so pleadable, are sufficient to void the inhibition? Your Lordships, being of opinion that the objections are not in their own nature sufficient to void the inhibition, may not be called upon to decide the relevancy. But, in the view I took of the case in the Outer-house, and still take of it, it is indispensable to begin with the relevancy.

I did not go into that point at any length in the note to my interlocutor, because, I confess, I did not regard it as an open question. The doubts suggested by your Lordships render me, of course, less confident of being right in so dealing with the question, and these doubts tend at the sametime to throw the law into the least satisfactory of all states,—a state of uncertainty.

The main difficulty raised upon the relevancy of the defences is this. It must always, it is said, be uncertain whether any given objections to the diligence would have been pleaded and persisted in to judgment by the debtor, or his competing creditors, and it must farther be uncertain, whether, if pleaded and persisted in, the Court would have decided them in the same way in which your Lordships might do now. It is thus, it is said, uncertain whether the whole debt might not have been recovered, had there been no error on the defender's part, and, in respect of this uncertainty, it is contended that the defender must be liable in damages, to be measured solely by the amount of the debt.

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This difficulty, if it be one, would be equally applicable to the case of magistrates of burghs, law-agents, messengers-at-arms, and other persons, defending themselves against claims of damages for errors and omissions in the discharge of their duty. Suppose a mercantile agent should unduly fail to insure a vessel, and the vessel is lost—there, as here, it might be asked, why allow him to plead objections to the claim for loss which, had he done his duty, might never have been pleaded or persisted in by the insurers; or, if so pleaded and persisted in, might have gone before different Judges or a different jury, who might have arrived at a different result? All this being involved in inextricable uncertainty, the amount which ought to have been insured must, it might be said, be the measure of the loss. Yet I do not know that it has been doubted, either here or in England, that the agent, in such a case, may plead all defences,—such as illegality of the adventure, deviation from the voyage, &c., which would have been pleadable by the insurers had the insurance been effected, and may thus involve his employer in questions and law-suits, to which it would be no bar to say that the insurers might have followed a different course or met with a different result. Yet there we should have had all the supposed hardship and uncertainty which are urged in the present case.

This leads me to observe that there are two classes of cases in the books which have always been distinguished, and are in themselves quite distinguishable. The one is the class of cases in which, on the part of messengers-at-arms, magistrates of burghs, or law-agents (for the same principle applies to them all), there has been some failure in duty, the consequences of which, upon the recovery of the debt, do not admit of precise ascertainment, but *where no objections exist either to the constitution of the debt or to the regularity and validity of the diligence.* For example, the law-agent fails to instruct the messenger to execute a caption,—the messenger fails to apprehend the debtor,—or the magistrate fails to receive him into prison, or unduly liberates him, or allows him to escape when there. In such cases it is impossible to tell what might have been the effect of apprehending or detaining the debtor. He might be utterly insolvent, and, yet, he might have had the money in his pocket, or at his command, and might have paid the debt, although to the prejudice of his other creditors, rather than go to or remain in prison. Or some friend might have paid it for him, to prevent his apprehension, or to obtain his liberation; and if there exist no good objections to the debt or diligence, the debtor could have had, in such cases, no defence against payment, and so neither can any one who comes into his place.

But there is another class of cases, different from the above, and which have gone on and been decided along side of them, for above two centuries, without it having been supposed that there was any inconsistency between the two sets of decisions. I refer, now, to that class of cases in which, although there has been an error or failure in duty on the part of the law-agent, the messenger-at arms, or the magistrate, there do, at the sametime, exist prior objections to the debt or to the validity or regularity of the diligence, which the debtor himself, or his creditors in a competition, might have pleaded, and which, if so pleaded, would have been sufficient to invalidate the diligence. In such cases it has always been held, that if the party at fault can shew the diligence to be inept, he is not liable for the debt, because, in that view, it must be held there has been no damage.

No distinction has ever been taken, nor do I see how any well could be taken, between fatal irregularities patent upon the face of the writ, and fatal irregularities occurring in the grounds and warrants of the writ. Nor between objections in point of fact, which admit of ascertainment, and objections in point of law, which require the decision of the Court.

For example, if it could be shewn that, at the time the messenger ought to have used arrestments, or had used them in an erroneous form, the common debtor was dead, so that the arrestments, however formal and regular, would have been inept, the messenger is not liable. In like manner, if it could be shewn here, that, at the date of executing the inhibition, Major Anstruther was dead, there could be no liability for irregularities or omissions on the part either of the messenger or Keeper of the Record. Yet the fact of the death would, of course, not be discoverable on the face of the diligence, nor otherwise than by enquiry.

Then, as to objections in point of law, it is true we cannot be sure that the debtor would have pleaded and persisted in these objections, or that one Judge would

have decided them in the same way as another Judge. But the presumption is that the Judge decides rightly, and, if rightly, then that the decision of another Judge would be the same. It matters not whether the objections to the diligence be plain and palpable, or whether they be nice, difficult, and critical. Your Lordships are presumed to know the law in all cases, intricate as well as easy, and to be able to decide it rightly, with less or more aid from the bar, as the case may require. No. 54. — Dec. 20, 1856. Davidson v. Mackenzie.

Nor is the plea of uncertainty as to what the debtor might have done, any better than the plea of uncertainty as to what other Judges might have done. A debtor may become bankrupt or die, and his trustee, or his heir, may take objections to the debt, or to the diligence against his estate, which the debtor himself might never have taken. Even the same individual may be less or more litigious at different times. But this is not *the kind* of uncertainty, any more than uncertainty of decision, to which the law looks, and which is referred to in the cases quoted, and which I shall immediately notice. Even if the distinction between the two kinds of uncertainty were more shadowy than it is, it is a distinction which has been adjudicated upon, after full argument,—has been long settled in our law,—and cannot, I conceive, be now disregarded.

Nor is there anything startling in the proposition that, if a man is called upon to pay a debt, he shall be entitled to take the position of the debtor in respect of his rights as well as of his liabilities:—to plead whatever the debtor might have pleaded, while liable to pay whatever the debtor was compellable under that diligence, to have paid. It is unnecessary, in the present case, to carry the principle farther than this. For it is not easy to figure any objection to an inhibition, pleadable by the debtor's creditors in a competition, which would not be equally pleadable by the debtor himself. At all events, there can be no doubt that all the objections stated here might have been competently and, if well founded, availably pleaded by the debtor, either in a petition for recall of the inhibition or in a reduction and declarator to have it found ineffectual to restrain him in the administration and disposal of his estate. An inhibition, your Lordships know, is a diligence which may be obtained behind the debtor's back; and, if he could not object to it after it is obtained and used, he could not object at all. It ties him up at once, and without warning, from all power of dealing with or disposing of his heritable estate; and, consequently, if he can shew that it is, in any material respect, informal or irregular, he is entitled to have it forthwith recalled. Accordingly, many of the cases, in which technical and critical objections to inhibitions have been sustained, have been cases of petitions presented by the debtors for their recall. For instance, Elliot v. Johnston, 26th June 1829, Fac. Coll., in which the objections to the inhibition were of a very critical kind, the Court, with the single exception of Lord Craigie, concurred in laying it down that the debtor, having an interest in the free administration of his estate, had a corresponding right to insist that the diligence by which he was restrained should be in all respects strict and formal, and that there was no room for distinguishing between objections stated by the debtor himself and those occurring in a competition between his creditors. So in the late case of Smith v. Flowerdew, 5th March 1850 (12 D. 818), even an adjudication was set aside upon the most critical objections stated by the debtor, although the summons had been duly served on her in the outset, and she had allowed decree to go out and possession to follow for many years without objection or complaint. Again, in M'Rosty v. Halley, 2d March 1850 (12 D. 816), summary diligence upon a bill of exchange payable on demand was held to be inept, upon an objection by the debtor that the date of the bill was written on an erasure. In short, there is no objection, however critical, to diligence against the person or estate, which may not be pleaded by the debtor himself; and if by the debtor himself, then why not by a party who, by being sued for the debt, comes to stand in the debtor's place?

It may [illegible] not be that such party may raise questions which might not otherwise have been raised. That did not happen here. For all the objections now taken to the inhibition were stated in the process of ranking and sale; and, although the Court [illegible] objection—namely, the error in the record—to be palpably sufficient, [illegible] into the others, we may fairly hold that these would have been gone into and decided if necessary. But, apart from this, look at the opposite [illegible], which would exclude the relevancy of all prior defects in the

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diligence. Is the creditor to get payment of his debt from the messenger, or magistrate, or law-agent, or Keeper of the Record, although the diligence was, even on the face of it, palpably blundered and inept from the outset? Suppose that here, or in the case of Cooke v. Falconer, it had been found necessary, after the letters had been erroneously recorded, to execute the inhibition of new against the debtor, or at some additional market-cross, and the messenger had then returned an execution which, after being separately recorded, was found to be blundered and inept, would he still be bound to pay the debt without being entitled to plead the previous nullity in the record? And, if entitled to plead that objection, would he not be equally entitled to plead whatever other objections to the diligence the debtor could have pleaded, and which existed when it was put into his hands for execution?

Accordingly, all the cases cited for the pursuers will be found to be cases of the class to which I have first alluded, in which there were no objections to the debt or to the regularity and validity of the diligence. These cases were five in all,—two of which have been noticed by Lord Curriehill. Taking them in the order of their dates, the first is Ross v. Hay (5 Brown's Supp. 577), in which the messenger did not execute the diligence against the debtor, although instructed to do so. The second is Murray v. Durne (Hume's Dec. 323), in which a law-agent was instructed to raise a horning, and to use arrestment and other diligence, and represented that he had done so, while, in fact, he had done nothing of the kind. The third is King v. Stevenson (Ib. 344), in which a messenger was instructed to apprehend the debtor on a particular morning, before a sist could arrive on a second bill of suspension which, it was feared, would be presented, and where the messenger reported that he had done so, but, in fact, had not done it, the consequence of which was that the sist arrived and the diligence was defeated. The fourth is Chatto and Company v. Marshall, 17th January 1811, F. C., in which the messenger four different times got orders to execute a poinding, but failed to do so. The fifth and last is Macmillan v. Gray, 2d March 1820, F. C., in which, after decree *in foro* had been obtained and arrestments used, the law-agent lost the process inclusive of the decree and whole proceedings. In each and all of these cases i was impossible to say that the due execution of the diligence might not have pro duced payment of the debt; and, there *being no objections alleged against th validity and regularity of the grounds of debt and diligence*, the measure of th damage was, naturally and properly, held to be the amount of the debt.

It is true that in the last of these cases there was a vague allegation that th debt was not justly due. But the decree *in foro*, which constituted the debt, no being denied to be regular, formed a conclusive answer to that objection, and le the case the same as if nothing had been said against the debt at all.

The opinion of President Blair in Chatto and Company v. Marshall was, course, given with reference to the case before him. The messenger had com mitted a breach of duty, which, as his Lordship observed, there was reason believe, " did not arise from mere negligence or inattention, but was wilful an corrupt, for the purpose of protecting the debtor." No sequestration was awarde till more than sixty days after the poinding ought to have been executed, so th the poinding might have produced full payment; and it was far from clear (as h Lordship added), that " if the messenger had reported his reason for not executin the diligence, the party might not have operated payment by means of caption other diligence." If there was any doubt in such a case as to whether the de might or might not have been recovered, it was of course right to give the dou against the corrupt messenger. The debt and diligence were unobjectionable; a I am not aware that the opinion of President Blair, as applicable to the case which it was given, or to the class of cases to which it belongs, has ever be questioned. Certainly I do not question it here.

So it was in Macmillan v. Gray, where Lord Alloway and the Court adopt the same doctrine. The decree being *in foro*, excluded (as already observed) t competency of maintaining that there was no debt. No objection was stated the regularity of the decree and diligence; and the debt, as Lord Alloway observe being only L.40, it was impossible to say that, if the decree and diligence had n been lost, the debt would not have been recovered.

These are the whole authorities relied on by the pursuers upon this branch

the case, but to which I conceive they are inapplicable, and in no degree inconsistent with that other class of cases where the diligence, in carrying out which an error or failure in duty had occurred, was shewn to have been inept in respect of some previous blunder or irregularity.

For example, in the case of Adam v. The Bailies of Ayr (M. 3748), in which the magistrates had allowed the debtor to escape, the defence against liability for the debt was, that "the horning whereupon caption was executed was null, because the charge given to the party, whereupon he was denounced, was not lawful, seeing the same bore to be executed at his dwelling-place, and made no special mention nor designation of his dwelling where he was charged, which allegeance was found relevant, and so that the horning was null, and therefore the bailies were assoilzied *simpliciter* from the pursuit." Again, in Potter v. Baillie, M. 7788, one of the bailies of Inverness having failed to take a debtor into custody, when required to do so upon a caption, and having been sued for the debt, his defence was that the denunciation upon the horning, which necessarily preceded the caption, was null, as being at the wrong market-cross. The answer was, that the horning and denunciation could only be challenged by reduction, "and, albeit the horning were null, yet that cannot excuse the defender, who was obliged to obey the charge of the King's letters." "But the Lords found the allegeance, upon the nullity of the horning, relevant, and therefore assoilzied the defender." So in Wyllie v. the Bailies of Wigtown, M. 7793, where the magistrates had set the debtor at liberty, but apprehended him again, three years afterwards, when he died in their hands, "the Lords permitted the bailies to say all which the party might say against the debt if he were living, and to insist in the suspension." But as the bailies seem to have had nothing to say against the debt, and alleged no flaw in the diligence, they were held liable in payment. Then we have the case of Sinclair v. Wilson and M'Lellan, 12th Feb. 1829, S. & D., which appears to me to be the strongest of all possible cases. There a messenger had failed to execute diligence on a bill of exchange. His cautioner (who of course stood precisely in his place) was compelled to pay the debt, under a decree in absence obtained against him and the messenger, the cautioner receiving an assignation with warrandice from fact and deed. It was afterwards discovered that the bill was vitiated in its date, and that there was an error in the instrument of protest, and the cautioner was consequently held entitled to get back what he had paid. This case obviously proceeded on the footing that the messenger and his cautioner were entitled to plead all objections to the bill and diligence which could have been pleaded by the debtor. Accordingly, Lord Newton, Ordinary, says in his note, "He conceives that the messenger could not have been subjected in damages for neglect had it appeared that the document of debt was vitiated, or the diligence inept;" and the Court necessarily adopted the same doctrine, otherwise the judgment arrived at could not have been pronounced. The difficulty arose from payment having actually been made, under a decree, although in absence, and an assignation which bore warrandice from fact and deed only, in place of absolute warrandice. But even this difficulty did not prevent the Court from giving effect to the principle I am now stating. The case, with deference, cannot be solved as one of your Lordships has proposed to solve it, by holding that the objection was to the debt. The justice of the debt was not questioned. The objection was to the diligence as proceeding upon a vitiated bill and an irregular instrument of protest, which did not form a valid warrant for such diligence, although these might (as was observed in M'Rostie's case), have perfectly well warranted an ordinary action.

If I mistake the law on this matter, I mistake it in common with Mr Bell, who distinctly lays it down (1 Com. 460-1) that the responsibility in such cases is only for the loss; and "so if a writer has committed an error which annuls the diligence, but it turns out that this diligence would, on another ground, have been ineffectual, he will be freed from responsibility." Mr Bell does not, I apprehend, rest his doctrine upon the case of M'Lean v. Grant. He lays down the general doctrine, without deeming it necessary to quote the authorities from which he collects it; and he refers, in a note, to the case of M'Lean v. Grant as a case in which this doctrine was so applied as to lead to a singular result, which he there explains. But, at the same time, it cannot be doubted that the case of M'Lean proceeds upon a full recognition of the general doctrine, and nobody could know this better than

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Mr Bell, who was counsel in the cause. As a recognition of the general doctrine, its authority is not destroyed by any doubt which may be entertained of the soundness of the way in which the doctrine was there applied.

In Cooke v. Falconer, I agree with your Lordship in the chair that the point now under consideration did not require to be decided. But Lord Wood, obviously, assumes the principle in the latter part of his note, in dealing with the objection of want of mandate, and Lord Cuninghame expressly goes upon it in the third head of his opinion, where he holds the previous blunder in the registration to be a conclusive answer to any claim against Mr Falconer for not subsequently publishing the inhibition at Aberdeen, and adds :—" The case is similar to one which has repeatedly occurred, when, in proceedings on other diligences, such as caption, it was discovered that the horning was ill recorded, or erased, or denounced before the lapse of the *induciæ;*" and in which cases (he observes), no damages could be claimed from the agent or messenger accidentally failing to incarcerate the debtor.

If, indeed, it could be shewn that there is a distinction between all these cases and the case of the defender, in respect he is a public officer, charged with a statutory duty, there might be something in the pursuer's plea on this branch of the case. But it is difficult to see any sound distinction. A messenger-at-arms is a public officer, imperatively charged with a public duty, which he must perform on payment of the usual fees. The liability of the defender, like that of magistrates, law-agents, and messengers, is simply a liability for damages. The Act declares the Keeper of the Record " liable to the damages of the parties prejudged by the not due observing of the present Act." It must therefore, I conceive, be open to him to shew that there has been no damage, in the same way, and on the same grounds, as it is open to these other parties to do so.

Holding then, as I must still do, after duly attending to the observations of your Lordships, that the objections taken to the inhibition are pleadable and relevant in the mouth of this defender, the next question comes to be, whether they are sufficient to invalidate the diligence?

And here I cannot help fearing that the doubts which your Lordships entertain on the relevancy may have led you to take a less strict view than you otherwise would have done, of the formalities necessary in this diligence. For when I hear it stated by my brother Lord Ivory, that the strictness of the law on this subject has been relaxed, I confess I hear a doctrine for which I know no sanction in the practice or decisions of this Court All the recent cases seem to me to establish the reverse. The objections sustained were extremely critical in the cases already noticed of Sinclair v. Wilson and M'Lellan, 12th February 1829, and Elliott v. Johnston, 26th June 1829. In Forbes v. Gallie, 4th March 1847, the fact that the word " dependence," introduced *narrative* into the letters of arrestment, was written on an erasure, was held sufficient to nullify the diligence, although the word stood quite right in the deliverance on the plack bill which was so narrated. The Court held it irrelevant even to say that the word stood as it now did when the writ passed the Signet,—Lord Fullerton observing that, in other writings, it might do to shew that the alteration had been made before signature, " but it is entirely different when we have to deal with diligence," which the party against whom it is to operate may disregard if not complete in all its essentials. In Burleigh and Others v. Horwood, 20th July 1848, the objection was sustained that the words, " Edictal citations at Edinburgh," occurring in the will of the letters of inhibition, were written on an erasure, although the will directed the copy to be left at the Record Office, " in terms of the statute made thereanent," and the officer's execution correctly bore that the copy had been left at the office of the Keeper of the Records of Edictal Citations, in terms of the statute and Acts of Sederunt, and the copy itself contained the words in question fairly written without erasure. This was the unanimous decision of the whole Court, and it seems to me impossible to read the opinion of the consulted Judges, in which the other concurred, and to hold that they recognised the slightest relaxation in the strict rules which have been applied to diligence, against person and property, from the earliest times downwards. The concluding paragraphs of the opinion shew, I think, the reverse, particularly as to inhibitions. Then in Wilkie or Smith v. Flowerdew, 5th March 1850, the objections to the adjudication were, as already

observed, of a very critical kind, and were given effect to in circumstances far from favourable to the debtor by whom they were pleaded,—Lord Cuninghame observing, "All the later cases shew the stricter practice of your Lordships." Then look at the case of M'Rostie, 2d March 1850, than which I know no instance of the Court dealing more strictly, or perhaps so strictly, with the matter of diligence at any period of our law. As counsel in that case, by referring to Whitehead v. Henderson, 19th February 1836, and to some earlier cases, I at first prevailed with the Court to allow a proof, before answer, that the erasure in the date of the bill of exchange, on which the diligence proceeded, had been made at the time of acceptance, with the knowledge of the acceptor (vide 12 D. 124.) But, after a proof had been led, the Lord Ordinary reported the case with a strong indication of opinion that, although the proof might be sufficient to establish the fact relied on, and thereby to support an ordinary action on the bill, it ought not to be held admissible in a question of summary diligence; and so the Court found, overruling the previous decisions to the contrary. This appears to me to have been an application of the strictest of all possible rules to the matter of diligence; for, as the bill was payable on demand, and interest could only run from the date of demand, which was fixed by the instrument of protest, nothing whatever turned upon the date of the bill, the erasure in which was held, nevertheless, to nullify the diligence, whatever might be the fact as to the erasure having been made with the knowledge of the acceptor at the time of acceptance.

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Nor do I know any reason why these rules *ought to be* relaxed. As Lord Jeffrey observed in Forbes v. Gallie,—"Writs of diligence are edge-tools, which ought to be handled with a delicate scrupulosity; and, if the property or person of another is to be attached under them, they ought to be of a nature beyond the reach of question." This is specially true of the diligence of inhibition, which, as Mr Ross observes, (1 Lec. 459,) "from the period of its introduction had and continues to have the strongest, the most sudden and determinate effect of any writ known in our law;" and which, he afterwards says, (p. 468,) is "the most fatal and impolitic diligence that was ever introduced into the law of any country." By this diligence a party may, without warning or opportunity of resistance, be, at once, deprived of all power of disposal of his heritable estate, whether acquired before or after the date of the inhibition. The mere production of an executed summons (as happened in the present case) is enough to enable the party to obtain inhibition against his alleged debtor, who, being thus laid under restraint, without notice, and for an alleged debt which may, after all, turn out not to be due, is entitled to insist that the diligence and its warrants and executions shall be, in every respect, strictly regular and formal, otherwise that the diligence shall not affect him. As Lord Balgray observed, in Elliot v. Johnston,—"There was no legal diligence of which the law of Scotland was so jealous, or where objections of so critical a nature had been sustained, as the diligence of inhibition, which, until lately, was only granted *causa cognita*. It was necessary that the bill which prayed for the letters of inhibition should be correct in inself; and the *fiat ut petitur* was the warrant for the diligence which proceeded on this."

Now, applying these rules to the diligence in the present case, it did not appear to me, for the reasons stated in the note to my interlocutor, that the diligence could be held to have been valid, supposing there had been no error committed in recording it. I need not here repeat these reasons. It is not necessary that the objections should amount to a want of what we call *solemnities* in the procedure. Defect in the appropriate and usual formalities is enough. This is apparent from nearly all the decisions in regard to such diligence. Now, the leading objection to the procedure here is that which relates to the defective nature of the black bill (which all the authorities agree in holding to be just a petition to the Court), and, consequently, in the warrant which bears to have been granted in terms of that bill. As Lord Glenlee observed, in Kyd's case (11th March 1830)—"The bill comes in place of a summons, and the *fiat ut petitur* is in fact the decree." There is no statute authorising citation of persons out of the kingdom. It is authorised solely by custom; and the position meant to be laid down under the first head of my note is simply this,—that, in order to take benefit from the custom, the custom must be followed in all its material parts; much in the same way as the statute must have been followed had such citation been authorised by

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statute:—that the custom requires that it shall appear, from the terms of the plack bill or its prayer, that warrant is sought to cite the party as forth of the kingdom, otherwise the deliverance embodied in the words "*fiat ut petitur*" will not imply such a warrant,—that this material part of the custom was not observed here; and, consequently, that no warrant ever existed for citing the debtor as forth of the kingdom.

To this objection I have heard no answer. The case of *Lord Braco*, which was the solitary case referred to, and of which we have no satisfactory report, has been shewn from the session papers to have been decided on specialties. Besides, it related to an *adjudication*, which proceeds upon a regular summons under the Signet; and it depends upon whether we look upon an adjudication as a summons or a diligence (both of which characters have been ascribed to it), whether a special warrant to cite as forth the kingdom would be necessary,—custom not having required this in regular summonses as it has always done in diligences, such as inhibition. There is not a single formulist, from the earliest times downwards, who does not lay it down that, wherever the diligence is meant to be directed against a party forth of the kingdom, the plack bill ought to be framed, in special terms, so as to obtain a warrant to that effect; and I am at a loss to discover why a departure from the prescribed forms, in this respect, should now be sanctioned for the first time. It is not pretended that there is any usage to sanction it. The report of the Deputy-Keeper of the Signet shews the reverse. The *onus* lies, I think, on the pursuers to show that they have complied with the custom, on which alone they can found as sanctioning edictal citation at all. But, in place of this, it is established, both by the reports obtained upon the custom, and by the forms (or precedents) in the style books, which are part of our custom, that the custom has not, in this case, been complied with.

As Mr Ross observes (1 Lec. 202), "it is only the voice of their Sovereign that people who are absent are obliged to hear; and, therefore, whoever means to act or do anything at the market-cross, pier and shore, must have a special authority for that purpose." He then states, that the form is "to present a bill or petition to the Supreme Court," stating that the debtor is out of the kingdom, and praying for authority to cite or intimate at the market-cross of Edinburgh, pier and shore of Leith (now changed, by statute, to the Office for Edictal Citations). He adds, "Writers have not authority to insert warrants out of the kingdom, as they are termed. Bills must, or at least ought to be presented, requesting that liberty from the Court." The same rule applies both to civil and to criminal process; and, accordingly, Mr Hume says (v. 2, p. 259), "Last of all, from the oldest times, our custom has been familiar with an expedient, which the law of some countries does not apply even to civil process, for citation of persons who are forth of the realm of Scotland. *Special* authority for this purpose must be asked in the bill for the criminal letters."

It is true that the plack bill does not require any actual signature. But it must bear to be the bill of some writer to the signet named. And, so here, it bears to be "Alexander Monypenny's bill." I should not like to be in the shoes of any one who would put the name of Alexander Monypenny there without his authority. So much is it the bill of the writer to the signet, that it ought always to begin (as I have been taught) with the words, "My Lords," in the singular (being the writer's address to the Court), at the instance of whatever number of parties he may crave the letters to be granted. At all events, nobody but a writer to the signet can present such a bill. It is a privilege, involving a duty, like that of presenting signature for a crown charter in Exchequer; and the writer to the signet becomes responsible that the letters to be expede, under the signet, shall correspond precisely with the bill. Accordingly, Mr Beveridge says (p. 164), "A bill may be defined a petition praying for letters under the King's signet, conceived in the same terms. *In other words, it is the draft of the letters*;" and he adds (p. 170), that accuracy is essential, "because the bill is the measure of the letters."

I do not resume the other heads of my note, having nothing to add to them. The first head has always appeared to me to be the most important (though it may be strengthened when taken in connection with the second), and it is precisely the head which it seems to me your Lordships have rather overlooked. I regret the looseness of procedure which this decision may appear to sanction, and think

would have been more wholesome to have adhered to the strictness usual in dealing with matters of diligence. No. 54.

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THE COURT pronounced the following interlocutor: — "Recall the interlocutor of the Lord Ordinary submitted to review: Repel the defences in the original action, in so far as founded on the alleged irregularities of the inhibition and execution thereof: Find that the original defender, and now his representatives, are liable to the pursuer in such damages, if any, as shall be proved to have resulted from the denial of effect to the inhibition in the process of ranking and sale, referred to in the record, and remit to the Lord Ordinary to consider as to the damages claimed in the original action; and, if he shall see cause, to receive a particular condescendence thereof: Also remit to the Lord Ordinary to hear counsel in the supplementary action, and, generally, to proceed further in the conjoined actions as shall be just; with power to disjoin the actions if, in the course of the proceedings, he shall consider it right so to do; reserving, in the conjoined actions, all questions of expenses."

WILLIAM SKINNER, W.S.—JAMES DALGLEISH, W.S.—T. & R. LANDALE, S.S.C.—
W. & J. H. MACKENZIE, W.S.—Agents.

WILLIAM GIBSON AND OTHERS, Suspenders.—*D. F. Inglis—Cook.* No. 55.
JOHN KERR AND OTHERS, Respondents.—*Lord-Adv. Moncrieff—Logan.*

Burgh—Election—Suspension and Interdict—3 *and* 4 *William IV, cap.* 76.—At the usual meeting for the annual election of office-bearers of a royal burgh, a motion was made and carried by the majority of the councillors present, for the adjournment of the election till a specified day. An amendment to proceed at once with the election was adopted by the minority, and certain gentlemen were declared to be elected to the offices of bailie and treasurer. A note of suspension and interdict was then brought by the minority to prevent the majority proceeding with an election in terms of their resolution;—*Held* (*dub.* Lord Deas), that suspension was incompetent, and *observed*, that it was only after a completed election, at which all parties had voted, or in circumstances in which the councillors who had not voted could not be held to have been excluded from exercising their privilege, that such a procedure was competent.

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STRANRAER is a royal burgh. The Town-Council of the burgh consists of eighteen members, six or one-third of whom annually go out of office, in terms of the statute 3d and 4th William IV., cap. 76. The statute provides that any councillor, magistrate, or office-bearer elected *ad interim*, shall go out of office on the first Tuesday of November next ensuing his election, and the vacancy thereby occurring shall be supplied at the next annual election of councillors and magistrates or office-bearers in such burgh.

During the year ending in November 1856, one of the members of the Town-Council of Stranraer died, and another was elected *ad interim* to supply his place, in terms of the statute. The member so elected vacated office on the first Tuesday of November, along with the six members retiring by rotation, so that, upon the day for the annual election to supply vacancies, there were seven vacancies to be filled up. The respondents averred that there were eight.

Of the members retiring by rotation one was a bailie of the burgh. There was also a vacancy in the office of treasurer, and these offices fell to be filled up after the election of the new councillors, in terms of the 24th section of the [illegible], which provides, "That when any magistrate or office-bearer ([illegible] the provost or chief magistrate and treasurer) shall be [illegible] the [illegible] council going out of office, the place of such magistrate [illegible]

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or office-bearer shall be supplied by election by the council as soon as the full number thereof shall have been completed by the annual election of the third then hereby directed to take place, the said election to be made by plurality of voices, and the chief or senior attending magistrate to have a double or casting vote in case of equality."

On 20th October 1856 notice was publicly given that the election for filling up the seven vacancies in the council would take place on Tuesday the 4th of November. The election took place accordingly, when the respondents were duly elected, and the provost directed written notice to be sent to them of their election, requiring them also to appear within the Town-Hall upon Thursday the 6th November, to declare whether or not they accepted of office. On 6th November the respondents appeared, declared their acceptance of, and were duly sworn into office. Thereafter the clerk declared the councillors of the burgh to be the eighteen persons specified in the minute of the meeting of the 6th November. His right or authority to do so was denied by the respondents, and the declaration itself was also said by them to be not correct in point of fact.

In terms of these notices, a meeting of council assembled in the Town Hall on the 7th November 1856, when, *inter alia*, the following procedure took place:—The respondent Mr Ingram, a newly elected councillor moved "that in respect Mr James M'Dowall has become disabled, by non residence and by his name being withdrawn from the roll of electors, to s as a member of the Town Council, the town-clerk be instructed to give the requisite notice, under the 25th clause of the 3d and 4th William IV., cap 76, to the remaining members of council, to meet and elect a councillor *ad interim*, in room of Mr M'Dowall, and that this meeting do now adjourn ti the day then fixed for such election, and at that time to proceed with th business of this meeting, as well as with the election of councillors *ad interim*." This motion was seconded by the respondent Mr M'Culloch. On the other hand, Mr Murdoch moved as an amendment, "that in respect M M'Dowall has this day intimated his intention to resign the office of coun cillor, and his resignation cannot be accepted or dealt with till the expira tion of three weeks at least, the council do now proceed to the statutory election of office-bearers, and that Mr Peter M'Lean be now elected one the bailies of this burgh, in room of Mr David Kennedy, who filled th office, but who was one of the retiring councillors, and had not bee re-elected; and that Mr William Gibson be appointed treasurer." Th motion and amendment having been put to the meeting, the motion w carried by a majority of ten to seven. Thereupon Mr Murdoch protest "that as no other candidates had been proposed for election at this statuto meeting, the gentlemen named by him have been duly and lawfully electe Following up the above resolution, the respondents issued notices calling meeting of council for the 17th November, "to elect a councillor *ad interi* in room of Mr James M'Dowall, and then to proceed with election of offi bearers." The 26th section of the statute enacts, 'That any person elect and accepting the office of councillor, magistrate, or other office-bearer, any Town Council, under the provisions of this Act, may resign his s office at any time, upon giving not less than three weeks notice of such intention, by a written intimation to the town-clerk, or chief or senior mag trate." The first notice given by Mr James M'Dowall of his intention resign was alleged by the complainers to have been at the meeting on 7 November 1856.

The minority, including Mr M'Lean, who was proposed for the office bailie, and Mr Gibson for the office of treasurer, then presented this petiti and complaint, praying the Court to interdict the respondents "from mole ing the complainers, William Gibson and Peter Maclean, in the possessi and enjoyment, or in the discharge of the duties of their respective offices

treasurer and one of the bailies of the said burgh of Stranraer; as also from acting upon or following up in any way the resolution of 7th November 1856; and in particular, from proceeding in terms of the resolution to elect a councillor, bailie, and treasurer, or any other office-bearer for the burgh, upon the 17th day of November; or to do otherwise," &c.

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Answers were lodged for the respondents, in which they stated, *inter alia*, that on "the 7th of November 1856, when the election of the suspenders Messrs Maclean and Gibson, as one of the bailies and as treasurer respectively for the burgh of Stranraer, was alleged to have taken place, the council did not consist of the full number of councillors required by the sett of the burgh, and by the Act of Parliament, in respect that upwards of a year before the election in November 1856, Mr M'Dowall, a councillor, retired from business, went to reside in or near Lanark, and ceased to have any connection with the burgh of Stranraer. By so doing he became disqualified as a councillor, and *eo ipso* of this disqualification, ceased to be such. In the month of October last he was, by the assessor of the burgh, struck from the list of parliamentary voters, a proceeding confirmed by the Sheriff in the course of the same month. Therefore they alleged that no real or effectual election had taken place.

The complainers pleaded;—That Messrs Gibson and Maclean had been duly proposed and elected as treasurer and bailie respectively, at the statutory meeting for election of office-bearers, and it was therefore incompetent to proceed to any election on the footing that these offices were vacant: That the resolution of 7th November to adjourn the election was, in the circumstances, null and contrary to statute; and that Mr M'Dowall not having resigned, any election to supply his place as a councillor would be illegal.[1]

The respondents pleaded;—That Messrs M'Lean and Gibson had not been duly elected, and possessed neither title nor interest to insist in the present application; and the object of the application (in so far as the other suspenders were concerned) being merely to maintain the two suspenders in offices to which they had no just claim, the application was altogether without foundation, and ought to be dismissed. Farther, that interdict was incompetent; the only question thereby raised being the validity of the election, a question incapable of being decided except by way of declarator.[2]

The Lord Ordinary, on 12th November, granted interim interdict, and on 4th December reported the case to the Court.* The minutes of the meeting of council of 17th November bore, that the agent for Messrs M'Lean and Gibson appeared, "and in virtue of the warrant of the Lord Ordinary, claimed that these gentlemen be now sworn into office, which was done accordingly."

To-day the case was put out for hearing, and having been opened, the senior counsel on both sides stated that they proposed to allow the case to stand on the opening speeches of the junior counsel without farther argument. Lord Deas intimated that he had as yet formed no opinion upon the

[1] *Complainer's authorities.*—Grant on Corporations, p. 70; Oldknow v. Wainwright, 1 W. Blackstone, 229; Gosling v. Veley, 8th Feb. 1847, 7 Adolph. and [illegible] (Q. B.) p. 435.

[2] *Respondent's authorities.*—Maculloch v. Hill, 22d Feb. 1839, ante, vol. i. p. 549; Fleming v. Dunlop, 17th Dec. 1837, 16 S. & M'Lean and Rob. 574; Scott v. Magistrates of Edinburgh, 21st Dec. 1838, ante, vol. i. p. 347; Magistrates of St Andrews, 29th July 1747, Kilkerran, p. 107; Oldknow, 2 Burrow 1017; Queen v. Mayor of Bradford, 17th Jan. 1851, 20 Law Journal (new series Q. B.) p. 226.

* "NOTE.—This case has been reported at the request of both parties, who are anxious to obtain a speedy judgment from the Court. The Lord Ordinary need only observe, that the discussion before him had not proceeded so far as to enable him to form a satisfactory opinion on the questions raised, which appear to be important and difficult, both on the competency and the merits."

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case, and would prefer that the argument should proceed to a conclusion. But the rest of the Court not insisting upon this,—

Lord Ivory proceeded to deliver his opinion as follows:—

Pressed as we are by the circumstances in which this burgh is placed, we must give such judgment as we best can where so little time is allowed us for deliberation. There is an important question here, whether this suspension is brought under circumstances which render such an application competent. In the ordinary case, where a party has been inducted into office, and the election has been completed, suspension and interdict is the natural remedy for preventing that officer being hindered or molested in the exercise of his duties. But in the present case there is no such completed election. There is no completed investment of the office in the sense of all the cases to which we have been referred, for on the 17th November the swearing in of Messrs Maclean and Gibson, for the first time, takes place; that is, five days after the date of the suspension and interdict, and therefore nothing had been done prior to the date of the suspension for investing these gentlemen in their respective offices.

On 7th November matters were left where the subsequent meeting of the 17th took them up. The election on the 7th is a very clumsy form of election. It is not taken up as the substantial matter of business of that day. It is engrafted on a motion for adjournment, and therefore until the question of adjournment is disposed of, the matter of the election could not be taken up. In all the cases to which we have been referred, both parties have been engaged in what substantially was an election, one party wishing to elect one candidate, and another party wishing to elect another candidate, and so forth. In all these cases the parties meet in the same arena. The same question is in discussion between them, and it is only in such circumstances that the matter comes into this position that the party not exercising the elective franchise at the proper time is not in the situation of throwing away his vote. Besides, you are not to mix up in elections of this kind matters of a complex nature, as was done here. You must so manage that each individual councillor may give his vote for the one candidate or the other, as he pleases; and farther, you are not to mix up the voting for an election with the voting on a motion for adjournment. These things are all mixed up here. Unless the votes of the majority are to be held as thrown away, you cannot hold the election by the minority to be good. That is quite sufficient to determine this case, and as the suspension takes up matters at that stage, I hold it to be not a competent mode for extricating the question. I do not wish to enter into the general proposition that suspension cannot in any circumstances be a proper mode for extricating such a question. But when the matter is at a stage of defect and imperfection, where interdict is to stop parties on both sides from proceeding further with the business, and where the question of right affects only the intermediate stage of the election, then suspension and interdict is not the proper mode for trying that question. There is more than that in this case. I am not prepared to say that if there be good and reasonable and *bona fide* grounds for asking an adjournment, there is any statutory rule forbidding the adjournment of the day for electing Magistrates. It is not as if the statute had fixed the election for a certain day, so that if not completed on that day, the election could not be completed on any other day. The Council must meet on that day, but until their number is complete, they cannot elect, and therefore you are not tied up to any absolute point of time as regards the day of the election. There are, doubtless, circumstances in which the election may be adjourned, and if so, it is reasonable at least to entertain a motion for adjournment, made on sufficient grounds and in good faith.

Considering all these things, I think that this suspension and interdict must be refused. I am sorry that interdict had ever been granted, for it has raised many difficulties calculated to keep this body in feud. But we must now remedy it as well as we can: And, on the whole, I have no doubt as to the propriety of refusing this application.

Lord President.—I concur.

Lord Curriehill.—I also concur. I only wish to say that there are farther grounds on which I do not wish to give any opinion at all.

LORD DEAS.—It is unfortunate that this case, which involves points of importance, should occur for decision when the Court is just about to rise for the Recess, and all parties are pressed for time. I am confirmed in thinking a completed argument desirable, by observing that the main ground of judgment now to be pronounced has been rested by Lord Ivory, with concurrence of your Lordships, on a view not stated from the bar at all: And it is this: At the meeting of 7th November, a motion was made to adjourn the election of office-bearers to a future day. This was met by what is called an amendment, but which was truly both an amendment and a motion, embracing two things quite distinct in themselves, and which ought not to have been linked together—namely, 1st, That the election be at once proceeded with; and, 2d, That certain persons named should be elected. Now, if the question had been first put—"Adjourn, or proceed?"—the whole Councillors present would afterwards have had a proper opportunity of voting or declining to vote for or against the particular persons put in nomination, which, as the matter was managed, they have not yet had. According to the best opinion I can form at this moment, this objection to the proceedings appears to me to be well founded, and, the case being pressed to judgment on the argument as it stands, I can only go upon this opinion. I am sensible, at the sametime, that the objection taken to the competency of the suspension ought naturally to come first. But I am still less inclined to deal with that point than with the other, because, while stated and argued by the respondents' counsel, it was not opened upon by the counsel for the complainers, and, there having been no reply, we are left without any explanation of the grounds on which the case is sought to be distinguished from the case of Fleming; and I shall therefore say that I am inclined to doubt at present the competency.

No. 55.

Jan. 13, 1857.
Reid v. Lamond.

I am well pleased, however, as the case is decided by the votes of your Lordships, that no opinion of mine can affect the result.

THE COURT pronounced the following interlocutor:—"Refuse the note of suspension and interdict: Recall the interdict; and find the respondents entitled to expenses, and remit," &c.

GEORGE COTTON, S.S.C.—ROBERT M'WILLIAM, S.S.C.—Agents.

No. 56.

WILLIAM REID, Pursuer.—*D. F. Inglis—Patton.*
ROBERT LAMOND AND OTHERS, Defenders.—*Moir—Ross.*

Personal Obligation—Heritable and Moveable.—The proprietor of certain lands who had granted a bond and disposition in security, containing a personal obligation and a conveyance of the lands in security, sold them to joint purchasers, under burden of the payment of the sum contained in the heritable bond. The amount of the bond was retained by the purchasers, who only paid to the seller the balance of the price. The seller assigned to the bondholder his right of relief against the purchasers. The bondholder having brought the subjects to sale, they did not realise the full amount of the debt;—*Held* (affirming judgment of Lord Ardmillan), that the purchasers were jointly and severally liable to the bondholder in the balance of the debt.

Jan. 13, 1857.
1ST DIVISION.
Ld. Ardmillan.
C.

THE facts of this case were embodied by the Lord Ordinary in his interlocutor, as follows:—

"The late William Reid, who is represented by the pursuer, held a bond and disposition in security from David Tait, over certain subjects in Kirkintilloch, for the sum of L.450, which subjects were in January 1839 purchased from Tait by the defenders. The price of the subjects set forth in the disposition by Tait to the defenders was L.615, but it was admitted on record that only L.165 were paid, the difference of L.450 being the sum in the heritable bond to Reid. The subjects were disponed by Tait, and accepted by the defenders, under the lien and burden of the 'payment to William Reid of L.450 sterling, and interest thereof from Martinmas last' (1838), being the sum in the heritable bond. By assignation granted by Tait to the pursuer, the pursuer was vested in all right and claim of relief

No. 56. — Jan. 13, 1857. Reid v. Lamond.

competent to Tait against the defenders, in terms of the disposition and the transaction of sale, in so far as regards the L.450, which remained in the hands of the defenders, as purchasers, in the manner above explained. The pursuer brought the subjects to sale, when they realised, after the usual deduction of expenses, L.277, 18s. 6d. A sum of L.122, 2s. 7d. had been paid by or for behoof of the defenders, to account of interest; and the balance of the principal sum of L.450, and the interest from Martinmas 1838, under deduction of the sum of L.122, 2s. 7d., formed the subject of the present action."

The defenders pleaded;—That they had never come under any personal obligation to pay the amount of the debt alleged to be due to the pursuer. The mere fact of accepting a disposition of subjects under a real burden did not rear up a personal liability for the amount of the real debt or interest that might have accrued upon it—far less did it rear up a conjunct and several liability against the purchasers.

The Lord Ordinary, on 22d February 1855, pronounced the following interlocutor:—(After findings in fact, as above given)—"Finds, in point of law, as applicable to this state of facts, that the defenders are jointly and severally liable to the pursuer in the said balance of the debt of L.450, with interest as aforesaid, and decerns accordingly against the defenders, jointly and severally, conform to the conclusions of the libel: Finds the defenders liable to the pursuers in expenses." *

The defenders reclaimed, and pleaded;—That there was here no real transfer of the personal obligation, and therefore no personal claim against the defenders.

Counsel for the respondent were not called on.

Lord President.—I see no reason to differ from the interlocutor of the Lord Ordinary.

Lord Ivory and Lord Curriehill concurred.

Lord Deas.—I am of the same opinion. Mr Patton founded on the words, "with and under the further lien and burden," as shewing that the burden of the sum of L.450, and interest, was a burden of the same kind with the burdens previously referred to, which he said were inherent conditions of the grant, and the same with those warranted in the bond and disposition in security. But on looking at these conditions, it will be seen that they are of a nature which were personally binding on whosoever should purchase the property, as well (it may be) as real burdens, by being made inherent conditions of the grant:—for instance, not to build certain kinds of manufactories on the ground,—to keep always upon it houses of a certain description, and in good repair,—not to place, or allow obstructions on the street, &c. So that if any inference were to be drawn from the words above alluded to, it would rather be that the burden of payment of the sum in the bond, and interest, was meant to be both a personal and a real burden. But I do not go upon this. Nor do I go upon the footing that the L.450 was truly part of the price. I look upon the mention made of L.615 as the price as important, mainly as favouring the construction of the subsequent clause in the way the Lord Ordinary has construed it,—namely, as importing an obligation of relief, which is truly the whole question in this case. It is not usual for the seller of heritable subjects to remain liable for heritable bonds affecting it without relief, and I am quite satisfied that such is not the legal import of the transaction here.

The Court adhered, with additional expenses.

Wright & Finlay, S.S.C.—Horne & Rose, W.S.—Agents.

* "Note.—The special terms of the disposition to the defenders, according to which they undertook the burden of payment of the sum in the bond to William Reid—the fact that the amount of the bond was retained by the defenders, as purchasers, who only paid to the seller the balance of the price—and the assignation by Tait, the seller, to the pursuer of his right of relief—really remove all difficulty from this case, and distinguish it from the case of Kippen, 24th February 1852 (14 D. 533).

WILLIAM LOSH, THOMAS WILSON, THOMAS BELL, AND OTHERS, Pursuers.— *D. F. Inglis—Young.* No. 57.
ALEXANDER MARTIN, Defender.—*Penny—Mackenzie.*

Jan. 14, 1857. Losh, Wilson, and Bell v. Martin.

Process—Leave to appeal.—Evidence proceeded with in a cause, pending an appeal of one branch of it.

1st Division. Ld. Benholme. C.

SEE supra, p. 101.
The pursuers now presented a petition for leave to appeal.

Smith v. Barlas.

Penney, for the defenders, objected. This was not a case for appeal. The Lord Ordinary had appointed issues to be lodged. The evidence would be very much that of seamen, and if the case were taken to appeal now, and kept up for two or three years, much of that evidence would likely be lost. No injury could result to the pursuers by going on with the case in the usual course.

D. F. Inglis, for the pursuers.—The case naturally divided itself into two parts,—the first question being, whether the defence founded on the allegation of unseaworthiness, could, in the circumstances, be sustained. Both parties wished that defence to be disposed of, and renounced probation upon it, and it had been treated by the Court as a separate case. The reason why parties wished to have that defence so disposed of was that, in the event of its being affirmed, there would be an end of the case That same reason of expediency applied to this application for appeal. In the event of the judgment of this Court being reversed, the whole of the labour and expense of an enquiry into this branch of the case would be avoided. In the event of the judgment being affirmed, the parties would then be in a position to proceed with the investigation, and with no disadvantage from the delay. There was nothing to prevent the defenders going on with their evidence while the case was pending in the House of Lords, by taking it on commission. The pursuers did not object to the defender getting an issue before going on with their proof.

LORD PRESIDENT (after consultation).—The opinion of the majority of the Court is, that, in the circumstances of this case, and especially there being engrossed in the interlocutor of 18th January 1856 the consent of parties to have this ground of defence disposed of in the first instance, the prayer of the petition should be granted. We shall delay this case until issues are adjusted, but it being understood that the petition is then to be granted.

JOHN CULLEN, W.S.—W. A. G. & R. ELLIS, W.S.—Agents.

MRS MARGARET KIRKPATRICK MARDER OR SMITH, Nominal Raiser and Claimant, (Reclaimer.)—*C. F. Shand.* No. 58.
ROBERT BARLAS, Claimant.—*Pattison.*

Title—Confirmation.—Held (affirming judgment of Lord Neaves, *abs.* Lord Wood), that where one of two children was confirmed executor to her father, who on the predecease of his wife had retained in his own hands the entire goods in communion, which so got mixed up in his executry, and were given up in the inventory, she was not entitled, before paying to the other child her proportion of her mother's share of these goods in communion, to demand that a separate title should be made up to the mother's share.

Question—Whether such a title could have been demanded had the husband's executor been a stranger.

Interest—"Legal interest."—Such a claim to a proportion of a mother's share of the goods in communion, though not made till twenty years after her death, bears legal interest. The term "legal interest," where the contrary is not specified, still means five per cent.

No. 58.
Jan. 15, 1857.
Smith v.
Barlas.
1st Division.
Lord Neaves.
R

The late Henry Marder married Isabella Robertson, without at the time or afterwards executing any marriage-contract. His wife died in October 1832, leaving two children, Margaret and Helen, the claimants, Mrs Smith and Mrs Douglas. The husbands of both daughters were alive at the date of the raising of this action, though both died during its dependence. At Mrs Marder's death, the goods in communion amounted to about L 2000; but no payment was made in name of their mother's share to either of the daughters as representing her. Mr Marder himself died in December 1849, leaving upwards of L.3200 of moveable property. He left a trust-disposition and settlement, whereby his whole estate, heritable and moveable, was conveyed to his daughter, Mrs Smith, who was appointed sole executrix; and she accepted the office, and duly expede confirmation.

This deed bore to be granted under burden, *inter alia*, that Mrs Smith should invest L.600, the security to be taken in favour of her sister, Mrs Douglas, in liferent, for her liferent use allenarly, and exclusive always of the *jus mariti* of her husband, and to her children in fee, declaring the provision to be in full of claim of legitim, bairn's part, or otherwise, competent to her through his death. Disputes having arisen as to the amount of Mr Marder's estate, and as to the right of Mrs Douglas under the settlement of an uncle who died in 1831, to a share of the succession to his estate, which had come into her father's hands, a multiplepoinding was brought by Mr and Mrs Douglas, and Robert Barlas, as Douglas's assignee, in name of Mrs Smith. Mrs Douglas, in the course of the action, put in a minute, repudiating the settlement, and electing to betake herself to her legal claims; and the only points of interest arose upon the claim of Mr Barlas and Mrs Smith's pleas regarding it. Barlas, as in right of Douglas, claimed, as due to him by the deceased, one-half of the third of the goods in communion at the date of Mrs Marder's death, with interest thereon from said date, under deduction of all sums paid to account; and farther, one-half of the legitim due from the personal estate of the deceased, with interest from his death.

Mrs Smith pleaded, *inter alia*;—"Assuming that any sum is still due to Mrs Douglas, as one of the executrices of her mother, a title must be made up jointly with the claimant, Mrs Smith, to the late Mrs Marder's share of the goods in communion, before Mrs Douglas or those in her right can uplift and discharge the same."

The Lord Ordinary pronounced the following finding in regard to Barlas's claim:—"Finds that the claimant Robert Barlas, as assignee and in right of Alexander Douglas, the husband of the said Helen Robertson Marder or Douglas, is entitled to demand that there shall be paid or accounted for to him by the nominal raiser, out of the fund *in medio*, the one-half share of the free third of the goods in communion between Henry Marder and Isabella Robertson or Marder, the parents of the said Helen Robertson Marder or Douglas, at the death of Mrs Marder, her mother, on the 21st day of October 1832, with the legal interest thereon from that date: as also, the one-half of the *legitim* due from the moveable succession of the said Henry Marder at his death on the 7th day of December 1849, with the legal interest thereon from that date, as the same may be duly ascertained and fixed; but under deduction always of any sums of money paid to account of the said claims respectively, or which the nominal raiser, as in right of the said Henry Marder or otherwise, could set off against the same."

Mrs Smith reclaimed, praying the Court, *inter alia*, "to alter said interlocutor, in so far as it finds that the claimant Robert Barlas is entitled to demand that there should be paid or accounted for to him, by the reclaimer, out of the fund *in medio* (under the deductions therein mentioned), any portion of the goods in communion between the late Henry Marder and his

late spouse, the said Isabella Robertson or Marder, at the death of the latter in 1832, without finding that a legal title must first be made up to said portion of the goods in communion, and to find that prior to any such payment or accounting, a legal title must be made up thereto; to recall and alter said interlocutor, in so far as it finds the claimant Robert Barlas entitled to 'legal interest' on said portion of said goods in communion and on the share of the *legitim* from the death of the said Isabella Robertson or Marder and the death of the said Henry Marder respectively."

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It was pleaded in support of the reclaiming note;—1. Where a claim was made by the next of kin of a deceased wife, confirmation was always required. It was a mother's estate—a moveable right on which she could test—that was in question here, and it could only be taken up by an executor, or some one representing her by some title. Barlas had no title whatever; no doubt he was Douglas's assignee, but neither Douglas nor his wife had made up any title to Mrs Marder's succession, so that Barlas was not in position to grant an effectual discharge; and, till he put himself in a position to do this, the reclaimer could not be obliged to pay.[1] 2. The term "legal interest" was obscure since the abolition of the usury laws, and, at any rate, five per cent was, in the circumstances, too high a rate. No claim had ever been made by Mrs Douglas for her proportion of her mother's share of the goods in communion. The father was not bound, without such a claim, to realise his estate at his wife's death, and could not be considered a wrong-doer; and down to 1855, when the minute by Mrs Douglas repudiating the settlement was lodged, the reclaimer did not know that legitim was to be claimed, so that she could not be considered wrong, or in *mora* in not paying it. Thus on neither branch of the claim should penal interest, or interest beyond the date of raising the action, be allowed.

Mr Barlas replied;—1. The claim here was a proper claim of debt against the husband's estate, which only arose after the wife's death, and in which the wife had no vested right, and stood in an entirely different position from a claim through a mother to *jus relictæ*, which claim could only exist through the wife's having survived her husband, and the right having thus become vested in her. Here the goods in communion had remained in the husband's hands, and had been given up by Mrs Smith in her confirmation, and thus this claim became a proper debt against the estate. 2. Although it was now lawful to stipulate for a higher rate of interest than five per cent, that rate still answered the technical description of "legal interest." In the claim lodged in the multiplepoinding, interest was stated as part of the demand made, and this being a claim of debt, if well founded, it bore interest by force of law, independently of *mora* or taciturnity, or of the knowledge of the debtor that it was due—consignation alone could have stopped it.[2]

Lord Justice-Clerk.—On the question of interest, I think the previous decisions give us the rule, unless something can be stated in limitation of that rule. In the case of Cooper, quoted to us, where the claim was of the same nature as this, and made twenty-nine years after the mother's death, it seems to have been held, that while the father alimented the children there was no liability for interest, but that there was when he did not do so. I had thought more effect was allowed to lapse of time, but it seems that is not taken into account as a bar. Now, what we find here is, that the entire goods in communion were dealt with by the deceased as his own, and so dealt with profitably, for it appears from the

[1] Ersk. Inst., I, vi, 28; III, ix. 21 and 30; Bell's Law Dict. *voce* Confirmation; Smith v. Thomas, 9th Feb. 1830, Sh. vol. viii, p. 468; Leighton v. Russel, 1st December 1852, ante, vol. xv, p. 126; Hardy v. Kay's Trustees, 12th Feb. 1823, F.C. Sh., vol. ii. p. 107.

[2] Fraser, Dom. Rel. vol i, p. 597; Hardy v. Kay's trustees, 3d Feb. 1823, F.C. Sh. vol. ii, p. 187; Steele's Trustees v. Cooper, 16th June 1830, Sh. vol. viii, p. 926; Menzies v. Livingstone, 5th July 1838, Sh. vol. xvi, p. 1268; 27th Feb. 1839.

No. 58. — Jan. 15, 1857. Smith v. Barlas.

accounts in process that the principal part was invested, and that the stock was sold at a higher rate than it would have fetched at the wife's death; so that the question might arise, as in Cochrane v. Black, whether the profits should not be communicated. But, at all events, having so dealt with the funds as his own, and changed the securities, his estate must be held liable in interest.

As to the necessity for making up a title, we cannot listen to that demand from one who has confirmed to her father, and acknowledges the funds to have come into her hands, and acknowledges, too, the relationship of the claimant, her own sister. The claim is made by an acknowledged creditor of the succession which she holds, and to which she has confirmed.

Lord Murray.—If we were now laying down a rule of law for the first time, I would have it, that, if the party were in any degree blameworthy, he should be mulcted in the highest rate of interest; but that, otherwise, he should pay whatever he drew, whether it were four per cent. or ten per cent. But I do not think the deceased can be said to have been in the position of a trustee who failed in his duty, and I see no evidence of his having drawn more than four per cent., and I would not make him liable in more. Then, as to the title, I think it unnecessary to disturb the practice which would hold this to be sufficient, for the sum in question is included in the confirmation of Mrs Smith. It does not help her case at all to say that a title has to be made up to *jus relictæ* through the widow, because here we have a case where there is no widow, for the wife predeceased her husband.

Lord Wood was absent.

Lord Cowan.—As regards the question of interest, I am of opinion, with the Lord Ordinary, that legal interest is due. A claim of this kind is one of debt, and ought to bear interest, unless there are grounds for excluding the demand, in respect of maintenance, or some such ground. And, where interest is due, it ought to be at the rate of five per cent. when the funds have been used and appropriated for his own purposes by the debtor. It is quite a different case when the fund can be traced as remaining all along in a certain stock, or invested in a certain bank or security, yielding a lower rate of interest. The debtor could not, in such a case, be called on to pay a higher rate than what had been received. To that view effect was given in the ultimate decision of Russell v. Leighton. But I agree that here no specialty of that kind has been made out.

On the second point, I think there are specialties which may enable us to adhere. I apprehend that, in practice, where the wife predeceases with the absolute right of property either to the half or third of the goods in communion, her next of kin must confirm to their author before enforcing their right against the husband. It may be a brother, as in the case of Coldstream, 30th June 1843, or a distant relative, as in the case of Russell v. Leighton, 1st December 1852, or children, as here. In every case, when demanded, confirmation is the only legal evidence of the right; and, accordingly, in the report of the last of the cases mentioned, it is expressly said that, on Fleming's death, A. Leighton and others exped a confirmation to the wife as next of kin. As regards the question of title, therefore, in the general case the next of kin—be they children or cousins, or more distant relatives—must confirm and expede a title in their persons to the wife's portion of the goods in communion. Nor is it material that there has been confirmation to the husband's estate. That does not interfere with this principle, that, to take up the succession of the mother, there must be confirmation to her by the next of kin to give them a complete title to pursue, at least to obtain decree against the husband's representatives. But, if your Lordships think, in the special circumstances, confirmation to be unnecessary, I do not dissent, for this is a very extraordinary case. These parties are two sisters, and the defender, Mrs Smith, one of them, is the general disponee of the father. As such, she has taken up the whole of his moveable succession,—she does not require to expede a title in her person to get her share of the goods of her mother,—but yet she insists on her sister making up a title. This technical plea—which is not necessary for the defender's safety in paying—I am not sorry that your Lordships see ground for repelling, and concur in that course.

The Court adhered to the Lord Ordinary's interlocutor, and remitted the case to him to be disposed of as regards other points.

William Alexander, W.S.—Paterson & Romanes, W.S.—Agents.

MRS JANE BOWMAN OR M'NAUGHTON AND OTHERS, Pursuers.—*Penney*—*J. Lorimer*. No. 59.

CALEDONIAN RAILWAY COMPANY, Defenders.—*Patton*. Jan. 15, 1857. M'Naughton v. Caledonian Railway Co.

Master and Servant.—*Held* (*aff.* judgment of Lord Ardmillan, *abs.* Lord Wood), that a master is liable in damages to the representatives of a servant who died of injuries received in his service through the carelessness of a fellow-servant.

THE pursuers of this action of damages against the Caledonian Railway Company were the widow and children of a workman said to have met with his death while in the defenders' employment, in circumstances thus stated by the Lord Ordinary:—"The facts alleged by the pursuers, and to be assumed at present, are briefly these:—M'Naughton, while employed as a joiner or carpenter in repairing a railway carriage on a siding, was killed by a collision caused by an engine driving violently into the siding. No warning was given, and no precautions were taken, to secure the safety of those who might be engaged on the siding. The collision, and consequent injury and death of M'Naughton, are alleged to have been caused by the fault of the defenders' servants, viz. the persons in charge of the engine and the person who arranged the switches." 2D DIVISION. Ld. Ardmillan. R.

The defenders pleaded;—1. The death was purely accidental. 2. The accident would not have happened, but for the deceased's own neglect of proper precautions. 3. The allegation that injury was occasioned through the culpability of fellow-servants in the defenders' employment is irrelevant, the defenders not being legally responsible in a question with the deceased, or his representatives, for such culpability.

The Lord Ordinary pronounced the following interlocutor:—"Having heard counsel for the parties on the third plea in law stated for the defenders, and made avizandum, and considered the closed record and debate—Repels the said plea in law, and appoints the cause to be enrolled with a view to further procedure, and reserves the question of expenses." *

* "NOTE.—The defenders' objection to the relevancy of this action raises a question of great general importance, entering deeply into the constitution of one of our most common and familiar contracts.—(Here followed the statement quoted above.)

"The defenders plead that these averments are not relevant to infer their liability, in respect that M'Naughton was in their employment at the time of the collision, and that for injury by one servant to another the common master is not responsible.

"The primary principle of responsibility is, *culpa tenet suos auctores*. But actual personal fault is not necessary to the responsibility as *auctor*. A man may be *auctor* without being personally actor of the wrong. *Qui facit per alium facit per se*. Another may so represent me that for what he does as actor I may be responsible as *auctor*. His act in the matter in which he represents me may be by imputation mine, and for his fault in the doing of that I may be responsible. This liability rests on the principle of mandate, and on the representation constituted by the mandate in regard to and within the limits of the matter committed. When the mandate is express, and relates to the doing of the wrong, there can be no doubt of the liability. The mandant is in that case the direct author of the wrong. But the law does not limit the responsibility to the case of express mandate. Where the wrong is done by the mandatory, while acting within the scope of the mandate, he is held as in that matter representing the mandant, and the responsibility of the mandant follows. There is an implied mandate by a master to a servant for doing all acts within his proper service. The servant is doing what, but for the delegation, the master must have done,—the servant is actor, the master is *auctor* of what is done. Thus it is settled by a great many decisions, and recognised as undoubted law by our institutional writers, that a master is responsible to a stranger for the fault of his servant committed within the scope of the

No. 59.

Jan. 15, 1857.

M'Naughton v. Caledonian Railway Co.

The Railway Company reclaimed, and pleaded:—It would not do to found their liability, as the Lord Ordinary did, upon the servants being here

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employment. This has been so long and so firmly fixed in our law, that it is unnecessary to quote authorities. There can be no doubt of the relevancy of the averments in this case, if the person injured had been a stranger. On this point it is understood that the master's responsibility is also recognised by the law of England.

"But it is said that here the person injured was himself in the employment of the defenders, and that a master is not liable for injury done by one servant to another. The fact that the wrong-doer and the sufferer are fellow-servants is founded on as releasing the master from a responsibility which would attach to him if the sufferer were a stranger. In support of this plea, the defenders refer to the law of England, and several very important English authorities have been quoted, particularly the cases of Priestly v. Fowler, 1837, 3 Mees. and Welsb., p. 1; Hutchinson v. York, Newcastle, and Berwick Railway, 22d May 1850, 19 Law Journal, Exch. Rep., p. 296; and Wigmore v. Jay, 22d May 1850, 19 Law Journal, Exch. Rep., p. 300.

"The Lord Ordinary has given to these English authorities his anxious consideration, and compared them with the decisions in the Scottish Courts,—particularly with Linwood v. Hathorn, May 14, 1817; Sword v. Cameron, 13th February 1839; Sneddon v. Adie, 16th June 1849; Rankin v. Dixon, 31st January 1852; Gray v. Brassey, 1st December 1852; and the recent case of Reid v. The Bartonshill Coal Company, 3d July 1855, now under appeal. So far as he can venture to form any opinion on the English decisions, he is disposed to think that no rule quite so absolute and inflexible as that for which the defenders contend has been settled by express decision, though certainly the authority of the cases and the *dicta* of the learned Judges are favourable to the defenders' plea. In the law of Scotland, the decisions directly adverse to the absolute rule contended for by the defenders are express and numerous. Masters have been repeatedly found liable for injury done by one servant to another. There is no trace of such a rule in Scottish law as exempts the master from responsibility merely because the injured party as well as the doer is in his employment.

"It is true that the contract of service, and the responsibility of masters for the acts of servants, ought not to be governed by peculiarities of local law, and that the principles, when fully ascertained and judicially recognised, ought to be of general application. There may perhaps be found some standard of responsibility intermediate between an inflexible rule enforcing the master's liability in all cases where one servant is injured by the fault of another, and an inflexible rule exempting the master from liability in all such cases; and it were most expedient that if there be such a standard it should be authoritatively declared and enforced throughout the United Kingdom.

"The case, for instance, might occur of injury to one servant by the fault of another while both were employed in a common operation,—as two men sawing at one plank, or felling one tree, or working together as colliers at one place, and in one department,—when by the carelessness of one the other is injured. There is no warranty of absolute security implied in the contract of service, and if several men, in one employment, engaged together in one common operation, mutually relying on one another, there may be good grounds for adopting the rule of the English law, which exempts the master from responsibility to one of these servants for the fault or carelessness of another.

"On the other hand, cases may occur of a different character where other elements arise, which must enter into the question of liability. It may be that the persons, though servants of the same master, stand in regard to each other in the relation of superior and subordinate. Both are indeed servants, but they are not on the same level, for superintendence is entrusted to the one, and in superintending he is doing the duty, and acting as the representative of the master. In such a case, the Lord Ordinary is of opinion that, for the fault of the servant having such superintendence, the master is and ought to be responsible; and in the case of Patterson v. Wallace, in the House of Lords, the master's liability, where there

engaged in different departments of duty. The operations of the Company were complex, and all were necessary to carrying on the ordinary business

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is blame on the part of the servant charged with direction or superintendence, was recognised.—(Macqueen's Rep., 1, 748.)

Then, again, it may be that the two persons, viz., the wrong-doer and the injured, though both at the time servants of one master, are engaged in different operations, and in distinct departments of work. A dairy-maid is bringing home milk from the farm, and is carelessly driven over by the coachman. A painter or slater is engaged at his work on the top of a high ladder, placed against the side of a country house, and is injured by the carelessness of the gardener, who wheels his barrow against the ladder, and upsets it. A clerk in a shipping company's office is sent on board a ship belonging to the company with a message to the captain, and he meets with injury by falling through a hatchway, which the mate has carelessly left unfastened, though apparently closed. A ploughman is at work on a piece of ground held by a railway company, and adjacent to a railway, and is, while in the employment of the company, killed by an engine, which, through the rashness or carelessness of the engine-driver, leaps from the line of rails into the field. Many similar illustrations of injury to one servant by the fault of another in a separate and distinct department suggest themselves. If the absolute rule maintained by the defenders is well founded, the master would in all these cases be exempt from responsibility,—a very startling result to a Scotch lawyer, for whatever support to such a rule may be found in some of the decisions of the Courts, and more particularly in some of the *dicta* of the learned Judges in England, there is neither precedent nor authority in the law of Scotland in favour of it; and the Lord Ordinary is humbly of opinion that an absolute and inflexible rule releasing the master from responsibility in every case where one servant is injured by the fault of another, is utterly unknown to the law of Scotland.

"Nor has the principle or theory of the rule any more support than the rule itself. The doctrine of an implied undertaking in the contract of service to incur all risk from the fault of servants in all different departments, is not once recognised in Scottish law. A man who habitually works side by side with another in the same operation, may perhaps be viewed as consenting to incur the risk of the carelessness of that fellow-workman in that common operation. They may be viewed as in that matter mutually relying on each other, and not relying on the employer. Even in such a case the exemption of the employer from liability has never been recognised by Scottish law; but the great deference due to the English authorities, and the importance of uniformity of law on such a point, may perhaps recommend the adoption of the English rule to this limited extent. But it is impossible that every person entering the employment of a railway company can mean to rely on the skill, steadiness, and carefulness of all the servants of that company, wherever employed, and in whatever department. A universal undertaking of that kind, extending to hundreds of persons, in widely different places, cannot be lightly implied. It is not to be inferred in point of fact from practice or general understanding, for the practice and understanding in Scotland is the other way; and it is not in Scotland an inference in point of law, for the law has never drawn it, and the whole stream of authority, institutional and judicial, is against it.

"In the present case, which is a fair illustration, the carpenter having nothing to do with the locomotive department, was engaged in his own separate work, in a place where he was entitled to expect safety. It was the duty of the defenders to take all proper precaution for his safety. The locomotive business was in the hands of the defenders, or their servants in that department—not to any extent in the hands of the carpenter. It was surely the duty of the defenders so to work the locomotives as not to run them into what was for the time the carpenter's shop; and if it was their duty to secure his safety by their caution, then those who conducted the locomotives were doing their work in a department with which the carpenter had nothing to do, and for fault in the doing of that work, they, and not the carpenter, should be responsible.

"On the whole matter, the Lord Ordinary,—though disposed to qualify his [illegible]

No. 59. — Jan. 15, 1857. M'Naughton v. Caledonian Railway Co.

of the establishment, so that all must be looked upon as in one service; and the liability contended for did not arise out of and was not an ordinary incident of the contract of service. The maxim *qui facit per alium facit per se* did not apply to such a case as the present, but to the case of principal and agent. The whole servants of the Company must be looked upon as one family, and, *inter familiam*, servants took the risk of their fellow-servants, *culpa tenet suos auctores;* the coachman alone was liable if he drove over the footman. There was no warranty on the part of the master, or obligation on him, to protect one servant from injury from his fellow-servants. As regards the obligation of the master to grant reparation to one of the public, that rested on a different basis altogether; the maxim which applied was *respondeat superior*, and there were grave reasons of public policy for it. The law the Company contended for was the law of England and of America.[1]

Without calling on the pursuers to reply—

Lord Justice-Clerk.—I would rather guard myself against adopting all the Lord Ordinary's note. I go on this broad principle, that since the employer is liable to third parties for the injuries sustained by them, he is *a fortiori* liable for those sustained by his own servants. The defenders say the general policy of the law is otherwise. I do not agree with that. I consider the safety of that large class of men coming under the designation of fellow-workmen ought to be attended to. The notion that each workman undertakes all the risks of accidents caused by, say 1000 other fellow-workmen employed in a railway, and that the master is not to be liable, is to my mind quite opposite to reason and justice.

The question is—what is really in the contract of service? and I cannot help thinking that we cannot imply in it an exclusion of the right of protection to life and person. The duty of the employer is to take care not to allow his servants to injure any one. That is a general duty, and it is not limited merely to the public. If he is liable for injury done to the public, why should he not be also liable for injuries done to one of his own servants, even although such injury should arise by a fellow-servant's neglect or disobedience to orders? The first thing, I think, is to take care of all his own servants; they are brought into constant contact with each other, and the risk of injury is very great. The order and duty, therefore, of being careful and attentive to the life and person of others, applies first and primarily to fellow-servants. Well, if the instructions given clearly apply to the preservation of fellow-servants, then disobedience to them renders the party liable. As to the English cases on this point, if they had declared a master not liable wherever his instructions had been violated, I could have understood it; but that is not said, for he is liable in England in cases of injuries to the public, and why he should not be liable for the injuries done to fellow-servants I cannot imagine. It seems most extraordinary to say that he is free from all risk for accidents caused by fellow-workmen. We are told that workmen will be better cared for by giving them actions of damages against their fellow-workmen—persons from whom, in general, nothing can ever be recovered. I am sure if we introduce this principle into railways, there would be a most dangerous laxity and extreme want of care. If the highest Scotch Court, the House of Lords, shall declare that we have misunderstood the law, or rather declare that it should be altered, we must bow to its authority.

Lord Murray.—I go entirely upon the facts which are here alleged. The question is—whether, in these circumstances, the master is liable? and, according t[o]

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judgment by reserving for serious consideration the propriety of adopting th[e] English rule to a limited extent, and in a limited class of cases,—is of opinio[n] that in this case of injury by the fault of a servant in a separate and distinc[t] department, the plea of the defenders against the relevancy ought not to b[e] sustained."

[1] Sword v. Cameron, 13th February 1839, ante, vol. i. 493; Ranken v. Dixo[n] 31st January 1852, ante, vol. xiv. p. 420; Gray v. Brassey, 1st December 185[2] ante, vol. xv. p. 135; Reid v. Bartonshill Coal Company, 3d July 1855, ante, xvi p. 1017.

all our principles, I have no doubt he is, and therefore this action is relevant, and the pursuers are entitled to maintain it on the allegations they have made. I cannot see my way to any principle here which would free the master from his liability. I do not know the English law on this point, but we have a principle which appears to me very wise and just, by which, at any rate, I, as a Scotch Judge, am bound. No. 59. — Jan. 15, 1857. Dods v. Fortune.

Lord Wood was absent.

Lord Cowan.—The Lord Ordinary has repelled the third plea in law for the defender, and, in reference to Mr Patton's argument, it is material to keep in view the precise terms of that plea. The plea is not contended to be applicable to the special circumstances of this case, as distinguishing it from others of the same class. It is in terms the very plea urged in the case of Gray and Brassey, and is, in the words of Lord Fullerton in that case, "general, absolute, and unqualified." Had the question been an open one in principle, it would have required serious discussion and deliberate consideration, and I would not have been content with merely hearing the opening counsel for the reclaimer. But this is not the first time the point has occurred, or that the general question of a master's liability for injury done by one servant to another has been before us. It was before me as Lord Ordinary in Gray and Brassey, prior to the decision in Rankin v. Dixon, in this Division of the Court. It was dealt with in that case as the first attempt to introduce a principle from the law of England, not hitherto recognised in the decisions of the Scotch Courts as such. I reported it to the First Division, in order that an authoritative decision might be pronounced; but their Lordships sent it back to me for judgment. In the meantime the case of Rankin v. Dixon had been decided, in which this very defence was repelled, so that there remained with me no difficulty in repelling the plea for the defenders in Brassey's case; and their Lordships of the First Division, on the case going back to them, adhered to that judgment. Since then we have the decision in Reid v. Bartonshill Coal Company. Thus there are two, if not three, decisions standing in which this defence has been repelled by well-considered judgments of this Court. It would be wrong, in this state of matters, as it appears to me, to entertain serious argument on a principle so thoroughly recognised, until the House of Lords has instructed us to act differently. It may be very expedient that the same rule should prevail in both countries, but so long as the decisions in our own Courts stand unreversed, I do not see how we can do otherwise than affirm the interlocutor of Lord Ardmillan.

The Court adhered, and found additional expenses due.

William Mason, S.S.C.—Hope & Mackay, W.S.—Agents.

George Dods, Pursuer.—*Lord Adv. Moncreiff—Baillie.* No. 60.
George Fortune, Defender.—*Macfarlane—Millar.*

Repetition—Process—Conclusions.—A landlord, by written lease, became bound to pay the tenant L.65 on his producing vouchers to that extent of expenditure on the buildings of the farm. Before the buildings were executed, the landlord allowed the tenant to retain L.65 out of his rent, on condition that the buildings were proceeded with the next Spring. After the lapse of a year or two, the landlord brought an action concluding alternatively for production of the vouchers or repayment of the L.65. *Objection* to the competency of the action, that the only conclusions which the landlord was entitled to insist in were for damages, or to enforce implement, *repelled;* and inquiry, of consent, allowed to ascertain what sum had actually been spent by the tenant.

A previous case between the same parties is reported, ante, vol. xvi. p. 478. Jan. 15, 1857. — 2d Division. Sheriff of Berwickshire. L.

Fortune held a farm from Dods under a written lease dated 19th November 1846, but which declared the entry to have been in 1844. Dods had been bound to repair the onstead, and build a new dwelling-house. As to these an arbitration was entered into, and it was found that L.65 would suffice to complete what then (Nov. 1846) required to be done, and that this sum "must be paid by the said George Dods to the said George Fortune, on his

No. 60. — Jan. 15, 1857. Dods v. Fortune.

exhibiting vouchers that such sum has been truly expended, and that in respect of this allowance, whether expended by the said George Fortune or not, he is bound to leave the whole in good and sufficient and tenantable condition at the termination of the lease. And further, in respect the said arbiters and oversman have ordained the said George Dods to pay to the said George Fortune the sum of L.65 sterling, as a sufficient sum to enable the said George Fortune to complete the new dwelling-house which the said George Dods was bound to erect, and to put the whole onstead, &c., in good and sufficient and tenantable condition, the said George Fortune being bound at his own expense, to drive all carriages for said repairs and dwelling-house and the said George Fortune being also bound to exhibit vouchers or receipt that said sum has been so expended, before it shall be paid by the sai George Dods, the said George Fortune hereby binds and obliges himself an his foresaids to maintain, not only the whole onstead, &c., and to leave them at the expiry thereof, in good, sufficient, and tenantable condition."

Such being the state of written obligations between the parties, Do raised an action in the Sheriff-court of Berwickshire, concluding that Fortun "ought to be decerned, first, to exhibit vouchers or receipts, shewing th he has expended the sum of L.65 sterling in completing the new dwellin house at Barnside, and putting the whole onstead, &c., in sufficient cond tion, which sum the defender was not entitled to receive under the lea between the parties, until he had expended the same, and produced vouche or receipts shewing that he had so expended the same; or, second, he oug to be decerned to repay to the pursuer the said sum of L.65, he havi retained the same out of the rent payable by him at Candlemas 1847, a having failed or refused to exhibit vouchers or receipts that he has expend the said sum, or any part thereof, in terms of the obligation in his tack, wi the legal interest thereof, from the said term of Candlemas 1847, till pa ment, and with expenses."

Fortune's defence was, that it had been specially agreed between the subsequently to the date of the lease, that no vouchers were to be requir until the end of the lease, or until the money had been fully expended, a that the money having been paid by the pursuer of his own accord, near ten years ago, on this understanding, he was not now entitled to ask repa ment of it.

A proof having been allowed of this allegation, the whole evidence each side consisted of that of the parties.

"Dods, the pursuer, deponed—When the defender came to Harehead pay his rent at Candlemas 1847, he asked me to allow him the L.65. said the work was not done. He said no; but that if I would allow h the money, he would begin and do it as soon as the Spring set in. On t promise, I allowed him to retain L.65 of his rent. The defender never spo about being allowed till the end of his tack to produce his vouchers. I we with Swan to Barnside in 1849, and saw that the work was not done, exc to the extent of perhaps L.5; and I told the defender that I would ins on his going on with it."

The substance of the defender's evidence was,—"The pursuer said t I was perfectly entitled to have the L.65; and he either gave me the mon or desired me to retain it out of my rent; I cannot tell which. I think one else was present. Pursuer gave me the money to put the houses repair, keep them in repair, and leave them in repair. I said, that if required vouchers at the end of my tack or sooner, if I had laid out money, I would produce them. This conversation took place, I think, w I paid my Candlemas rent in 1847. I do not remember telling the purs that I would lay out all the money in the course of that Spring. In 18 the pursuer and Mr Swan, the joiner, came to Barnside. I do not reme

ber Swan asking me whether I had executed the repair for which I had been allowed the L.65. I paid no attention to Swan. He had no business with me. I have no vouchers to produce; and I have produced none to my landlord. The houses shew that I am keeping them in repair. I give the houses as vouchers for what I have done." No. 60. — Jan. 15, 1857. Dods v. Fortune.

The Sheriff-substitute (Wood) pronounced the following interlocutor:—"Finds that the pursuer allowed the defender, when he paid his Candlemas rent, in 1847, to retain L.65, to enable him to execute certain repairs, though the pursuer was not bound to allow this sum before the production of vouchers for its expenditure; that the defender has failed to prove that this was done under any arrangement by which vouchers were not to be demanded before the end of the tack, or before the work was completed; that the defender has produced no vouchers, and is not even now prepared to produce any, which affords a very fair presumption that the money has not been properly expended; that the defender has no right to retain the pursuer's money, without shewing that he has applied it to the purpose for which alone he was allowed to retain it: Therefore, Repels the defences, and decerns against the defender for the sum of L.65, with interest from the date of citation; reserving to him his right of requiring from the pursuer repayment of the said sum, or of any part thereof, when he can produce proper vouchers therefor: Finds the pursuer entitled to expenses," &c.

To this interlocutor the Sheriff-depute (Bell) adhered, except that he found "the defender liable in payment of interest at the rate of 5 per cent per annum, from the term of Candlemas, till paid."

A note of advocation, presented by Fortune, was brought directly under the statute to the Inner-House, and supported on the ground that the interlocutor proceeded on the basis that the obligation in the lease as to the vouchers still subsisted, but that had been got rid of when the L.65 was paid. Therefore, the first conclusion failed, and the other conclusion amounted to *condictio indibiti*. Farther, the pursuer nowhere alleged that the money had not been expended, and if he did, the action should have concluded that the money should now be expended, or for damages.

For the landlord it was replied;—The substance of the obligation truly was that if the tenant saw it for his interest to spend a certain sum on the buildings, he should have a claim for repayment; and the fact that the landlord had out of kindness advanced the money, could not alter its nature. He was entitled to see that it was expended. He asked for vouchers as the ordinary mode of proof, but any other evidence would satisfy him; and if the defender had averred that the money had been expended, the litigation would have resolved into an enquiry as to the truth of that fact.

Lord Justice-Clerk.—This appears to me a very clear case. A lease was entered into—new buildings were to be erected and repairs to be executed, and what sum the tenant was to be allowed for the fulfilment of this obligation was fixed by a decree-arbitral, but afterwards, as it might be difficult for the tenant to advance the money, the landlord allows him to retain it out of his rent. But for what purpose did he do this?—to lie in his pocket to the end of his lease? No; but, as the tenant himself has deponed, to put, and keep, and leave the house in repair. But this the tenant did not do, he did not repair the premises; and sometime afterwards the landlord goes with a tradesman to see whether the new buildings were completed and the others repaired—(the new house seems to have been mainly built, in the first instance, before the lease), but the tenant refused to have [illegible] to do with this inspection. The landlord found some L.5 only had been expended, and still it was only after some years that he brought this action (the tenant having at this time had in his pocket the money he was allowed as a [illegible] to put him in funds to make the repairs), and I think he has brought it in [illegible]. The lease having fixed the character of the obligation, he concludes first for [illegible] then stipulated for. Now, the defence is not—"I have no

No. 60. — Jan. 15, 1857. Dods v. Fortune.

vouchers, but I have spent the whole sum or more, and am prepared to prove it." Had that been the defence, the action would not have gone on as it has done. Then the summons goes on to the other conclusion for repayment of the L.65, and what is the defence?—that it had been agreed that no vouchers were to be required till the end of the lease or until the money had been fully expended; and parties are allowed a proof, which amounts at the utmost to this, that expenditure was to be taken in lieu of vouchers, but the tenant does not say that the expenditure has taken place, except perhaps to a limited extent. The pursuer's statement on his oath is quite distinct that he allowed this sum on the express promise that he should go on in Spring, and the defender does not truly deny that. I concur with the Sheriff, but we cannot adopt all his findings, and I am not indisposed now, at the tenant's expense, to allow an investigation as to how far expenditure had been made—a course to which we are told the landlord does not object.

Lord Murray.—I entirely concur. The conduct of the landlord has been perfectly fair throughout. That of the tenant leaves a different impression.

Lord Cowan.—I think it material to observe how the parties stood under their original obligation. It was the landlord who was to complete the dwelling-house and repair the other buildings—the tenant being bound to perform certain cartages. But what the parties did was to enter into a submission on the subject, and the arbiters find L.65 to be a sufficient sum to execute all the landlord was bound to do—that he was to pay that sum to the tenant on his producing vouchers for its expenditure, and that the tenant was to leave the whole in good order. All this is embodied in the lease which was granted. The money was thus to be paid for expenditure that had been actually made. Then at Candlemas 1847 or 1848—it is not quite clear which—the tenant asks for the money, and the landlord has to consider whether it was to be paid or not, and objects, because the work had not been actually executed. We must assume that such was the fact, but on the tenant promising to begin in Spring, the landlord, when examined under the interlocutor allowing proof, says he allowed him to retain the L.65, and substantially the defender says the same thing. We must hold that the condition upon which this money was allowed was that it should be immediately expended. Yet the defender does not allege that this has ever been done. Hence, under the second conclusion of the libel, repayment of the L.65 is asked by the pursuer. The foundation of the claim is *causa data causa non sequita*; and it is entitled to regard, except to the extent of the sum of L.5, which the pursuer admitted had been expended in 1849. In these circumstances, although the original condition was to a certain extent departed from, I hold the pursuer to be right, and entitled to a judgment; but your Lordship has proposed an investigation, as to which, as the parties do not object, I shall say nothing, though I generally prefer disposing of cases as they come before us.

The Court pronounced the following interlocutor:—"Advocate the cause: Recall the interlocutors complained of,—But, of new, find that the respondent allowed the tenant to retain the sum of L.65 shortly after the commencement of the lease, in order to complete a dwelling-house, and to execute other repairs, which, by the condition of the lease, the landlord was bound to repay, when executed by the tenant to the extent of the said sum: Find that the said sum was so given to the tenant for the express purpose of executing repairs in the ensuing Spring, or within reasonable time: Find, that after the lapse of several years, the landlord, who averred that the sum had not been expended, was well entitled to call for vouchers as the mode of establishing the fact of expenditure provided for in the lease: Find that the advocator did not in the process either produce vouchers of any kind, or aver the expenditure of any part of the said sum for the purposes for which it was given: Find that the landlord had admitted that to the extent of L.5 money had been expended some years ago,—But, find that to the extent of L.60 the landlord is entitled to have decree for repayment of the money advanced by him, with interest at the rate of 5 per cent from

No. 60. — Jan. 16, 1857. Aikman v. Cockburn.

Candlemas 1847, and Find the respondent entitled to expenses hitherto incurred in this and the inferior court, and remit to the Auditor to tax and report, and decern: But, in respect that the advocator has averred at the bar for the first time that a considerable part of the said sum has been actually expended in the way and for the purposes required by the lease,—Allow him, of consent of the respondent, and at his own expense entirely, to prove to the satisfaction of the Court, by inspectors or otherwise, such outlay, before decree is pronounced for the same," &c.

MORTON, WHITEHEAD, & GREIG, W.S.—J. F. WILKIE, S.S.C.—Agents.

No. 61.

ELEANORA DAWSON OR AIKMAN AND SPOUSE, Pursuers.—*Cook.*
JAMES COCKBURN, Defender.—*Logan.*

Process—Proof.—The prorogation of a commission for conjunct proof expired on a box-day in vacation. The pursuers' evidence alone had been then led, and appeals had been taken, and were undisposed of. At the meeting of the Court, the defender moved for a prorogation, which he obtained; and this having been renewed, without his having commenced his proof, circumduction was then granted. *Held* that, the commission having expired, the subsequent prorogation was incompetent; therefore interlocutor of circumduction recalled.

Jan. 16, 1857. — 1st Division. Ld. Benholme. L.

THIS was a declarator of right to a gable of a tenement; the pursuers alleging that the defender had made certain offensive erections on the gable, which were injurious to and encroachments upon the pursuers' property.

On 6th June 1856 the Lord Ordinary pronounced the following interlocutor:—"Before farther answer, and of consent, allows the pursuers a proof of the alleged encroachments upon their property, referred to in the 11th article of the pursuers' revised condescendence, and of the time when the same appear first to have been made; allows the defender a conjunct proof; grants diligence at both parties' instance against witnesses, and of consent, grants commission to the Judge Ordinary of the bounds at Cupar to take the said proof, to be reported within three weeks from this date; and farther, and of consent, authorises the commissioner to take down the proof according to the mode enjoined in the 10th section of the 16th & 17th Vict., cap. 80."

On 27th June his Lordship granted a prorogation for fourteen days; and again, on 11th July 1856, of consent, to the first box-day in the ensuing vacation, 16th October. By this time the pursuers' proof was closed, but the defender had not led his. On 6th November 1856 his Lordship, of consent, "prorogates the time for the defender reporting his proof for fourteen days." On 21st November, "of consent, farther prorogates the time for reporting his proof for fourteen days;" and, on 10th December, on the pursuers' motion (the defender not having even yet commenced his proof), "Circumduces the term for proving under the diligence granted on 6th June last, and appoints parties to be heard of new in the debate roll on the proof led, and remaining conclusions of the libel undisposed of."

The defender reclaimed, and prayed for a further prorogation, on the ground that the proof led by the pursuers in the Sheriff-court had occupied till the box-day, and was of a kind for which the defender was not prepared from any statements on record. Besides, there were appeals which were not yet disposed of, and, therefore, this interlocutor of circumduction was premature and incompetent.[1]

The respondents pleaded;—That a party, to be reponed, must shew cause. The defender had got three prorogations from the box-day, being the 16th

[1] [illegible] v. Hook, 15th November 1851, ante, vol. xiv. p. 39.

No. 61.
Jan. 16, 1856.
Livingstone.

October, till 10th December, and had done nothing. There was no technical reason to compel the Court to recall this interlocutor.

The reclaiming note merely contained the summons, the 11th article of the pursuers' condescendence, with the defender's answer, and the objections to the evidence under appeal.

The respondents waived all objections to it in point of form.

LORD CURRIEHILL. — There has been a miscarriage here. The commission expired on the box-day in October. It was limited to that date. Again, part of this proof is under appeal, and, until disposed of, it is impossible to know what the proof in chief is to be; and, therefore, whether the commission had expired or not, the defender was not bound to go on with his proof until he knew what the proof in chief was to be. His mistake was in asking the Court on its meeting for a prorogation; and the question is, whether that was a departure from the appeal? But, if not, then the time for the defender leading his proof had not commenced; so that there has been a miscarriage in more respects than one on both sides.

LORD PRESIDENT.—I do not see how the defender could have done anything between the 16th October and the meeting of the Court, for the commission was reported on the 16th October. That was its extreme limit. The next interlocutor should have been to renew the commission. I think we must recall this interlocutor.

LORD IVORY concurred.

LORD DEAS.—I wish it to be understood that in dealing with this reclaiming note I go entirely, as regards its competency, on the consent of the respondents to waive any objection to it. The record is not printed, nor even the interlocutor closing the record; and I am not prepared to say that this is an interlocutor by default for not implementing an order, in which view alone it could be said to be competent. Upon that question I give no opinion. Neither do I hold the recalling of this circumduction to be a decision upon any general question. No general question was decided in Hook's case, although the rubric erroneously bears so. In the present case I go entirely upon the irregularity of the previous interlocutors and procedure as not properly paving the way for an interlocutor of circumduction: and, but for such irregularity, I should have been disposed to adhere to the judgment of the Lord Ordinary.

LORD PRESIDENT.—Certainly there is no such general rule as that laid down in the case of Hook.

THE COURT pronounced the following interlocutor:—"In respect the respondent departs at the bar from any objection to the competency of the reclaiming note, and in respect of the irregularities in the proceedings, recall the interlocutor of the 10th December last: Repone the defender against the same, upon payment by the defender to the pursuer of the modified sum of L.6, 6s. sterling of expenses; and remit to the Lord Ordinary to renew the diligence and commission formerly granted to the defender for leading the proof allowed to him for such time as to his Lordship shall seem proper, and to proceed in the cause as shall be just."

JOHN ROSS, S.S.C.—MURRAY & REID, W.S.—Agents.

No. 62. SIR ALEXANDER LIVINGSTONE, Baronet, Petitioner.— *Watson.*

Judicial factor—Recall of appointment.—There is no absolute rule that a petition for recall of a factory must be in name of the factor himself.

Jan. 16, 1857.
1ST DIVISION.
Ld. Mackenzie
C.

SEE ante, vol. xviii., p. 865.

Mrs Ann Livingstone or Fenton, sister of the late Sir Thomas Livingstone and the petitioner, presented separate petitions to the Sheriff of Chancery, each claiming to be served nearest and lawful heir of Sir Thomas, in the lands of Bedlormie and others. In these circumstances, and in order that the rents of the estate might be uplifted for the benefit of the party who should be preferred to the succession, an application was made to the

Court for the appointment of a judicial factor; and, on 2d July 1853, Mr William Moncrieff, accountant, was appointed, with the usual powers.

No. 62.

Jan. 17, 1857.
Carron Co. v. Ritchie and Others.

The petitions for service having been conjoined, and a proof allowed by the Sheriff of Chancery, Mrs Fenton advocated the cause to the Court of Session; and, after various procedure, the Court found the petitioner entitled to be served nearest and lawful heir of tailzie and provision in special to Sir Thomas Livingstone, his uncle. The petitioner was accordingly duly infeft and seised in the lands of Bedlormie and others. Mrs Fenton presented two appeals to the House of Lords, but having failed to enter into recognizances in the appeals within fourteen days, pursuant to the standing order of the House of Lords, the appeals were dismissed.

In these circumstances, the present application was made by the petitioner for recall of the judicial factor's appointment, and for warrant for an interim payment of the balances consigned by the factor in bank. The petitioner also prayed, that the factor should be appointed to lodge a continuation of his accounts in process; and after an examination of the same, that warrant should be granted for payment of the balance arising thereon; and thereafter, that the factor should be discharged and exonered of his intromissions and management.

After a remit, the accountant reported favourably for the petitioner, but called the attention of the Lord Ordinary to the circumstance, that the petition for recall was not in name of the judicial factor, but of the successful claimant to the estate.[1]

The Lord Ordinary reported the case.

Lord President.—The Court do not mean to lay down an absolute rule, that petitions for recall of the appointment of a judicial factor must be in name of the factor himself. The case of Williamson was a special one.

Petition granted.

James Somerville, S.S.C.—Agent.

The Carron Company, Pursuers.—*Lord Adv. Moncreiff—Mackenzie.* No. 63.
Ritchie, Watson, and Company, Defenders.—*Penney—Millar.*

Exclusive privilege—Issues—Fraud—Statute 5 & 6 *Vict. cap.* 100.—Form of issues to try a question of fraudulent invasion of the copyright of a design registered in terms of the 5 & 6 Vict. cap. 100.

Jan. 17, 1857.
1st Division.
Ld. Benholme.
C.

The Carron Company brought this action against Ritchie, Watson, and Company, for L.500 of damages, for violation of their right as proprietors of a new and original design of a fire-grate, registered under the 5 & 6 Vict. cap. 100. Their allegation was,—"The defenders have, during the existence of this right, and at various times between the 1st day of March 1855, and the date of service of this summons, and at or near their Etna Foundry, in or near Glasgow, or at some other foundry or place in the United Kingdom to the pursuers unknown, pirated said design, or part of said design, and have applied said design, or part thereof, viz., the back of the said grate contained in said registered design, or part of said grate-back, or at least a fraudulent imitation of said design, or of said part thereof, for the purpose of sale, to the ornamenting of the backs of grates cast or manufactured by the defenders."

They proposed the following issues:—

"1. Whether the pursuers are the proprietors of the copyright of the design of a fire-grate, attached to the certificate of registration, dated 28th June 1854, and being No. 5 of process, and whether the defenders, in violation of the said copyright, at various times, between the 1st day of March 1855, and the 31st day of January 1856, did apply, or use, or cause or pro-

[1] Williamson or Hare, *supra*, p. 99.

No. 63. cure to be applied or used, the said design, or some part thereof, for the purpose of sale in the manufacture of the backs of fire-grates, to the loss, injury, and damage of the pursuers?

Jan. 17, 1857. Riddell and his Trustee.

"2. Whether the defenders, in violation of the said copyright, at various times, between the 1st of March 1855, and the 31st of January 1856, did publish, expose for sale, and sell, or did cause, or procure to be published, exposed for sale, and sold, certain fire-grates to which said registered design, or part thereof, had been applied, in the knowledge that the pursuers' consent had not been given to such application?"

The defenders denied any piracy of design, and pleaded;—That the pursuers were bound to establish that the part of the design alleged to be copied was an essential part thereof, and the alleged copy thereby within the statutory category of a fraudulent imitation; and farther, that they were bound to establish the same to have been new and original. The mere imitation of a portion of the grate would not constitute a violation of the pursuers' right, everything else being different. There must be a particular specification of the breach complained of, for without it the defenders would be put to great disadvantage.[1]

It was replied;—The question is, between a casual similarity and a fraudulent imitation. The allegation on which the action is rested is that the design has been pirated in regard to the backs of grates, and therefore the issue can alone apply to that, and to nothing else.[2]

The following issues were approved of:—

"1. Whether the pursuers are, in terms of the Act 5 & 6 Vict. cap. 100, proprietors of the design, of which No. 5 of process is the certificate of registration?

"2. Whether, between the 1st day of March 1855, and the 31st day of January 1856, the defenders did, in violation of the pursuers' copyright in said design, apply the said design, or a fraudulent imitation thereof, for the purpose of sale, to the ornamenting of the backs of fire-grates, to the loss, injury, and damage of the pursuers?

"3. Whether, during the time aforesaid, the defenders did, in violation of the pursuers' copyright in said design, publish, sell, or expose for sale, backs of fire-grates, to the ornamenting of which the said design, or a fraudulent imitation thereof, was applied, in the knowledge that the pursuers' consent, as proprietors of said design, had not been given to such application, to the loss, injury, and damage of the pursuers?"

GIBSON-CRAIG, DALZIEL, & BRODIE, W.S.—J. & J. MACANDREW, S.S.C.—Agents.

No. 64. SIR JAMES MILES RIDDELL, Baronet, and C. M. BARSTOW, Esq., his Trustee, Petitioners.—*D. F. Inglis—Sandford—Lee.*

Entail Amendment Act—Application of price of lands sold for payment of debt.—Part of the price of lands sold under 11 and 12 Vict. c. 36, sect. 25, for payment of debt, applied in payment of arrears of interest arising subsequently to the interlocutor finding the estate validly charged with debt.

Jan. 17, 1857. 1st Division. Ld. Handyside L.

In a petition for authority to sell a portion of an entailed estate (under the 25th section of the Act, 11 and 12 Vict. c. 36,) for payment of debts with which the fee of the estate was validly burdened, a minute was lodged for the petitioners, craving application of the price of the lands sold in the following manner:—1st, In payment of certain of the principal sums found to be debts with which the estate was validly charged; 2d, In pay-

[1] Hindmarch on Patents, p. 261; Coryton on Patents, pp. 272-4.

[2] Stewart, 23d Dec. 1846, Macfarlane on Issues, 347; Sellers v. Dickinson, 4th May 1850, Welsby, Hurlstone, and Gordon's Exchequer Reports, vol. v. p. 312; Macfarlane on Issues, p. 338, *et seq.*

ment of certain arrears of interest upon these debts, which had arisen between the date of the interlocutor finding the estate validly charged with the debts, and the date of the lands being sold, and which the rents of the lands sold had been insufficient to pay; and, 3d, In retaining a sum, being the remainder of the price, and the interest accruing thereon after the date of consignation, to meet expenses incurred in the application for authority to sell. An interlocutor, finding the estate validly charged with debt, had been pronounced on 15th July 1853; and a portion of the lands had been set apart and sold under authority of the Court, and the price consigned, upon 15th May 1856. The price obtained was insufficient to pay the whole debts.

No. 64.

Jan. 17, 1857.
Moncrieff v. Edinburgh and Glasgow Railway Co.

The minute above mentioned was remitted in the usual course by the Lord Ordinary to Mr William Campbell, W.S., who presented a report in favour of the application of the price proposed by the petitioners, in so far as regarded the payment of principal sums, and the reservation of a portion of the price to meet expenses; but with regard to the payment of interests, he submitted the following queries:—"(1.) Whether it be competent for the Court to apply the prices of the lands sold in payment of arrears of interest of the debts? (2.) If this be competent, Whether the Court have a discretionary power to grant or withhold their sanction to such application? and (3.) If they have that power, Whether, in the present case, they ought to sanction the application of a part of the price in payment of the said interests?"

The Lord Ordinary reported the case, and the Court, on the 16th July 1856, approved of the application of the price as proposed in the minute, in so far as regards the principal sums and sum retained to meet expenses, "reserving for farther consideration the application of the remaining sum of L.1665, 5s. 10d., viz., the sum proposed to be applied in payment of arrears of interest."

Of this date, the Court, after ascertaining from states lodged by the trustee, that the rents of the lands sold during the period between the interlocutor of 15th July 1853, and the sale, had been inadequate to that extent to meet the interest of the debts charged upon the estate, pronounced the following interlocutor:—

"The Lords, with reference to the reservation contained in their interlocutor of 16th July 1856, and having resumed consideration of the minute No. 201 of process, and Mr Campbell's report, dated 19th June 1856, with reference to the application of the remaining sum of L.1665, 5s. 10d., Approve of the application of said remaining sum, as proposed in said minute, and remit to the Lord Ordinary to proceed in the cause."

Smith & Kinnear, W.S.—Agents.

No. 65.

William Moncrieff, Petitioner.—*Cook.*
The Edinburgh and Glasgow Railway Company, Respondents.—*Blackburn.*

Railway—Expenses of uplifting consigned money—Lands Clauses Consolidation (Scotland) Act, 1845, *sects.* 77–79.—An arbiter ordained a railway company to deposit in bank the sum he found due by them for certain portions of an estate acquired by them; and he also ordained the proprietor to grant a disposition of the land; which he failed to do. The railway company, having consigned the money, completed their title under section 76 of the Lands Clauses Act. *Held,* that the expense of an application for warrant to uplift the consigned money formed a valid charge against the railway company.

Jan. 17, 1857.

The petitioner was judicial factor on the estate of Springhill, which belonged to several co-proprietors. In 1846 part of the estate was required

1st Division.
L.

No. 65. for railway purposes, and a submission was entered into between the co-proprietors and the Railway Company (now represented by the respondents) to determine the price of the ground taken, and compensation for damages thereby occasioned. In his decree-arbitral, the arbiter ordained the Railway Company to deposit the sum found due by him, with interest, in one of the chartered banks; and, thereafter, that the proprietors should grant to the Railway Company a valid and ample disposition of those portions of the estate required by the Railway Company. The money was deposited, but the conveyance was not executed, and the Railway Company completed their title under section 76 of the Lands Clauses Consolidation (Scotland) Act, 1845, by notarial instrument, reciting the deed of agreement and submission, and decreet-arbitral or award; and reciting, also, the deposit, and the refusal or inability to convey the lands to the respondents,—which instrument was duly recorded in the General Register of Sasines at Edinburgh in 1851.

Jan. 17, 1857. Irvine v. Irvine.

In these circumstances, this petition was presented by the judicial factor for authority to uplift the consigned money, and, under section 76 of the Act, to find the Railway Company liable in payment of the expenses.

The Railway Company opposed this application, so far as regarded the matter of expenses, and pleaded:—That under section 79 of the Act, they were not bound to pay any incidental expenses caused by the consignation. The decree-arbitral not having been fulfilled by the proprietors of Springhill, the depositation could not be regarded as made under the decree. This expense was caused by their title not having been made up, and consequent inability to grant a conveyance.

Cook, for the petitioner;—The question is, whether the money was deposited in bank by reason of the failure on the part of the proprietors of Springhill to make up a title. But consignation must have been made, whether the title was made up or not.

LORD DEAS.—The arbiter orders consignation,—title or no title.

LORD CURRIEHILL.—The consignation was not made by reason of want of title. I have not the slightest doubt about granting the prayer of this petition.

The LORD PRESIDENT and LORD IVORY concurred.

THE COURT pronounced the following interlocutor:—"Grant the prayer of the petition, and grant warrant to the National Bank of Scotland to pay the said consigned sum of L.488, 10s. 8d., with the whole interest accruing thereon, to the petitioner, as judical factor foresaid, and decern: Find the said Railway Company liable in the expenses prayed for in terms of the statute, and in expenses of process arising from their opposition, and remit, &c.

HUNTER, BLAIR, & COWAN, W.S.—SMITH & KINNEAR, W.S.—Agents.

No. 66. JAMES IRVINE, Pursuer.—*D. F. Inglis*—*D. Mure*—*J. C. Graham.*
MRS FRANCES JANE DAVIDSON OR IRVINE, Defender.—*Macfarlane*—*F. W. Clark.*

Jan. 17, 1857. 2d DIVISION. Ld. Handyside I.

Process—Production after closing Record—6 Geo. IV. c. 120, sect. 3—A. of S. 11th July 1828, sect. 55.—Production of a letter addressed to the defender in an action, and admittedly all along in the defender's possession, allowed to be made in the course of the defender's proof,—it being alleged to be necessary in order to meet a point made for the first time in the course of the pursuer's proof.*

* NOTE.—(The part of the Lord Ordinary's note relative to this point was as follows):—

"The last objection requiring notice arose during the examination of the witness

Proof.—Interlocutor allowing a letter produced, and a deposition by a witness that it was in her handwriting, "to form part of the defender's proof," "altered to the effect of finding that the letter may be referred to, in the course of the discussion on the merits, so far as it is sufficiently proved, or is otherwise competent evidence." No. 66. — Jan. 17, 1857. Ricketts v. Ritchie.

HOPE & MACKAY, W.S.—JAMES BAYNE, S.S.C.—Agents.

MRS LOUISA GEORGIANA RICKETTS OR RITCHIE, Pursuer.—*Pattison.* No. 67.
JOHN RITCHIE, Defender.—*D. F. Inglis—Arthur.*

Process—Proof.—In an action of divorce, a conjunct probation was allowed, in the course of which the defender entered various appeals. The day after the proof was concluded the Lord Ordinary pronounced an interlocutor of circumduction, "in respect the counsel for the defender declines to be heard on his appeals." The effect was to exclude certain witnesses. Circumduction recalled on the ground that the appeals had not been disposed of.

IN the course of taking a conjunct proof in an action of divorce, the defender entered various appeals against decisions by the Sheriff-commissary. The proof was concluded late on the 19th December 1856, and on the 20th December, the Lord Ordinary pronounced the following interlocutor:—"In respect the counsel for the defender declines to be heard on his appeals, taken in the course of his proof, Circumduces the term for proving against the defender, without prejudice to the report being lodged on Tuesday next: And, on the pursuer's motion, Allows her a proof, in reference to the evidence of the witnesses John Bethune, Andrew Carrick, and Peter Brown, examined for the defender, and against whom the pursuer protested for reprobator: Renews the remit to the Sheriff Commissaries, to be reported by the box-day in the ensuing Christmas recess." Jan. 20, 1857. — 1ST DIVISION. Ld. Ardmillan C.

The defender reclaimed, and pleaded;—That the circumduction was premature, in respect his appeals were undisposed of. The effect would be to exclude the evidence of certain witnesses altogether.

LORD PRESIDENT.—It sometimes happens that where objections are taken to a witness or to a question, and a decision adverse to their admission is given, and an appeal follows, the evidence is taken pending such appeal. But here the witnesses are excluded altogether, and, the defender having appealed, I rather think that circumduction ought not to have been given till the appeals were disposed of.

Sarah Young, to the production and identification of a letter written and addressed by her to the defender, on the ground that the letter had been all along in the defender's possession, and could not at that late stage be competently made a production. The pursuer maintained that, as a writing within the power of the defender, it required to be produced before the record was closed; and the Judicature Act, 1825, and the relative Act of Sederunt, were founded on as being conclusive against the competency of its being received and proved by the witness. The Lord Ordinary cannot so read the Act of Sederunt. He apprehends it applies to writings and documents founded on by the parties in the record, or on which they mean to found and use in support of their respective averments on record. The letter in question could have neither value nor relevancy as affecting the statements on record on either side. Its use and application arose only in the course of the proof as a piece of evidence to clear up dates spoken to by witnesses. The discovery of its importance was wholly accidental. It could not be of any value except from the course the proof took. It may be important to confirm or discredit certain of the evidence previously led. The Lord Ordinary, in order to dispose of the objection more satisfactorily, opened the sealed packet and examined the letter."[1]

[1] *Pursuer's authorities.*—Ross v. M'Leay's Trustees, 1834, Sh. vol. xii. p. 631; Wright v. Bell, 10th December 1836, Sh. vol. xv. p. 242; Earl of Fife v. Pirrie, 16th January 1852, ante, vol. xiv. p. 135.

No. 67. — Jan. 20, 1857. Carter and Others. — Wilson.

LORDS IVORY and CURRIEHILL concurred.

LORD DEAS.—The interlocutor proceeds entirely on the footing that the counsel for the defender declined to be heard. But from the explanations now given as to the state of procedure, it does not appear that the counsel for the defender could be expected to have been ready to be heard. I therefore concur in thinking that the interlocutor should be recalled.

THE COURT pronounced the following interlocutor:—"Recall the circumduction pronounced in the interlocutor of 20th December last, and remit to the Lord Ordinary to hear parties on the appeals taken for the defender in the course of the proof, and to proceed in the cause as shall be just; *Quoad ultra* refuse the desire of the said reclaiming note."

MACQUEEN & BRIDGEFORD, S.S.C.—RICHARD ARTHUR, S.S.C.—Agents.

No. 68. MRS EMMA DAVIES OR CARTER AND OTHERS—Petitioners.—*Shirreff*.

Judicial factor.—In the Second Division, when the appointment of a *curator bonis* to minors, or a factor *loco tutoris* to pupils is craved, the Court appoint a curator *ad litem* to report as to the facts stated in the petition, and specially as to the amount of the estate, and fitness of the proposed curator or factor for the office.

Judicial factor.—A *curator bonis* appointed to minors *puberes*, and a factor *loco tutoris* to pupils.

Jan. 21, 1857. — 2D DIVISION. I.

THIS was a petition presented by Mrs Carter, residing in Montrose, widow of Thomas Carter, formerly merchant in London, with concurrence of her children, Mary and Anthony, who were above pupilarity, but under majority. Besides these two children, Mrs Carter had other two children who were in pupilarity. The petitioner stated that the children had become entitled to certain property, which it was necessary should be managed for their behoof. It was therefore prayed, that Mr Savage, writer in Montrose, should be appointed *curator bonis* to the two children who were beyond pupilarity, and factor *loco tutoris* to the two children who were within pupilarity.

At the moving of the petition, a curator *ad litem* was appointed to investigate the statements in the petition, and, in particular, as to the amount of the estate, and the propriety of appointing the gentleman suggested as factor. Having giving in his report to the effect that the statements as to the estate were correct, and that the proposed factor was a person of respecatbility and fitness for the office, the case was again moved yesterday.

LORD COWAN.—In this case we have now a report from the *curator ad litem*, who was appointed to report, according to the practice of this Division, when petitions of this kind are presented to us, and it is in every way satisfactory; but there is a peculiarity in this case which deserves notice. The petition prays for the appointment of a *curator bonis* to persons above pupilarity who can choose curators for themselves. I have observed that, in the other Division, they have refused to appoint a *curator bonis* to minors *puberes*; and it is a matter for consideration whether we should follow that course also.

LORD MURRAY.—As the Lord Justice-Clerk, who has paid great attention to this branch of the law, is absent to-day, I would suggest that the matter be delayed till to-morrow, when his Lordship is expected to be present.

The case was moved this day. The Lord-Justice-Clerk was present, when their Lordships unanimously granted the prayer of the petition, as craved.

JOLLIE, STRONG, & HENRY, W.S.—Agents.

No. 69. JANE M. JOHNSTONE WILSON, Petitioner.—*Fraser*.

Judicial factor—Minor—Tutor-dative.—Two clergymen appointed tutors-dative to a pupil heir-at-law, and another clergyman appointed tutor-dative to other pupils, being the younger children, under the Act 19 & 20 Vict. c. 96, sec. 19.

This was the first application to the Court under the Statute 19 & 20 Vict. c. 96, sec. 19, transferring to the Court of Session the duties incumbent on the Court of Exchequer, with regard to the appointment of tutors-dative. The petitioner—the widow of the late Mr Johnstone Wilson of Croglin and Stroquhan,—prayed for the appointment of tutors-dative to her five children (all in pupilarity). The petitioner stated :—" The two brothers of the petitioner's deceased husband are, the Rev. M. S. Johnstone, minister of Minigaff, and the Rev. T. Johnstone, minister of Anworth. The petitioner's own brother is the Rev. G. Colville, minister of Canonbie. These persons, who are all above 25 years of age, are the nearest relations of the pupils except the petitioner herself, and are willing to undertake the office of guardians to them. No one of them, however, is willing to undertake the office of factor *loco tutoris*, with all the responsibility and labour of management upon himself alone ; but they are willing, if joined together, to act as guardians for the petitioner's children. They are persons in whom the petitioner has every confidence, and whom it is very desirable to obtain as guardians for her children ; and she trusts that she may obtain the sanction of the Court to that to which alone they will consent—their joint appointment."

No. 69.

Jan. 22, 1857.
Pridie v. Dick.

2d Division.
I.

Lord Justice-Clerk.—We must follow here our usual course of appointing a curator *ad litem* to report upon this petition, and as to whether the proposed tutors are suitable for the office, and the amount and nature of the estate to be administered. The petition also suggests to my mind the propriety of intimating it to the law officers for the Crown, as it is part of the Crown's prerogative to nominate tutors-dative.

The petition was accordingly intimated to the Lord Advocate, and the Solicitor-General attended on his Lordship's behalf, and stated that he had no objection to the petition being granted.

A report was also given in by the curator *ad litem* who had been appointed, in which he stated that the gentlemen proposed were in every way fit for the office, but he recommended that they should not be appointed jointly to all the children. The estate consisted of heritage and moveables, the former of which the eldest son succeeded as heir-at-law, while the younger children succeeded to the personal estate. In these circumstances, the children might have conflicting interests, and the curator therefore suggested that they should have separate guardians.

To this proposal the petitioner acceded, and

The Court made the appointment in the following terms ;—" Nominate and appoint the Rev. Michael Stewart Johnstone and the Rev. George Colville, and the survivor of them, to be tutors and tutor-dative to Thomas Johnstone Wilson ; and nominate and appoint the Rev. Thomas Johnstone to be tutor-dative to the petitioner's other children, with the usual powers, they finding caution before extract."

Jardine, Stodart, & Fraser, W.S.—Agents.

Peter Hampden Pridie, Pursuer.—*Lord Adv. Moncreiff—Fraser.* No. 70.
Charles Dick & Alexander Thomson, Defenders.—*A. S. Cook—M'Ewan.*

Reparation—Relevancy.—A trustee alleging that he had been so irritated and annoyed by the improper conduct of co-trustees in the management of the trust that his health was injured and he was unable to attend to his business, which he lost in consequence, brought an action of damages against them, which was (*aff.* judgment of Lord Ardmillan, *abs.* Lord Wood) dismissed as irrelevant.

See previous action between the same parties, ante, vol. xvii. p. 835.

The pursuer, who was a solicitor at law, and defenders, were accepting trust-disponees under the settlement of the late Mrs Dick, who died in 1842, and all took a share in the management up to 1848, when disputes arose

Jan. 22, 1857.

2d Division.
Ld. Ardmillan.
R.

No. 70. relative to the conduct of the trust, of which the defender Thomson was factor. These disputes had led to the litigation reported ante, vol. xvii. p. 835, the proceedings in which were here narrated, and the medical certificate obtained in the course of it was quoted. It was dated in 1855, and was to the effect that it appeared to the medical men that Mr Pridie "has laboured for a considerable time under a nervous affection of the heart, and that this has been aggravated by the circumstances in which he has been placed by Dick's trust, of which he is a trustee."

Jan. 22, 1857. Pridie v. Dick.

The pursuer now alleged;—The circumstances referred to in said report as having aggravated, or rather caused the disease, was the conduct of the defenders, as trustees in said trust. In the year 1848 the pursuer was free from illness. In that year, however, the defenders began their improper proceedings in reference to the trust-management, by which the pursuer was entirely deprived of all control thereof, or any management whatever as trustee, while the defenders insisted that he should be held responsible *qua* trustee. These improper, irregular, and unwarrantable proceedings of the defenders produced in the pursuer such agitation and distress, as ultimately were productive of nervous affection of the heart, under which, since 1848, he has been and is still labouring.

Prior to 1848, the pursuer, from his business, averaged, during ten years, L.200 per annum. Owing, however, to the state of bodily health to which the pursuer was reduced by the unwarrantable conduct of the defenders, he became unable to attend to business. The result was that his practice altogether disappeared.

In these circumstances, he brought this action, concluding for damages for loss of business from the year 1848, and for prospective loss of business, and the expenses he had been put to.

The defenders pleaded;—1. That the grounds of action were irrelevant. 2. That they were unfounded in point of fact.

The Lord Ordinary pronounced the following interlocutor:—"Finds that the pursuer has not set forth relevant grounds to support the conclusions of this action of damages: Therefore sustains the first plea in law stated for the defenders: Dismisses the action, and decerns: Finds the pursuer liable in expenses." *

* "NOTE.—The injury to the pursuer's health, and the consequent loss of his business, in respect of which damages are sought, are not so directly connected with any wrongful act alleged against the defenders as to sustain this action.

"The pursuer's anxiety in regard to the affairs of the trust, and his desire to bear his part in the management of its business, appear to have sprung from the best motives; and it is much to be regretted that his health and professional interests have suffered. But an action of reparation for consequential damage, resting on such grounds as are here condescended on, is without precedent, and cannot be sustained.

"No question is here raised in regard to the interests of the trust, which are now committed to the charge of Mr Raleigh, the judicial factor. The pursuer has been relieved by the Court of the duties and office of trustee, and has been discharged from responsibility. No pecuniary loss or liability of any kind to the pursuer, directly flowing from the acts of the defenders, has been condescended on; and all risk on that head was removed by the interlocutor of Court. Apart from pecuniary loss, there is no averment of injury and damage directly caused by the acts of the defenders; and where the alleged injury is remote and consequential, there is no relevant ground for an action of damages.—(Starkie on Law of Evidence, vol. ii. p. 299; Powell v. Salisbury, 2 Y. & J. p. 390; Walton v. Fothergill, 7 C. & P. p. 392.) The rule recognised by these and many other authorities in the law of England, has been received and applied by this Court—(Ersk. B. 3, T. 3, sect. 84; Dunlop v. M'Kellar, 31st May 1815, F.C.; Scoular and Brownlee v. Robertson, 19th January 1829; Snare v. Lord Fife's Trustees, 17th January 1852;) and must be considered as settled."

No. 70.

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Pridie v. Dick.

The pursuer reclaimed. The question came to be, was this consequential damage? It was contended that Stair, 1, ix. 4, and Sedgwick, in his Law of Damages, p. 95, both stated the law in such a way as to cover the present case; and farther, that, in the case of Snare, it had been settled that he was entitled not only to claim as damages the loss of his profit by exhibiting his picture here, but also damages for injury to his character as a bookseller in Reading, arising from the charge of theft brought against him by the Fife Trustees. Here the first duty of the trustees was to consult all the members of the trust, and not to exclude one of them; to do which was just as illegal an act as to commit an assault. Suppose the consequence of the pursuer's extrusion had been loss of funds for which he had been made liable, surely an action would have lain at his instance against his co-trustees. Were the defenders to be relieved of the consequences of their clearly wrong acts because they led, instead of that result, to the injury of the pursuer's health, if the pursuer should be able, as at this stage it must be assumed he would be, to connect his loss of business with that fact?

The defenders' counsel were not called upon.

Lord Justice-Clerk.—I concur with the Lord Ordinary in thinking the pursuer has not set forth a relevant ground of damage. That he was excluded from the trust should rather have proved a relief, and given him more time for his other business, but his fear of loss, and his sensitiveness, produced irritability and aggravated heart complaint, so rendering him unfit for business. But it is not alleged that the trustees knew of his heart complaint and designedly irritated him; and was it ever known that a trustee who was opposed by his co-trustees, and, being irritable, was so worried that he could not attend to his business, was entitled to have a claim of damages sent to a jury? I dare say Mr Pridie had many unreasonable clients who made unfounded complaints against him which might irritate him in the same way. Is he to have an action of damages against each of them? It is a pity a man should be in a profession for which he has not nerves; but, were this action sustained, every person he did business with would be liable to an action of damages at his instance. I must say this is, as Lord Murray observed, a most fantastic and nonsensical action.

Lord Murray.—This is one of the most entertaining actions I have ever known come into Court, and I was most anxious to hear all that could be said in support of it. It is at the instance of "Our lovite" P. H. Pridie, who complains of being opposed at every turn by his co-trustees, and so, as he had heart complaint, being irritated and having his disease increased. Now it is too strong to suppose that he was always in the right, and his co-trustees always in the wrong. But, at this stage, we must assume it; and even then, surely, the entire conduct of parties is not to be regulated by the condition of health of a co-trustee, about which they may know nothing. Why, if this action be relevant, if a trustee had heart complaint and a co-trustee made a humorous remark, which so excited him that he died, his representatives would have an action of assythment. On such terms no business of any kind could be carried on. No trustee could do anything, being bound not to injure a co-trustee labouring under some unknown disease. He could not oppose his views in any way which could annoy or irritate him. It shews the pitch of refinement we have arrived at in our pleadings when such an action as this can be even thought of.

Lord Cowan.—I also am clear that, on the relevancy, the pursuer has no case. Had the only question been whether the damage was consequential, there would have been more room for discussion. Houldsworth v. British Linen Company (19th December 1850) was a case where that point was gone into.

But the question here is, is any legal ground of damages set forth? The pursuer does not say that the acts of the defenders led to damage to the trust-estate for which he has been made liable, but that the acts, it may be legal, were carried on with contumely to him, and thus irritated him and increased his heart complaint. I never heard of such an action.

The Court adhered, and found the pursuer liable in additional expenses.

Party Agent.—George Cotton, S.S.C., Defenders' Agent.

No. 71.

Jan. 23, 1857. Walker v. Walker.

WILLIAM WALKER AND MANDATORY, Pursuers and Advocators.—*D. F. Inglis—N. C. Campbell.*
DAVID WALKER, Defender and Respondent.—*Penney—Fraser.*

Proof—Succession—Legitimacy.—A person born before the marriage of his mother *held* proved to be the son of the man whom she married after the birth, although the mother, after her husband's death and at an advanced age, emitted a declaration of his illegitimacy.

Process—Service—Statute 10 & 11 *Vict. cap.* 47 (Service of Heirs Act)—*Judicature Act, sec.* 40.—When the Sheriff's judgment in competing claims for service is adhered to by the Court of Session, but not the grounds on which that judgment proceeds, the proper course is to advocate the cause, pronounce special findings, and remit to the Sheriff with instructions.

1ST DIVISION. Ld. Benholme. C. Sheriff-substitute of Renfrewshire.

IN a competition before the Sheriff of Renfrewshire for service to the deceased David Walker, the legitimacy of one of the claimants, David Walker, the reputed son of the deceased, was disputed, and after proof, the Sheriff-substitute pronounced an interlocutor, containing findings in point of fact, which he held established the legitimacy of David Walker, whose claim accordingly he preferred. The competing claimant William Walker advocated the cause. The proof was conflicting—many of the witnesses being old persons called to speak to things that happened in the beginning of this century. Admittedly, the claimant David Walker was born before his mother's marriage in 1803; but before his baptism, his mother married the deceased David Walker, who acknowledged the child to be his, and presented him to be baptised. Thereafter, the claimant David Walker lived in family with the deceased and his mother, and it was established that from his birth down till 1853, there had been acknowledgments of his status as legitimate by both his mother and reputed father, and that on his reputed father's death in 1831, he had succeeded to a lease of a farm, and thereafter executed a renunciation as eldest son. On the other hand, his mother at an advanced age emitted a declaration, in which she stated that he was illegitimate, and was the son, not of David Walker, but of a person of the name of David Gray. At that time, however, she was not only old, but feeble, and of deteriorated habits as respected her sobriety, and was living with and under the influence of her younger son, who—on David Walker's refusal to agree to a proposal to collate the whole of his father's heritable estate with the other members of the family—sided against David Walker, and challenged his paternity. A medical man, clergyman, and law-agent, all of them in her confidence, stated that they then heard her statements of her son's illegitimacy for the first time. It was not proved that David Walker's reputed father was not or could not be his father. In these circumstances, the Court held the status of legitimacy to be established, arriving at the same result with the Sheriff-substitute.

A question then arose as to the proper form of the interlocutor, in respect that although the Court arrived at the same result with the Sheriff, they did so upon different grounds—the point being, whether it was necessary or competent to advocate the cause, to pronounce separate findings, and, at the sametime, to remit to the Sheriff with instructions.

The Service of Heirs Act, 10 & 11 Vict. cap. 47, under which the present competition arose, provides that the judgment of the Sheriff, on a petition for service, shall be equivalent to and have the full legal effect of the verdict of the jury under the brieve of inquest according to the former law and practice; and sects. 12 & 13 provide, that the petition and judgment being transmitted to the office of the Director of Chancery, the extract decree shall be equivalent to an extract retour. On the other hand, the Judicature Act sect. 40, provides that the Court of Session shall, in reviewing the judgment of the inferior Court's proceeding on proof, distinctly specify in their inter-

locutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide. The question therefore was, whether the findings in fact by this Court were not final, and whether it was competent to advocate the cause and pronounce such findings, and at sametime remit to the Sheriff, whose judgment the Service Act provides for being transmitted to Chancery as the judgment in the cause.

D. F. Inglis.—Without a final judgment from the Sheriff, there is not wherewith to go to Chancery. There is nothing in the Service Act to withdraw it from the operation of section 40 of the Judicature Act, and there is neither inconsistency nor incompetency in finding in point of fact the true grounds on which the petitioner should be served, and remitting to the Sheriff to serve him on these grounds.

Penney.—The findings in an advocation become the judgment of this Court, which cannot be retoured, and, therefore, there is no judgment of service.

Lord President.—I confess I have difficulty in seeing in the statute any machinery whereby the process of service can get from the Court of Session into the Office of Chancery, except through the Sheriff.

The Court made avizandum. At advising,—

Lord President.—This is a matter of some nicety. The service statute does not give any clear direction as to this point. Some things, however, are very clear. In the first place, that the jurisdiction of the Sheriff is specially recognised as extending to petitions for service, and that where there is no advocation he pronounces a judgment serving the petitioner, which judgment is transmitted to Chancery, and is the thing which is afterwards extracted and becomes the service. Now the statute authorises advocation of cases either before judgment or afterwards. They may be transferred to this Court to be decided by jury. If the case comes into Court on the ground that the Sheriff has refused to serve the party, then the course adopted is not that this Court, in altering the judgment, shall serve the claimant, but shall remit to the Sheriff to pronounce decree of service, following out the view that his judgment is the service. Then, again, if the case is brought here in a competition, and we think that the Sheriff has preferred the wrong claimant, we alter his judgment, and remit to him to pronounce decree of service in favour of the right person. There, again, it is his decree that is the service. If the case is advocated before proof, we send the case to a jury. If the jury return a verdict, we apply the verdict, but there again we remit to the Sheriff to pronounce decree, which is the service. Therefore, in every stage, it is the decree of the Sheriff which is the decree in the case. The question is, whether we can competently advocate the case, and pronounce separate findings of fact, and also remit to the Sheriff to pronounce decree in the case. We think we may; because if we are to displace the findings of the Sheriff, we must have the case before us in a way in which we can displace it. We must have it under our own jurisdiction, and then we can remit, just as if it were here for a jury trial: We can remit to the Sheriff with instructions. Therefore, being of opinion that the findings of the Sheriff in this case are not such as ought to be in the title of the party; that they are not proper elements for leading to the conclusion at which we have arrived; we think it right to displace them. We think it right also to state our own grounds of judgment, and we shall therefore pronounce a judgment in accordance with these views.

Then, again, the question has been raised, whether we can here pronounce findings which shall be final under the statute in the case of proof? That is not a matter we require to dispose of. It is not our province to determine it at present, at all events. But this we ought to do: We see no reason, in any case proceeding on proof, why we should not, if so disposed, state the grounds on which we arrive at our conclusion in regard to the proof; and farther, it is our duty to take care that there shall not be in any event a miscarriage of the case by reason of our having [illegible] these reasons, if the case shall be carried elsewhere, and therefore we [illegible] pronounce the findings, which, we think, ought to be the grounds of the [illegible] in this case. The statute lays the ground for such a proceeding

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in a case of this kind. Perhaps it may not be incompetent to deal with it in another way. But we think this form is competent.

Lord Deas observed that it must not be understood that by the course followed here the Court recognised the competency of remitting to the Sheriff after advocating in ordinary causes. It was solely by force of the statute, and because there seemed to be no other way of complying with its terms, that this was done here.

Lord President assented.

The Court pronounced the following interlocutor:—" Advocate the cause; Recall the interlocutor of the Sheriff: Find it established, as matter of fact—1st, That in the end of April, or beginning of May 1804, at Shuna, the late Isabella M'Millan or Walker being then unmarried, gave birth to the claimant David Walker: 2d, That at the time of the birth, she ascribed the paternity to David Walker, now deceased, who, before that date, had gone to the Island of Skye, and was then employed in that island: 3d, That in or about the year 1805, the said Isabella M'Millan went to Skye, taking along with her the said claimant, then a child in arms, and was there married to the said David Walker, now deceased: 4th, That in Skye, soon after the marriage, the said deceased David Walker presented and held up the said claimant for baptism as his son, and he was accordingly baptised as such, and that the deceased, both before and after the marriage, acknowledged the said claimant to be his child, and recognised him as his eldest son: 5th, That the said claimant was brought up and treated as the eldest child of the family, bore the name of David Walker, and was held out to the world, and generally understood and believed by the friends and acquaintances of the family, and persons dealing with the deceased, to be his eldest son, and continued to be so recognised during the life of the said deceased: 6th, That after the death of the said deceased, which took place in September 1831, the said claimant, as eldest son and heir of the said deceased, possessed and occupied as tenant the farm of Netherton, in virtue of an unexpired lease thereof which had been granted in favour of the said deceased until the year 1838, when the said claimant, in his said capacity as eldest son and heir of the deceased, executed a renunciation of the said lease in favour of the landlord: 7th, That subsequent to 1838, the said claimant continued to be recognised, as well by the members of the family as by others who knew him and them, as possessing the status of a lawful son of the said deceased, and as being his eldest son and heir, and the right of the claimant to that character was not questioned till about the year 1851, when disputes arose between him and other members of the family in regard to money matters: Find it not proved that the said claimant was the son of David Gray, as alleged by the other claimants, or that he was the son of any person other than David Walker deceased, or that the said deceased could not be or was not the father of the said claimant: Find, in point of law, that in these circumstances the claimant David Walker must be held to be the eldest son of the said deceased David Walker by Isabella M'Millan, legitimated *per subsequens matrimonium* of his parents, and was entitled to be preferred in the competition before the Sheriff, and to be served as nearest and lawful heir in general to the said deceased: Therefore, repel the claim of the other claimant William Walker, and refuse the petition for him; sustain and prefer the claim of the said David Walker, and remit to the Sheriff with instructions to pronounce a decree serving the said David Walker nearest and lawful heir in general to the deceased David Walker, in terms of the statute 10th & 11th of Victoria, cap. 47: Find the claimant David Walker entitled to his expenses incurred in this Court," &c.

John Ross, S.S.C.—Patrick, M'Ewen, & Carment, W.S.—Agents.

Mrs Jean Fulton or Balderston and Husband, Pursuers.—*Pyper—Fraser.* No. 72.

William Fulton, Defender.—*D. F. Inglis—Young.* Jan. 23, 1857. Balderston v. Fulton.

Liferent and Fee—Vesting—Expiry of Trust.—A truster conveyed his estate to trustees, for payment of the annual income to his widow, and, after her decease, to his daughter—an only child—during her lifetime, but exclusive of the *jus mariti*, which provision was declared to be in full of all her legal claims: And he directed his trustees to make over the trust-estate to "his own nearest heirs," after the death of the longest liver of himself, his wife, and daughter. After the truster's death, the daughter claimed and obtained legitim, with consent of the widow, out of the capital of the estate—the deficiency of income to the widow thereby occasioned being also made good out of the capital of the estate. After the widow's death, in an action at the instance of the daughter and her husband, for declarator that the fee belonged to her, and that the trustees should be decerned to convey the whole estate to her and her husband—*Held*, (altering judgment of Lord Neaves), (1), that the fee of the estate was vested in the daughter; But (2), that the trust was nevertheless to be kept up, and the fee or capital of the estate to be retained by the trustees during the daughter's lifetime, in order to secure her in the liferent exclusive of the *jus mariti.*

The trustees had suspended the daughter's liferent interest, with the view of restoring the capital to its original amount before her legitim had been paid out of it, in the view that it might ultimately appear that the truster's own nearest heirs, at the termination of the trust, were entitled to the fee. But it having been decided that the fee actually vested in her, they declined to resist her farther claims. In respect of which declinature, *Held* that she was entitled to payment, exclusive of the *jus mariti*, of the free annual proceeds from and after the death of her mother.

1st Division. Lord Neaves. C.

The late Mr James Fulton conveyed to trustees his whole property, first, for payment of his debts; second, for payment to his wife, during her lifetime, in the event of her surviving him, of the free annual income. The third purpose was as follows:—"For payment to Jean Fulton, my daughter, wife of Robert Glas Balderston, during all the days and years of her lifetime, after the decease of the longest liver of me and the said Sarah Gardiner or Fulton, of the whole free annual income, rents, or profits of the estate and effects, heritable and moveable, above conveyed to my said trustees, and which provision in favour of the said Jean Fulton or Balderston is hereby declared to be in full of all bairns' part of gear, *legitim*, portion natural, executry, and others, which she can claim through my death, or the death of the said Sarah Gardiner or Fulton,—Declaring hereby that the said free annual income, rents, and profits of my said estate and effects, shall be payable by my said trustees and their foresaids, to the said Jean Fulton or Balderston, exclusive of the *jus mariti*, or right of administration of the said Robert Glas Balderston, or any other husband she may hereafter marry; and that the receipts for the same to be granted by the said Jean Fulton or Balderston alone, shall, without the consent of such husband, be good and effectual discharges for the said free annual rents or profits, or so much thereof as shall therein be expressed to be received,—And declaring that the provision hereby made in favour of the said Jean Fulton or Balderston shall not be affectable by her husband's debts or deeds, legal or voluntary, nor by the diligence of his creditors, the same being hereby expressly excluded and debarred."

The fourth purpose of the trust was as follows:—"For making over to my own nearest heirs, or to any person or persons to whom I shall destine the same, by any writing to be hereafter executed by me, the whole estate and effects, heritable and moveable, above conveyed to my said trustees, after the death of the longest liver of me and the said Sarah Gardiner or Fulton, my wife, and the said Jean Fulton or Balderston, my daughter."

The trust-deed then provided for the management of the trust, with a

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reservation of the truster's liferent and power to alter or revocate, "and also reserving to the said Sarah Gardiner or Fulton, full power, liberty, and authority from me, in the event of her surviving me, and without the consent of my said trustees, by any deed to be executed by her, and to take effect after her death, to destine and convey the whole estate, heritable and moveable, above conveyed in trust, in such way and manner as she shall think fit."

Mr Fulton died on 14th February 1850, without having altered or revoked the trust-settlement, and without leaving any deed affecting it. He was survived by a widow and daughter, Mrs Jean Fulton or Balderston. The parties named trustees and executors accepted of office. The widow also accepted of the testamentary provision in her favour.

In 1840, Miss Jean Fulton had married Mr Robert Glas Balderston. No contract was executed between them. After Mr Fulton's death, Mr and Mrs Balderston repudiated the liferent provision in favour of Mrs Balderston, contained in the third purpose of the trust; and, by arrangement with the trustees and executors, with the consent of the widow, L.2000 was paid them as the value of the legitim, and a discharge executed therefor. Mrs Fulton was a consenting party, and subscribed the discharge.

By that discharge it was provided that, in the event of Mr and Mrs Balderston acquiring an interest in the trust-estate by the truster's widow dying intestate, survived by Mrs Balderston, and the fourth purpose of the trust coming into operation, Mr and Mrs Balderston thereby discharged all claim competent to them against the trustees by reason of any diminution of the trust-funds caused by the payment to the widow, Mrs Fulton, of an annual sum from the trust-funds equal to the free annual proceeds of the whole estate, undiminished by the L.2000 then paid to Mr and Mrs Balderston.

On 5th January 1854 Mrs Fulton died, without having exercised the power of testing reserved to her by the trust-settlement. This action was then raised by Mr and Mrs Balderston against the trustees, to have it declared that the fee of the estate, both heritable and moveable, vested in the pursuer, Mrs Jean Fulton or Balderston, as her father's only nearest heir, subject only to the special provisions of the trust-settlement, and that whether the same be regarded as testate or intestate succession;—And further, that all the special purposes of the trust-disposition and settlement having now been fulfilled or superseded, the trustees were bound instantly to convey to the pursuers the whole subjects, heritable and moveable, held by them;—Or otherwise, and in the event of its being held that the pursuers were not entitled to such immediate conveyance and payment, then to have it declared that the trust subsisted only to the effect of securing the pursuer, Mrs Balderston, in the alimentary provision of the income of the trust-estate during her lifetime, the fee thereof being now vested in her, subject to her deeds, and transmissible to her representatives at her death,—and that the trustees should be ordained to make payment to Mrs Fulton or Balderston of the free annual income of the residue of the estate during her life from and since the death of her mother, Mrs Sarah Gardiner or Fulton.

They pleaded;—That the destination in Mr Fulton's trust-deed in favour of his nearest heirs having been purified from the contingency of any subsequent destination by himself, or by his widow after his death, the pursuer, Jean Fulton, his only child, was entitled to the fee of the estate, as having vested in her under that destination at her father's death.

The trustees pleaded;—(1,) Having regard to the terms of the trust-deed under which they act, they were bound to keep up the trust during the lifetime of the pursuer, Mrs Balderston; and, upon her death, to make over the trust-estate, as it should then exist, to the nearest heirs of the

truster. (2,) The provision in favour of the nearest heirs of the truster, by the fourth purpose of the trust, was a provision in favour of those who should be the truster's nearest heirs at the termination of the trust,—upon the death of the longest liver of himself, his wife, and daughter. (3,) The pursuers' claim to legitim having been satisfied and discharged, the whole trust-estate now fell absolutely under the provisions of the trust-settlement, and the estate could not be claimed by Mrs Balderston as the truster's heir or representative, or by her husband, as in her right, without giving effect to the settlement, including the provision whereby the estate was vested in the defenders during her lifetime, as trustees for the purpose of providing the liferent to her, to the exclusion of the *jus mariti* and right of administration of her present husband, and any other husband she might hereafter marry. (4,) Assuming the fee of the estate to be now vested in Mrs Balderston, the annual income thereof, during her lifetime, had been validly put under trust for her behoof, to the exclusion of the *jus mariti* and right of administration of her husband, and so as not to be affectable by his debts or deeds.

The Lord Ordinary, on 31st January 1850, pronounced the following interlocutor:—"Sustains the first, second, and third pleas in law for the defenders, assoilzies them from the conclusions of the action, and decerns: But without prejudice to any right which the pursuers may now or afterwards assert to the annual income or interest of the trust-estate of her late father for her lifetime under the trust-deed libelled, consistently with her claim to *legitim* already settled between the parties: Finds the defenders entitled to expenses," &c.*

* "Note.—It is a general rule of law, that when a right of succession is conferred by a testator on parties called not as individuals, but by description or character, the party entitled to succeed is the person answering the description, or holding the character when the succession opens or takes effect. The rule, it is thought, applies to a provision or destination to a testator's own nearest 'heirs,' which would mean the parties possessing that character, not necessarily at his death, but at the time when the provision or destination comes into operation, whenever that might be.

"In this case, the late Mr Fulton left his whole property to trustees for certain purposes. After payment of debts, the annual income was to be paid to his widow during her lifetime. Then, after the widow's death, it was to be paid to his only child, Mrs Balderston, excluding the *jus mariti* of her husband, and this provision was declared to be in full of *legitim* and executry. 'And in the fourth place, for making over to my own nearest heirs, or to any person or persons to whom I shall destine the same by any writing to be hereafter executed by me, the whole estate and effects, heritable and moveable, above conveyed to my said trustees, after the death of the longest liver of me and the said Sarah Gardiner or Fulton, my wife, and the said Jean Fulton or Balderston, my daughter.

"The question is, What is meant by the term in this fourth purpose, 'my own nearest heirs?' The pursuers say it means Mrs Balderston herself, as her father's heir. The defenders, that it means the parties who, at her death, shall hold that character.

"In the circumstances of the case, the pursuers seem to have an interest to try this question, and they have brought the present action for the purpose, but the Lord Ordinary thinks that their claims are not well founded.

"This is a case not of intestate but of testate succession, and it must be decided according to what may appear to be the true intention of the testator.

"The Lord Ordinary does not think that the testator, when leaving a mere liferent to his only child, and then directing his trustees, after her death, to convey his estate to his own nearest heirs, can have intended that his daughter should previously have the fee. He certainly does not say so, and it does not seem to be implied. The fee is only disposed of by a direction to convey, and that conveyance could never be made to his daughter, for it was not to be made till after her

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The pursuers reclaimed. They lodged a minute, by which they passed from the summons in so far as it concluded that the defenders should be ordained to convey to them the whole trust-estate, unless the succession to the same should be held to be intestate, adhering to the summons *quoad ultra.*

Lord Curriehill.—Under the conclusions of this summons, three questions arise—1, Whether the right to the fee of the trust-funds, subject to the special provisions of the trust, vested in Mrs Balderston on the death of her father and mother? 2, Whether she and her husband are entitled, in existing circumstances, to immediate payment of the capital? And, 3, If they are, whether they are entitled to payment of the annual income during the lifetime of Mrs Balderston?

I. The first question depends entirely on the true meaning and construction of the trust-settlement itself. The intention of the truster cannot be ascertained by the transaction which took place after his death between his trustees and his widow and his daughter and her husband.

As the trust-settlement of Mr Fulton was a universal disposition, by which he denuded himself of everything that might belong to him at the time of his death, and vested it in trustees, nothing was left in his *hæreditas jacens.* Hence no party could render available any right in his succession, otherways than by a claim on the trustees. This is clear as to the provisions created by the trust-deed itself. And even if any part of the trust-estate had not been thereby provided to third parties, such portion of the trust-estate, although the right thereof would have belonged to the truster's legal representative, could not have been rendered available by such representative by service or confirmation as heir or executor to him, or otherways than by a claim on the trustees to whom the universal *hæreditas* was conveyed.

The first provision in the trust-deed is the usual one as to debts and funeral expenses. The second is a provision in favour of the truster's widow, in the event of her surviving him, of the annual income of the estate during her survivorship. The truster declares that provision to be in full of all her legal rights.

By the third purpose, the trustees are directed, after the death of the survivor of

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death. The provision, therefore, seems to mean that the conveyance is to be made, and the fee conveyed to the parties, who, after the daughter's death, may then stand in the relation of the testator's heirs. It would otherwise mean, in reality, that the conveyance is to be to the daughter's assignees or representatives, which seems to do violence to the testator's words, where, as here, the daughter's predecease is not a mere casualty in the case, but a contemplated and necessary condition precedent to any conveyance in fee.

" These views seemed confirmed by other considerations. 1. A power to name the residuary disponee was not merely reserved to the truster but conferred on the widow, which necessarily suspended and excluded any right of succession, at least till the widow's death. It cannot, therefore, be said that the fee vested anywhere by the deed *a morte testatoris.* 2. The declaration that Mrs Balderston's provision of liferent was in full of all legal claims, and of executry, indicates an intention to exclude any further prospect of succession on her part, and renders it unlikely that the testator should have intended to give her a sole and absolute fee concurrently with her own limited liferent.

" Several cases have been referred to in argument, but none seem so closely to resemble the present as to form a ruling precedent. The case of Maxwell v. Wylie, 25th May 1837, 15 Shaw, 1005, comes the nearest to it of any that the pursuers have cited, but there the terms used, and history of the deeds, were different, and the Court had only to reconcile a total liferent with a partial right of fee; a liferent given to three unmarried sisters, with a fee divided among six sisters, married and unmarried. Such an arrangement is sufficiently natural and intelligible, but it is materially different from what is here supposed by the pursuer's argument. In consequence of the pursuers sometime ago claiming and receiving payment of a sum of *legitim,* her liferent interest was, in the meantime, suspended. But it seems not to have been held as finally extinguished, and any claim on this footing has been reserved."

Mr Fulton or his widow, to pay the annual income of his estate to his daughter. No. 72
That provision is qualified with two conditions—1, that it is in full of legitim; and
2, that it is to be free from and exclusive of not only the *jus mariti*, but also the Jan. 23, 1857.
legal right of administration, of her husband. These two purposes of the trust, Balderston v. Fulton.
which were intended to provide for the testator's widow and only child during their lifetimes, appear to be the only ones, as to which he had then made up his mind. There were no other individuals for whom he made any special provision.

By the fourth purpose, the trustees are expressly directed to retain the possession and administration of the estate, and keep it vested in their own persons during the lifetime of the truster's wife and daughter, or the survivor of them, and to denude of the fee or capital thereof, after the death of both of these ladies, in favour either of the truster's nearest heir, or of any other party to whom he should have destined the same. Mr Fulton died on the 14th February 1850, without having made any such destination of the residue. He was survived by both widow and daughter. The widow survived for about four years, without having exercised a faculty, which the settlement conferred on her, of disposing of the estate; and from 1854, the fee or capital of the trust-estate could not be claimed from the trustees by any party whatever, except the truster's heir.

From that time, and indeed from the time of the truster's death, the party in the position of being his heir at law, both in heritage and moveables, was his daughter; although this was a matter of contingency at the date of the settlement in 1844, because it was then possible that she might predecease him, with or without children, or that he might leave a son, who would be his heir. But according to the event that did happen, his only daughter was his sole heir at law and next of kin.

She was married to Mr Balderston, and he and she jointly so far defeated the purpose of this trust, that they claimed and got legitim, which was valued at L.2000, thereby partly defeating the directions in the settlement. In that state of matters, they have brought this action, concluding, *inter alia*, to have it found and declared that the fee of the estate has vested in Mrs Balderston, as her father's only nearest heir, subject only to the special provisions of the trust-settlement. In judging of this claim, we start with the fundamental principle to which I have already alluded—that such a general trust-settlement, although it takes all the trust-estate out of the *hæreditas jacens* of the granter, operates as a trust for his legal representatives, in so far as the trustees may not have been directed to pay or make over that estate to other parties. Keeping this principle in view, the question is,—Has the testator cut off the claim, which would thus belong to the party who on his death was in the position of his heir-at-law, by his having directed the trustees, upon the other provisions being fulfilled, to make over the estate to his nearest heirs? It is difficult to read the direction by the testator to make over the estate to his own nearest heirs, as importing an intention to disinherit his nearest heirs.

It is said that the parties whom he denominates "my own nearest heirs," in the fourth purpose of the trust, are those who should hold that character, not at the time of his own death, but at the time of the death of the survivor of his wife and daughter, because the direction to the trustees is to make over the estate to those heirs, "after the death of the longest liver of me and the said Sarah Gardiner or Fulton, my wife, and the said Jean Fulton or Balderston, my daughter."

But these words appear to refer not to the period of vesting of this provision, but to the period when it was to be implemented. The improbability of the testator having any other intention, appears when it is taken into view, that so far as he then knew, the person who might be his nearest heir at the time of his death might be not his daughter Mrs Balderston, but a son of the then existing or of a future marriage. Or he might leave other daughters of that or of a future marriage. And is it credible that he intended that, in such events, such son or daughters should be utterly disinherited, and be left in beggary, unless they should survive both his daughter Mrs Balderston and her mother? Or that, in the event of Mrs Balderston predeceasing her mother leaving children, these children, although his legal representatives, should have no right to even the fee of his estate, unless they should survive their grandmother? It is utterly improbable he intended that, in such events, his own descendants should be disinherited, and the right to the succession of the fee of his estate reserved for collateral relations (he could not know whom they

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There is another indication of its true meaning. The parties in whose favour the trustees are directed thus to make over this fund, were to be either his nearest heirs, or some other person or persons to whom he might specially destine his estate. He puts these two alternatively,—the nearest heir, and such destinee, in the same category. And suppose he had executed a deed setting forth that, by the settlement, he had made this alternative provision, and that in the exercise of that power he thereby named A B to be the person there referred to, that destination would surely have received effect if the destinee survived the testator, and he might have availed himself of it as a fund of credit, although he might not get possession until the death of the testator's wife and daughter. The only reasonable construction of this provision is, that the nearest heir referred to was just the party who would be in this position at the time of the testator's death, and that this was nothing more than a declaration that, after the wife and daughter were provided for, the reversion of the estate was to go to the testator's nearest heir, unless he should otherways dispose of it in his lifetime. Therefore, so far as regards the first conclusion of the summons, the pursuers are entitled to decree in terms of it.

It was stated in the argument, that although no other heir at law was excluded, the testator intended to exclude his daughter, because he declares that the liferent in her favour was to be not only in full of her legal rights, but of all that she could claim from his estate. I do not think that that is the meaning and effect of a clause of this kind. If he had other children, it might have excluded Mrs Balderston from taking any portion along with them. But when there are no other children, such a condition does not operate in favour of collaterals, according to the principle stated in Erskine, 3, 9, 23, and exemplified in the case of Maitland Gibson, 14th Dec. 1843. As here there is no other child in whose favour this clause could operate, it has no effect in preventing Mrs Balderston from claiming under the express provision in favour of the nearest heir.

2. Then as to the second conclusion, which is to have the trustees decerned and ordained to convey to the pursuers the whole subjects, heritable and moveable, now held by them: This is put on the ground that the whole special purposes are now fulfilled or superseded. But they certainly are not. The estate is directed to be held by trustees, in order that the annual produce thereof might be provided for the daughter in such a manner as to exclude the marital rights of her husband. That special purpose, at all events, has not been fulfilled. Nor has it been superseded by Mrs Balderston and her husband having taken legitim. Whatever effect that proceeding might have in creating a forfeiture of the provision in favour of Mrs Balderston, if there be any party in whose favour such forfeiture could operate, it has not superseded the directions of the trust, so far as the performance of them is still practicable.

This plea appears to rest on this fallacy of assuming that the trust is not binding on the heir at law. But as the estate is taken out of the *hæreditas* of the defunct, and his heir can have access to the estate only as having a claim on the trustees, it follows that the heir, when he goes against the trustees, is bound by the condition which the testator has annexed to that claim. A testator, by means of a trust-deed, may create a restriction on the rights of his heirs at law, although he confer no right in favour of any third party.

I therefore hold it to be clear that the pursuers are not entitled to take in terms of this conclusion of the libel in any way whatever, and that the capital must remain in the persons of the trustees during the whole of this lady's lifetime, more especially as her present husband may predecease her, and she might marry again, and this trust must have full effect.

3. There remains the third question,—whether, during her lifetime she is entitled to have the income of the remainder of the estate? Here a very great difficulty arises, from the circumstance that she herself was the party who defeated the testator's intention. Is she entitled to have this provision made effectual to her to any extent whatever, while she repudiates the settlement by continuing to withhold this L.2000? That is a question as to which we have had no assistance from the bar, and I am not at present in a situation to give judgment on it. I see

various views of it. If we were dealing with a third party, then this lady and her husband, by having withdrawn part of the capital destined to such third party, must have allowed the income of the remainder to have accumulated for that party's behoof, on the principle of equity of compensation, exemplified by the cases of Kerr and followed by the case of Bennet, and then by the case of Breadalbane. But can that principle operate in favour of the party who contravenes the settlement? I wish further argument on this point before forming an opinion on it, and I suggest that the judgment should be, to give decree in favour of the first conclusion, assoilzie the defenders from the second, and before answer as to the third, appoint parties to be further heard.

LORD IVORY.—I agree with the result of Lord Curriehill's opinion, and very much with its reasoning. I entirely agree with his Lordship on the construction of this deed that the word "heirs" must be held to be the heirs of the granter at his death, and that his daughter having come to be such heir, she is the party who is fiar of the estate, and that she is vested with the fee *a morte testatoris*. I also agree that under the deed she was entitled to that liferent which it was the object of the testator apparently to protect. But the deed is not allowed to stand. There is the disturbing element of the daughter having taken *legitim*, which she was certainly entitled to do. The father had no power to deal with *legitim*, but the daughter, because she is entitled to disturb this portion of the estate, is not therefore entitled to disturb the rest. She cannot take higher benefit by the deed than to obtain *legitim*. Anything further she must take under restriction of the deed itself. The difficulty here arises from the circumstance that we are not dealing with the interest of a third party. If the daughter takes the fee, subject to the restriction of the deed, she is taking the benefit of the deed while she also repudiates it. The widow was never the liferenter. But having survived the testator, she was an annuitant, and *pro tanto* she was a third party, and but for the deed of agreement and of discharge to which she was a consenting party, she would have been as a third party entitled in equity to insist that her annuity provided for her by the trust-deed should not be cut down. The parties seem to have had some view of the equity of compensation themselves, for they agree that if the trustees should be obliged to make up the full amount of the widow's annuity by encroaching on the capital of the trust, the daughter shall not afterwards impeach the right of the trustees to do so. But independently of that, the moment you come to deal with the fee, and with the fee as protected by the trust for securing the daughter in her liferent, the trustees being entrusted with the protection of the daughter against her husband, you come practically to deal with a third party, and if so, it will come to be an anxious question how the doctrine of compensation is to apply, or whether there are other elements to exclude it. The question is, how is it to be dealt with, and I agree with the proposal that it shall not be decided now.

LORD DEAS.—The question here is, whether the beneficial fee of the trust-estate has been given, by the deed, to those who shall be the truster's heirs at the date of his death, or to those who shall be his heirs at the date of the death of the survivor of his wife and daughter?

And this, again, involves the question, whether the words in the 4th purpose of the trust, "after the death of the longest liver of me and the said Jean Fulton or Balderston my daughter," are descriptive of the parties who are to take, or simply of the period at which the trustees are to denude?

Now, the words just quoted, taken in their strictly literal and grammatical sense, are descriptive only of the period of denuding. The 4th purpose is, "for making over to my own nearest heirs, or to any person or persons to whom I shall destine the same," the whole trust-estate and effects, "after the death of the longest liver" of the truster, his wife and daughter. The estate is, thus, to be made over after the death of the wife and daughter, but the heirs, to whom it is to be so made over, are not described as those who shall be the truster's heirs at the time of making over, but simply as his "own nearest heirs." Beyond what is contained in the words, "my own nearest heirs," he gives no description, whatever, of the beneficiaries in the fee. The words used are naturally descriptive of the persons who shall be the truster's heirs so soon as he leaves heirs, which he does at his death, when his succession truly opens and the deed takes effect, although the

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trustees are not to denude in favour of those heirs till the occurrence of a specified event; just as they were not to denude in favour of his *nominatim* residuary legatee (if he had named one), till the occurrence of the same event, although the right of such legatee would plainly have had no reference to survivance or predecease of the period of denuding, but simply to survivance or predecease of the date of the truster's death.

But although such may be the natural reading of the fourth purpose, when taken by itself, the following considerations were relied on, in argument, as sufficient to shew that, in no event, was it intended the daughter should take the fee:—1st, The form in which the fee is given, which is simply by a direction to make it over after the death of the wife and daughter. 2d, The power reserved to the wife to destine and convey the fee in the event of her survivance. 3d, The exclusion of the *jus mariti* as regards the liferent, and yet not as regards the fee. 4th, The supposed inconsistency of giving a liferent and fee to the same individual; and 5th, The stipulation that the liferent should be in full to the daughter of all legitim, executry, and other claims competent to her through the death of her father and mother.

These considerations, however, appear to me to be quite inadequate to support the construction contended for.

1st, Notwithstanding of the form in which the fee is given, the substantial effect of the deed is, that the trustees are to hold for behoof of the fiars (be they who they may) from the first. This would be the case, supposing the heirs who are to take were held to be those who shall be heirs at the death of the mother and daughter. The trustees would hold the fee for behoof of these heirs from the outset; and they must equally hold from the outset, for behoof of the heirs who are to take, supposing these heirs to be those who are heirs at the truster's death.

2d, The power reserved to the wife could only render the fee defeasible, or, at the utmost, suspend the vesting till her death. But even this latter view would create no practical difficulty, as the daughter has survived the mother.

3d, The truster might choose to protect the liferent for the daughter's maintenance, and yet not to exclude either her or her husband from dealing with the fee: subject always to the condition, that the capital must remain intact, in the hands of the trustees, during the life of the wife and daughter. This last indeed seems to me (as it does to your Lordship in the chair), to have been the great object of the deed. This object once accomplished, the truster seems to have been very little solicitous about any particular mode of disposing of the fee; and, accordingly, he merely substituted his own nearest heirs, failing any special destination of it by himself or his wife. Contemplating the probability of such a destination being made by one or other of them, he very naturally confined the exclusion of the *jus mariti* to the liferent, which alone it was his fixed purpose to secure to the daughter, although, failing the contemplated destination, she might happen to become fiar.

4th, There was no inconsistency in giving an absolute liferent to the daughter, and, at the same time, making a destination under which she might, contingently, become fiar.

5th, Nor is it surprising that the truster should stipulate that the liferent, which alone was given indefeasibly to the daughter, should be in full of legitim and all other claims, in place of stipulating that *all* which was given to her by the deed should be in full of these claims. This latter form of expression might have defeated his object had he or his wife exercised the reserved power, and thereby prevented the daughter from getting *the whole* of what had been declared to be in full of her claims. The exclusion was, however, applicable to her legal claims only, not to his own good will, by that deed or any other.

I may further observe, that if the daughter had predeceased the mother, none of the above considerations, except the first, could have had place in the question whether the fee had at once vested in the truster's heirs; although, according to the defenders' argument and their second plea in law, the death of the mother (as well as of the daughter) was a condition precedent to the vesting.

But while I thus hold the considerations relied on to be insufficient to control the natural meaning of the words, "my own nearest heirs," as used in the fourth purpose of the trust, I do so upon the footing that the trust must continue to subsist, and the capital to be retained by the trustees during the daughter's lifetime.

To this extent I do not think the objects of the deed could be defeated by any repudiation on her part. Whether the trustees will be entitled, and consequently bound, to retain the interest of the capital still in their hands till the sum withdrawn in name of legitim shall be made up—or whether the whole of that interest will fall to be periodically paid over to the daughter—may be a question upon which it will be proper to hear further argument. The act of claiming legitim was the daughter's act, to which her husband could not have compelled her; and the consequences of that act, as affecting her income, must be gravely considered. But this I hold will be the only question open; and, *quoad ultra*, effect should be given to the third and fourth pleas in law for the defenders, at the same time that their second and leading plea will fall to be negatived.

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Lord President.—I concur in the result at which your Lordships have arrived. I have felt considerable difficulty in construing that part of the deed contained in the fourth purpose of it. It admitted of two constructions, and taking light from the other parts of the deed, I find my difficulty increased. But one thing is very clear, that there was a settled purpose in the mind of the truster to secure the annual proceeds of this estate to his daughter during her lifetime, exclusive of the *jus mariti* of her husband; and the clause admitting of two constructions, that which was in consistency with the clear intention of the purpose of the testator was to be taken in preference to the other, although that other, in the absence of this leading purpose being so clearly expressed, would have been the more natural one. I have come to be of opinion that that purpose will be effectually accomplished as far as it admits of being accomplished, and therefore I concur in holding that the judgment should be in favour of the pursuer on the first conclusion of the action, and in favour of the defenders on the second conclusion. There must be an absolute settlement of the question that the daughter is not entitled to have the estate made over to her now. My reading of the deed cannot be satisfied without that being absolutely found. Then comes the question as to the disposal of the annual proceeds, and as to that there must be further discussion.

On 19th July 1856, the Court pronounced the following interlocutor:—"Recall the interlocutor of the 31st of January 1855 reclaimed against: Find that there was vested in the pursuer Mrs Jean Fulton or Balderston, only child and nearest heir of the late James Fulton, a right to the fee or capital of the estate heritable and moveable, which belonged to him, and which was by the trust-disposition libelled on directed to be made over by his trust-disponees after the death of the longest liver of Mrs Sarah Gardiner or Fulton, his wife, and of the said pursuer, after the special provisions in the said trust-settlement should be performed: Sustain the defender's third and fourth pleas in law, and find that the defenders are not bound to convey and pay over the fee or capital of the said estate and effects to the pursuers during the lifetime of the said Mrs Jean Fulton or Balderston: and assoilzie them from the conclusions of this libel to have them decerned and ordained instantly so to convey and pay over the said estate and effects: And before further answer, allow the parties to be heard on the remaining conclusions of the libel, &c., reserving all questions of expenses."

On 10th December 1856, the case was again put to the roll, when the Court appointed the pursuers to lodge a minute setting forth what they further demanded, and the trustees to lodge answers thereto.

The pursuers stated that what they demanded was "that the defenders should be decerned and ordained to make payment to the pursuer, Mrs Balderston, exclusive of the *jus mariti* of her present or any future husband, and in the manner provided for by her father's trust-deed, of the free annual income, rents, or profits of the trust-estate remaining in their hands, during all the days and years of her life, from and after the death of her mother, Sarah Gardiner or Fulton, the widow of the truster." And they farther craved decree [illegible] expenses of process to be paid out of the trust estate.

The [illegible] lodged a minute on 17th December 1856, which was afterwards [illegible] to be withdrawn for one dated 15th January 1857, in which

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they stated that "they had deemed it to be their duty, as trustees, to resist the conclusions of the action, and particularly the first and second conclusions, because it had appeared to them, and they had been advised, that they were bound to defend and maintain the interests of those who, upon the death of the pursuer Mrs Balderston, should possess the character of the truster's "own nearest heirs." Till Mrs Balderston's death it could not be known who would possess that character; and as upon one construction of the 4th purpose of the trust, viz., that which had been adopted by the Lord Ordinary, these persons, whoever they might be, would be entitled to the fee of the estate, the defenders were advised that it was their bounden duty to represent to the Court the interest of these unknown persons.

"By the interlocutor of 19th July 1856 the Court had decided, 1st, that the fee or capital of the trust-estate was vested in the pursuer Mrs Balderston; and, 2d, that the trust was nevertheless to be kept up, and the fee or capital of the estate to be retained by the defenders, as trustees, during Mrs Balderston's lifetime.

"As explained upon the record, the capital of the trust-estate had been diminished to the extent of L.2000, which had been paid to Mrs Balderston in name of *legitim*, she having repudiated the trust-settlement of her father. The defenders had been withholding her liferent, and had intended to continue to do so until the said sum of L.2000 had been made up, and the capital thereby restored to its original amount, in the view that it might ultimately appear that the truster's own nearest heirs, at the termination of the trust, were entitled to the fee. But it having now been decided that the fee of the capital of the estate had actually become vested in Mrs Balderston, the defenders do not consider it to be consistent with their duty to her, to resist any farther claim which she may make in this action; because, according to the judgment of the Court, there is no other interest, besides hers, for them to represent, or protect, as trustees. They decline to consent to any demand made by Mrs Balderston. They also decline, for the reasons above stated, to resist her claims."

Of this date the case was advised,—

Lord President.—The trustees for Mrs Balderston not considering it to be their duty now to resist the claim that is made for Mrs Balderston, the case is in this predicament, that there is no person whatever resisting the pursuers' claim. That being so, there is no course but to pronounce judgment in favour of the pursuers, in terms of their minute.

Lord Ivory.—If I am to understand that by granting the prayer of this minute we are pronouncing decree *causa non cognita*, thereby throwing the responsibility on the trustees, I have no objection. If, on the other hand, the minute for the defenders is to be interpreted merely as a minute throwing us back on the original discussion in the case, as I think it must be interpreted, it rather appears to me that we cannot deal with it in the manner your Lordship proposes. For we did not have a discussion which applied to the whole case, but only disposed of part of it; and all that the trustees now propose to do is only to allow us to complete the interlocutor. That is tantamount to throwing the responsibility on the Court, and it would not be becoming or competent for us to refuse to exhaust the case on the footing on which it was placed in the original discussion. In pronouncing the former interlocutor we were influenced by this consideration, that the trust-deed was specially directed to the separation of liferent and fee; and, in respect the liferent was brought into collision with the fee, that the liferenter was to be considered very much in the light of a third party, and that the intention of the truster was to protect the liferenter's interest. Now, if this had been the case of a third party, it is perfectly clear that, as in a question with the daughter, by the agreement entered into between her and the trustees, under which she repudiated the provisions in the deed, that third party would have been entitled to say, you have already got an equivalent for any possible claim,—you have repudiated that liferent provided for you,—and have thrown yourselves out of Court.

This minute for the pursuers never could have been sustained in that case, for it asks that which they were to receive in lieu of their claim, and also proposes to keep that which they were giving up. The Court would have been there obliged to apply an equitable principle of compensation. But I do not know, in the view we took of the case, that in point of principle there is any sound distinction between the case of a third party and the case of Mrs Balderston, considered as a liferenter whose interest was to be separated, under the second clause of the deed, from that of the fiar; and, under the first clause, protected as a separate interest, for which the trust was constituted; and, therefore, it appears to me that this is stultifying to some extent our prior interlocutor if we do other than apply the same principle of compensation to the case as it now stands. The motion now made virtually amounts to this, that, having obtained L.2000 by repudiation of the liferent provided in the deed, Mrs Balderston now wants the liferent which she formerly gave away. I hold that she has got her whole liferent, and has nothing in that shape now to get. The fee must, therefore, remain subject to the burden of the liferent imposed on it by the truster. Therefore I think we are rather bound to explicate our previous interlocutor in some such way as this, and that whether we are to deal with this as a case in absence, or where the defenders have withdrawn their instance.

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Lord Cuninghame.—When the interlocutor was pronounced, I anticipated an argument upon a very nice question, upon which we had not formed an opinion; and, accordingly, that interlocutor orders argument on these points. But we are here in an ordinary action, at the instance of Mrs Balderston against the trustees, who are the only defenders, and if they had simply stated, in a minute, "we decline to insist farther," there is only one course possible. The Court itself is not to argue these nice questions against the pursuer. In an ordinary action this cannot take place; and, when the only defender declines to insist farther in the defence, the Court, according to practice, must, as a matter of course, grant what is demanded by the pursuers, if it be within the summons; the judgment, however, not being pronounced *causa cognita*. It is stated in the minute that because the Court have decided so and so therefore the defenders are not to insist farther. They may or may not be right in not further opposing the demands of the pursuers, but I wish to guard myself from being understood as holding this to be the case. I required further argument to enable me to form an opinion on the subject.

Mrs Fulton had a testamentary provision made to her, the subject of which was the annual income of the estate; and that was declared to be in full of legitim. I do not know whether or not it might be held, in conformity with the case of M'Intosh's Trustees v. Stevenson and others, that it was optional in her to take either of these; and whether or not, on the principle of Tory Anderson, it was not the duty of the trustees to protect her even in the exercise of that option, more particularly as the statement in the record is a very remarkable one in regard to the manner in which that option is said to have been exercised. That statement is, that her husband insisted on her entering into the agreement with the trustees, and that on the application of the trustees she was induced to give a consent to that agreement; and the answer to that article does not appear to be a very distinct denial of it. In that state of matters, I thought it not unlikely the question might have arisen whether or not, while Mrs Balderston is entitled to be alimented by her present husband, the annual income should not be accumulated so as to provide a fund for compensating the loss of that income, in the event of the predecease of her husband, or of his eventually becoming unable to aliment her. But as the defenders no longer oppose the undisposed of conclusion of the action, I think the Court, without forming any opinion one way or another on the merits of that conclusion, have no option, but must *causa incognita* grant the motion of the pursuers for decree in terms of that conclusion.

Lord [illegible].—The summons contains two sets of conclusions—the one applicable to the [illegible] to the keeping up of the trust during Mrs Balderston's lifetime;—the other applicable to the annual income—as to which last the summons concludes that the [illegible] should be decerned to make payment to Mrs Balderston "of the free annual [illegible], rents, or profits of the residue of the said estate, both heritable and moveable, [illegible] all the days and years of her life, from and since the death of her mother."

In [illegible] vesting of the fee and the endurance of the trust, we had a full

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argument; and to those points, accordingly, the interlocutor of 18th July 1856 is confined. Upon the conclusion for payment of the annual income we had no argument whatever, it being naturally enough felt that this conclusion could not be satisfactorily dealt with till the other conclusions were disposed of. In the opinion which I then delivered (and which I find correctly enough reported in the Jurist, except that under head 2d, the word printed "testing" should be "vesting;" and under head 3d, the word printed "conclusion" should be "exclusion,") I expressly stated that the consequences of the claim made to *legitim*, as affecting the liferent income of Mrs Balderston, would be a question open for and requiring further argument. Accordingly your Lordships, by the interlocutor of 18th July, expressly directed "the parties to be heard on the remaining conclusions of the libel, having reference to the effect, if any, produced on the claim therein made by the deed mentioned" in certain articles of the condescendence—that is to say, the deed of discharge applicable to this very claim of *legitim*. The case was then repeatedly put to the roll, that the parties might be heard in terms of this interlocutor; but the trustees having declined to enter upon the argument, your Lordships ultimately ordered the minute and answers which have been now lodged—the answers for the trustees being embodied in their minute printed under date 15th January 1857. The operative part of that minute (or answer) is contained in the two concluding sentences—"They decline to consent to any demand made by Mrs Balderston. They also decline, for the reasons above stated, to resist her claims." I cannot say that the reasons thus alluded to are, to my mind, satisfactory; for they amount to this, that the trustees resisted the first and second conclusions of the libel, because they held themselves bound to defend the interests of those unknown persons who might be the truster's nearest heirs at Mrs Balderston's death, but that they do not consider themselves bound to resist any farther claim she may make in this action, "because, according to the judgment of the Court, there is no other interest, besides hers, for them to represent or protect." Now it humbly appears to me that the duty of trustees appointed to secure the alimentary liferent of a wife, to the exclusion of the *jus mariti*, is not merely to protect the fee for whomsoever it may concern, but to protect the liferent interest of the wife, and this not only against her husband and all third parties, but also against herself. They are bound to see that she does not anticipate or prematurely consume or diminish the fund intended for her separate alimentary support. And, if they fail in this, they fail in the duty imposed upon and undertaken by them. But the question how far they are or are not called upon, in the discharge of that duty, to oppose any particular demand of the wife, is a question which the trustees must decide for themselves, and upon their own responsibility. Here the wife demanded her legitim (for the husband could not have done so without her consent), and the trustees conceded the demand. She now demands the full annual income arising from the remaining capital of the trust-estate from and since her mother's death, without allowing any part of it to be retained by the trustees towards making up the capital withdrawn in name of legitim, and the trustees state judicially that they do not oppose this demand. The demand not being opposed, there is no course open to the Court but to grant it. The whole question of withdrawal from the trust of a portion of the capital in name of legitim, and the consequences of that withdrawal, might have been made the subject of important argument under the concluding portion of the interlocutor of 18th July 1856; and, in common with your Lordships, I anticipated that it would have been so. But if the trustees decline the argument, and state that they do not oppose the claim, the rules of this Court do not require or permit of our going into the question for ourselves. The responsibility of the course followed rests entirely with the trustees. That course may be the right one for anything I know. I give no opinion upon it one way or the other. But in concurring with your Lordship that we must give effect to the wife's demand under the remaining conclusions of the libel, I do so solely in respect the trustees do not oppose that demand.

D. F. Inglis.—The trustees have not withdrawn their defences. They have been all sustained. It must be distinctly understood that there is no withdrawal; and also that in sustaining the third plea, it is held that the claim of legitim is well satisfied and discharged.

LORD DEAS.—That is an additional reason for our present judgment. No. 72.

THE COURT pronounced the following interlocutor :—" Having resumed consideration of the cause, so far as not already disposed of, along with the said two minutes No. 12 and No. 14 of process, and heard the counsel for the parties,—In respect the defenders decline to resist the claims of Mrs Balderston, made in the said minute for the pursuer, No. 12 of process, Decern and ordain the defenders to make payment to the pursuer, Mrs Balderston, exclusive of the *jus mariti* of her present or any future husband, and in the manner provided for by her father's trust-deed, of the free annual income, rents or profits of the trust-estate remaining in their hands, during all the days and years of her life, from and after the death of her mother, Sarah Gardner or Fulton, the widow of the truster: Further, of consent of both parties, find them respectively entitled to their expenses of process out of the trust-estate: Allow accounts thereof to be given in, and remit," &c.

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JAMES BURN, W.S.—JAMES PEDDIE, W.S.—Agents.

JOHN HUME AND OTHERS (Rough's Trustees), Appellants and Reclaimers.— *Sol.-Gen. Maitland—E. S. Gordon.* No. 73.

JOHN MILLER (Baxter's Trustee), Defender and Respondent.—*D. F. Inglis —Penney.*

Bankrupt—Diligence—The Statute 2 & 3 Vict. cap. 41, sect. 83, applies equally to all sequestrated estates, whether of living or deceased debtors.—The first deliverance on an application for sequestration of the estate of a deceased debtor was not made till after the lapse of more than seven months from the date of his death. Arrestments were used within sixty days of the sequestration;—*Held* (in conformity with the opinion of a majority of the whole Court, aff. judgment of Lord Mackenzie), that the arresting creditors were not entitled to a preference in the sequestration,—the general proviso in sect. 83 that no arrestment or poinding executed within sixty days of the sequestration shall be effectual, applying to all sequestrated debtors, whether living or deceased.

Jan. 23, 1857. — 1ST DIVISION. Bill-Chamber. Ld Mackenzie. C.

THE facts of this case were thus stated in a joint minute for the parties: —" The deceased John Handyside Baxter, on whose sequestrated estate the respondent Mr Miller is trustee, died on the 25th day of April 1853. Three of Mr Baxter's daughters obtained themselves decerned and confirmed before the commissary of Forfar executrices-dative *qua* three of the next of kin of their father. The decree of decerniture in their favour is dated 17th May, and the confirmation 30th June, both in 1853. The amount of estate confirmed to by the executors, as set forth in the inventory, is L.1168, 16s. 5d. A summons at the instance of Rough's trustees against Mr Baxter's executors for L.500, contained in a bond and disposition in security granted by Mr Baxter, was signeted on the 16th April 1855, and after having been duly executed, it was called before Lord Mackenzie, Ordinary, on 24th May, when appearance was entered for the defenders. On the dependence of this action, the appellants used the following arrestments, of the respective dates after-mentioned, viz.:—On the 20th April 1855, in the hands of the branch of the Western Bank of Scotland at Dundee; on 28th April 1855, in the hands of the Western Bank of Scotland, Glasgow; and on 3d May 1855, in the hands of Durham and Thomson, stationers and booksellers, Dundee. The funds alleged to be attached by the said arrestments are—1st, a sum of L.828, 1s. 8d. due by the Western Bank in an account held with the branch of the said Bank at Dundee by 'Charles Philip for the executors of the late J. H. Baxter, stationer, Dundee,' with a declaration that it was to be operated on by Charles Philip. Mr Philip is the husband of one of the

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executrices. 2d, A sum of L.35, 5s. 9d. due by Durham and Thomson on account of stationery furnished them by the executors. The sequestration of the estates of Mr Baxter, as a deceased debtor, was applied for on 12th June 1855, which is the date of the first deliverance. The defences in the action against Mr Baxter's executors were due on the 7th June 1855, but not lodged. The case was enrolled, and when called on 12th June, defences were allowed to be given in by the 15th June. The defences were lodged of that date, and the record was closed on summons and defences on 10th July 1855. The case was thereafter put to Lord Mackenzie's debate-roll, but has not yet been disposed of by him. No decree has yet been pronounced in the said action, and no process of furthcoming has been raised at the appellant's instance."

Mr Baxter's executors pleaded in the action against them;—There being an application for sequestration of the estates of the defunct, under which the whole moveable estate will be adjudged from the defenders, and taken out of their hands, it is incompetent to proceed with the present action; at least the same ought not to be allowed to proceed *hoc statu*, seeing no decree against the defenders can be pronounced to the effect of compelling them to part with the executry funds, or any part thereof, to the pursuers.

In the sequestration the appellants claimed to be ranked for L.549, 8s. 9d., as the value of their security. The trustee pronounced this deliverance:—"Rejects this claim, in so far as the claimants claim to be preferred over the ordinary creditors, and to be ranked preferably accordingly, upon the ground that the arrestments founded on were executed within sixty days from the date of the sequestration; but he admits the claim to the effect of a ranking *pari passu* with the ordinary creditors for the principal debt and interest thereon, amounting together to the sum of L.549, 8s. 9d.

Rough's trustees appealed, and prayed to have their claim sustained as a preferable ranking.

On 7th March 1856, the Lord Ordinary pronounced the following interlocutor:—"Finds that the estates of the deceased John Handyside Baxter were sequestrated under the Bankrupt Act on the 12th June 1855: Finds that the arrestments founded on by the appellants were used on the 20th April, 28th April, and 3d May, all in the year 1855, being within sixty days from the date of the sequestration: Finds that by the 83d section of the Act 2 & 3 Vict. c. 41, it is provided that 'no arrestment or poinding executed of the funds or effects of the bankrupt, on or after the sixtieth day prior to the sequestration, shall be effectual,' but reserving to the arrester or poinder, before the date of the sequestration, a preference out of the funds, for the expense *bona fide* incurred by such diligence: Finds, in conformity with this provision of the Bankrupt Act, that the appellants are not entitled to be ranked as preferable creditors in the sequestration in respect of the arrestments used by them as aforesaid: Therefore affirms the deliverance of the trustee complained of, and dismisses the appeal, reserving the right of the appellants to be ranked as ordinary creditors for their debt, and their right to a preference out of the arrested funds for the expense *bona fide* incurred by them in their diligence: Finds the appellants liable in expenses, of which allows an account to be given in," &c.*

* "Note.—By the Bankrupt Act of 1839, section 4, it is competent to apply for sequestration of the estates of a deceased debtor, but except under certain special circumstances, this can only be done after the expiry of six months from the debtor's death. The 14th section provides, that 'if sequestration shall be awarded, such sequestration shall proceed in the same way as in other cases, with the differences necessarily arising from the death of the debtor.

"There is a general provision in the 83d section cutting down all arrestments or poindings of the debtor's effects within sixty days of the sequestration. Then

Rough's trustees reclaimed, and on 9th July 1856 the Court pronounced the following interlocutor:—"In respect of the novelty and importance of the point of law involved, direct copies of the printed papers in the cause, and of the present interlocutor, to be boxed to the Judges of the Second Division and to the permanent Lords Ordinary, with a view to a hearing before the whole Court, on the question whether, regard being had to the fact that the first deliverance on the application for sequestration was not made till after the lapse of more than seven months from the date of the death of the party whose estates were sequestrated, the interlocutor of the Lord Ordinary should be adhered to or altered?"

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The hearing took place on 5th December 1856. Rough's trustees pleaded, that their claim was entitled to a preference at common law. A creditor could secure a preference over the moveable estate of a deceased debtor either by confirmation as executor creditor, where no other party had been confirmed executor, or by arresting in the hands of a debtor to the executry.[1]

But the executor confirmed was the true debtor, and the funds to which he confirmed were subject to the claims of creditors of the deceased. There could be no poinding of the estate of a deceased debtor till some executor had taken up the estate, and then a creditor might proceed against him as against his own estate.

The Act 2 & 3 Vict. did not destroy the appellants' common law preference over the estate of the deceased debtor. That Act, for the first time, introduced the right to sequestrate the estate of a deceased debtor, as a mode of administering the estate which was intended to be beneficial. Sections 83 and 84 were the only two which struck against the preference acquired by diligence over the moveable estate of a bankrupt or deceased debtor. Section 84 alone applied to the case of a deceased debtor; section 83 to the case of a living bankrupt, the one being in contradistinction to the other. The provisions applicable to the one did not necessarily apply to the other. The word *bankrupt* was not synonymous with deceased debtor, and the interpretation clause gave no countenance to that construction. But farther, diligence was not used against the funds and effects of a deceased debtor. The funds were not now his funds, but of his executor, and therefore section 84 did not apply here.[2]

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the 84th section provides that where the sequestration of the estates of a deceased debtor is within seven months after his death, no preference by legal diligence within sixty days before his death, or subsequent thereto, shall be effectual in competition with the trustee.

"Founding upon this clause, the appellants maintain that where the sequestration of the estates of a deceased debtor is awarded after the lapse of seven months from his death, as happens to be the case here, all arrestments used by creditors after that period are effectual, although executed within sixty days of the sequestration. The Lord Ordinary cannot adopt this reading of the statute.

"No doubt the preference claimed by the appellants here is not cut down by the 84th section, because the sequestration was not awarded within seven months of the debtor's death. But this does not exclude the operation of the 83d section, which declares that 'no arrestment or poinding executed of the funds or effects of the bankrupt on or after the sixtieth day prior to the sequestration shall be effectual.' It appears to the Lord Ordinary that this general proviso applies to all sequestrated debtors, whether living or deceased, and if this view be correct, the trustee acted correctly in rejecting the appellants' claim to a preference under their arrestments, which were confessedly executed within sixty days of the sequestration."

[1] Benton v. Scott's Trustees, 31st May 1848, House of Lords, 7 Bell's Ap. Cases, 367.

[2] Melville v. Paterson, 1st June 1842, ante, vol. iv. p. 1311.

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The respondent pleaded;—That the present question did not in the least refer to an executor creditor, for there was confirmation by the daughters and the next of kin, which of course excluded all confirmation by the executor creditor. The question was, whether section 83 applied, or, in other words, whether the word "sequestration," used in the clause, included sequestration of the effects of a deceased debtor? The principle of the clause applied equally to the case of a deceased debtor as that of a bankrupt, and throughout this Act sequestration meant sequestration of a deceased debtor as well as of a living bankrupt. There was not one kind of machinery for the one and another for the other. After sequestration, both dead and living debtors were equally called bankrupts.

Do the vesting clauses apply to the case of a deceased debtor or not? If not, how could the trustee ever get vested? If they do, the present question admitted of easy solution; and section 83, which was in truth one of the vesting clauses itself, clearly applied. There was strength in the argument on the other side when considered as an argument on policy, but not on principle.

The consulted Judges returned the following opinions:—

Lord Justice-Clerk.—I concur in the opinion of the Lord Ordinary.

The 83d section of the Bankrupt Act, 2 & 3 Vict. c. 41, is in the following terms:—"And be it enacted, that the sequestration shall, as at the date thereof, be equivalent to an arrestment in execution and decree of forthcoming, and to an executed or completed poinding; and no arrestment or poinding executed of the funds or effects of the bankrupt on or after the sixtieth day prior to the sequestration, shall be effectual; and such funds or effects, or the proceeds of such effects, if sold, shall be made forthcoming to the trustee: Provided that the arrestor or poinder, before the date of the sequestration, who shall be thus deprived of the benefit of his diligence, shall have preference out of such funds or effects for the expense *bona fide* incurred by him in such diligence."

This section is in the most comprehensive terms which could be employed. It makes no exceptions. It begins in the same manner with the preceding—the Vesting Section, "The sequestration." In the 82d section this term applies to any sequestration—to every instance of that process of attaching the debtor's property. The next, the 83d, commences in the same way, and with a substantive general declaration as to the effect of that attachment. "The sequestration shall, as of the date thereof, be equivalent," &c. And then it goes on, "and no arrestment or poinding," &c. The first part of the sentence is general. How can the second part of the sentence be restricted on any warrantable principle of construction to any particular description of sequestration?

The attempt to restrain the operation of this section by the criticism that in the 83d, where arrestments and poindings are noticed, the expression used is "of the bankrupt," while in the 84th, mention is made "of the estates of a deceased debtor," and the argument thereon that *bankrupt* only applies to persons sequestrated during their lives, so as to obtain thereby a limited operation for the 83d section, is wholly unsuccessful. In the first place, the 83d section begins generally, "the sequestration," and the term bankrupt is only brought in subsequently, exactly as in the 82d, where the term is used in necessary reference to all sequestrations. Secondly, The 84th section necessarily used the term "deceased debtor," because it is an enactment specially applicable to that peculiar case, and to a limited class of such cases—viz. sequestration within seven months, in which class the sixty days before death is taken as the date for excluding preference by diligence. Hence the special case was necessarily to be limited in expression to the sequestration of "deceased debtors." Thirdly, The supposed distinction in the statute in point (as alleged) of legal import in the use of the term "bankrupt," and of the term "deceased debtor," is entirely fanciful, and is contradicted by the whole structure and enactments of the statute. The statute begins with two enactments—one for the case of a deceased debtor—the other, for any debtor of the character described—and authorises sequestration in each case. It denominates both classes as debtors. Then, when the machinery of the sequestration is put in motion, they

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are called bankrupts, and very naturally, as the very act of sequestration is declared to be equivalent to notour bankruptcy. And the whole provisions for the conduct, working, administration, and effects of the sequestration of either of such debtors, are contained in one set of enactments—the statute having further, by way of excluding any such criticism or objections as the present, made the following declaration as to deceased debtors a directory to the Court:—"That the Lord Ordinary shall award sequestration, and issue the other orders as herein-before provided in the case of any other debtor, in so far as circumstances will permit; and he shall ordain any successor who has made up a title to, or is in possession of the estate of the debtor, to transfer such estate, so far as liable to the debts of the deceased, to the trustee to be appointed, as hereinafter directed; and, if desired, the Lord Ordinary shall direct diligence to receive evidence to shew that the debtor resided or had a dwelling-house, or carried on business in Scotland at the time of his death, and was then the owner of heritable or moveable estates in Scotland, and was notour bankrupt, or had retired to, and remained in Sanctuary, as herein before mentioned; and if sequestration shall be awarded, such sequestration shall proceed in the same way as in other cases, with the differences necessarily arising from the death of the debtor."

Now, as to the question before us,—viz. the exclusion of preference by diligence obtained shortly before the sequestration, the death gives rise to no difference. After the death of the party, if his debts are not likely to be soon paid off,—if the management is not satisfactory, the probability of a sequestration will soon come to be suspected, before it is actually applied for, and then there may be attempts to anticipate such by arrestments which, (if there is to be a sequestration), should not be allowed, because a few days prior in time, to defeat the intended statutory distribution.

It would be tedious and most unprofitable to go through the statute in order to shew that all the provisions in the one case are applicable equally to the other (with the exception of differences caused by death), under clauses using the general terms,—"the sequestration," or "bankrupt." In truth, the sequestration after death would be wholly unworkable on any other view of the statute.

It was said that the 83d section is not applicable to the case of sequestration of the estates of a dead man, because, on the general construction of the 83d section, adopted by the Lord Ordinary, the effect of the confirmation of an executor-creditor is not struck at. How that matter should possibly exclude the operation of the 83d section as to arrestments and poindings, I am not able to understand. But I notice that sort of conjectural and speculative reasoning on the enactment, merely to say that I do not wish to give any opinion as to the effect of such confirmation, or to anticipate the question which may arise as to the import of the terms of the 14th section, already quoted, in regard to the extent of the estate to be handed over to the trustee by the successor of the deceased, and as to the meaning of the term successor therein employed.

I own I look on the present as a good illustration of the futility of any construction of the general words of a statutory enactment by general conjectural reasoning, and of the necessity of refusing to listen to any such mode of dealing with legislative provisions.

Lord Neaves.—I am of opinion that the interlocutor of the Lord Ordinary ought to be adhered to.

I am unable to construe the 83d section of the Act 2 and 3 Vict., c. 41, in any other way than by holding that it applies to sequestrations both of living and of deceased debtor's estates, and that in all cases the awarding of such sequestration is to render ineffectual any poinding or arrestment of the debtor's effects, executed within 60 days before the sequestration. I consider that "the sequestration" referred to in the beginning of the clause means any sequestration under the Act. I conceive also that the executry funds are still, in the sense of the Act, funds or effects of the deceased debtor, as being attachable for his debts, and as not being the private or individual property of the executor, even when confirmed. And, finally, in reference to the word "bankrupt," I find it repeatedly used throughout the Act, in the most important clauses, to include a deceased debtor against whom sequestration has been awarded, and whose estate, in the supposed case of competition, may [illegible] be regarded as bankrupt or insolvent. On these grounds, as

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well as in reference to the general purpose of the Act to favour equalisation among creditors where a sequestration ensues, I consider that the clause in question must be construed in its most comprehensive sense.

I think that the 83d and 84th sections are in perfect harmony with each other. By the 83d section, as I conceive, all sequestrations, whether of living or of deceased debtors, operate to cut down preferences obtained by certain diligences within 60 days before the date of the sequestration. By the 84th section, where the sequestration is awarded of a deceased debtor's estate within seven months after his death, there is a further retro-active effect produced, extending to the period of 60 days before the death of the debtor, which additional protection was necessary or reasonable in consequence of the incompetency of such sequestrations, till six months after the death. The ordinary equalisation produced by the 83d section seems nowise inconsistent with the more extensive and special equalisations produced by the 84th section.

Lord Cowan.—I am of opinion that the interlocutor of the Lord Ordinary ought to be adhered to, and have no difficulty in concurring in the reasoning in the note by which it is supported.

The 83d and 84th sections of the statute have in view that equalisation which it was the object of the legislature to introduce, in regard to all sequestrated estates. They are continuous parts of the statutory provision for that purpose, and regulate in that respect the effect of sequestration when awarded. The 84th section is not a separate and distinct enactment, unconnected with the 83d. On the contrary, the special case with which it deals is obviously annexed by way of proviso to the general enactment which it follows and qualifies. In sound construction, as it appears to me, the 84th section requires to be so read.

I am not moved by the argument that the diligence of confirmation, *qua* executor-creditor, is not in express terms mentioned in the 83d section. Any difficulty which may be felt in disposing of such a case, when it does arise, ought not to affect the question now before the Court, which, in my opinion, is free of difficulty, as well upon the special sections more particularly for consideration, as upon the whole provisions and general object of the sequestration statute.

Lord Benholme.—I concur in the opinion of Lord Cowan. And, in addition to the observations contained in it, I have only one remark to make, in reference to the argument of the appellants, founded on the use of the word *bankrupt* in the 83d section of the statute.

It appears to me, that throughout the statute, the word *bankrupt* is used to denote the party whose estate has been sequestrated; whether that party is alive or dead, and whether notour bankruptcy has, or has not been founded on, as the ground of the sequestration. And such use of the expression is explained and justified by the consideration that the implication of insolvency is at the bottom of the statutory remedy. Sequestration is intended as a means of dividing an insolvent, and not at all of administering a solvent estate. All its details are devised with reference to this object; and by section 93, no other proof of bankruptcy, except the act of sequestration, is required, in order to establish the competency of a judicial sale.

In proof of the opinion I have thus expressed as to the meaning of the word *bankrupt* in the statute, I need not refer in detail to the various sections which were noticed at the debate. Perhaps no section could, for this purpose, be referred to more appositely than the 3d or interpretation clause, in which the sequestrated "estates" are defined to mean the various properties of "the bankrupt." But the question itself, and the details by which it may be conclusively solved, have been already so fully stated in the note affixed to the judgment of the Lord Ordinary in the case of Lord Melville v. Paterson, 1st June 1842, that I hold it to be superfluous to do more than to refer to that masterly exposition.

Lord Handyside.—I concur in the opinion of Lord Cowan, with the addition made by Lord Benholme.

Lord Murray.—I am of opinion that the interlocutor of the Lord Ordinary is right.

The bankrupt statute introduced the novelty of sequestrating the effects of debtors deceased. The Legislature must have been convinced that evils arose from mal-administration of the effects of deceased persons whose creditors had not been

able to receive payment of their debts, and that sequestration of the effects of deceased debtors was the proper remedy. It was certainly no easy matter to incorporate the procedure applicable to the estate of a person who has died, without any previous act of insolvency, with the usual procedure in cases of ascertained bankruptcy. No person can, however, read the clauses with regard to the sequestration of deceased debtors without being satisfied that it was the intention of the Legislature to apply to the estates of deceased debtors all the rules of ordinary sequestrations which were applicable to that case. This intention is clearly expressed in the statute.

LORD ARDMILLAN.—I concur in the opinion of the Lord Ordinary.

The question must be disposed of on consideration of the statute (2 & 3 Vict. cap. 41), both in its several clauses and in its general scope and principle. The construction of clauses, in themselves broad and unequivocal, by conjectural and speculative reasoning from the phraseology of a different clause, is hazardous, and ought not to be lightly adopted. The 83d section is clear and comprehensive, and is in accordance with the general scope of the statute, and, with the principle of equalisation which pervades the bankrupt law; "no arrestment or poinding executed of the funds or effects of the bankrupt, on or after the 60th day prior to the sequestration, shall be effectual."

These words are plain; and there is nothing within this section which can be fairly read as limiting them to the case of sequestration of living debtors. Nor is there anything in the other clauses of the statute which supports such limitation. The 4th section authorises sequestration of the estates of a deceased debtor; the 14th section provides, that in the case of sequestration of the estate of a deceased debtor, "such sequestration shall proceed in the same way as in other cases, with the difference necessarily arising from the death of the debtor;" and accordingly the words, "the sequestration," are throughout the Act applied equally to the case of living debtors and of deceased debtors. Again, the 25th section declares that "the awarding of sequestration shall render the debtor notour bankrupt;" and the word "bankrupt" is used to denote persons sequestrated, without distinguishing whether the sequestration of the estate be while the debtor is alive or after his decease. It is so used in the 31st, 33d, 34th, 37th, and other sections, and particularly in the vesting clauses,—the 78th, 79th, 80th, and 82d sections. I concur with the Lord Justice-Clerk in thinking that the statute, so far as regards sequestration of the estates of a deceased debtor, "would be wholly unworkable on any other view."

Then, is this construction of the 83d section to be set aside on account of the provisions in the 84th section? I think not. The 83d section applies to all sequestrations under the statute, whether of the estates of living debtors or of deceased debtors. It is comprehensive and unqualified, and contains no exception. The 84th section applies, not to all cases of sequestration of the estate of a deceased debtor, but merely to such sequestrations when "within seven months of his death."

It has a special and limited application, and it does not, in my opinion, impair the generality of the immediately preceding section.

The present case is not within the 84th section, but is within the 83d; and no conjectural argument from the 84th section, which does not apply, can legitimately guide the construction of the 83d section, which does apply. It would require very clear expression to support a construction which would frustrate the Act, so far as it applies to deceased debtors. But on what footing are the appellants here? There is no trustee here,—no vested estate in his person,—no claim in the sequestration by the appellants, except under this statute, as applicable to the case of a deceased debtor, and on a construction of the words, "the sequestration," and "the bankrupt," in many of the clauses of the statute, which is fatal to that reading of these words in the 83d section, for which the appellant now contends.

LORD MACKENZIE.—I adhere to the opinion I formed of this case when it came before me as Lord Ordinary. I agree with Lord Neaves in thinking that the executry funds are still, in the sense of the Act, funds or effects of the deceased debtor, as being attachable for his debts, and as not being the private or individual property of the executor, even when confirmed. In the most important clauses of the Act, the word *bankrupt* is used so as to denote or include a deceased debtor whose

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estate has been sequestrated; and this cannot be better illustrated than it is in the elaborate note of the Lord Ordinary in the case of Melville v. Paterson, 1st June 1842. And it may not be out of place to remark that the word *bankrupt* is repeatedly used by the appellants in the same sense in the affidavit lodged by them in this sequestration; and, in claiming a preference in virtue of their arrestment, they treat it as a security held by them over the estate of the bankrupt.

At advising,—

Lord President.—The opinions of the consulted Judges virtually decide this case. I do not mean to detain the Court with any observations, for my opinion concurs with that of the Lord Ordinary, and consequently with that of the consulted Judges; and the grounds are substantially the same in all of them. Therefore I merely say that I am for adhering.

Lord Ivory.—I am very unwilling to express any doubt or difficulty in reference to a case in which the Court seems to be so unanimous against the view that raises the doubt in my mind. I do not mean to go into the grounds of my doubt at any great length; but after considering the opinions of the consulted Judges, these have not been entirely removed. I say that with diffidence; for I cannot but suppose, with the weight of authority against me, that there cannot be any substantial ground for my difficulty. When the question was sent to the consulted Judges, we were under another statute from that which now operates; and it was not so much that the Court had come to a substantial difference of opinion that the consultation was suggested, but because it was a question of novelty—the decision of which would establish a binding rule under the statute, and therefore it was desirable that such decision should be expressed authoritatively. Since that time there has passed a new statute; and therefore had we been in the situation in which the case stands at present, I do not imagine we would have troubled the rest of the Court on the point, for its importance is gone as a question of general application under the former statute. My object now is to keep myself open for reconsideration of the question when it shall arise under the new statute. But under the old statute the question has lost its importance. Still it is of weight as regards the interest of parties; and as it must be disposed of, I am pleased that the Court have seen their way to the view they have taken; for it goes to introduce an equitable principle, which, if it swerves from the statute at all, is on that side which will perhaps result in more substantial justice than a more rigid adherence to the statute would have done.

But taking the case as it stands, there are certain dates necessary to be kept in view as raising the elements of the question. Mr Rough died in April 1853. There were executors confirmed on 30th June 1853; and the effect of that confirmation was in law to take the estate of the deceased debtor *ex bonis defuncti*, and vest it by legal title in the executors, as trustees to certain effects for the creditors of the deceased; and also, after the lapse of a certain time, so much in their own persons, that their own creditors by a certain form of diligence might attach it. The arrestments we have to deal with were used in June 1855, and were directed against the executors as executors on the estate, and with the view of taking away the estate so vested in them, but not to take it *ex bonis defuncti*. Sequestration took place within sixty days of that arrestment, but two years after the date of the confirmation of the executors. Are these arrestments cut down as being within sixty days of the sequestration of the deceased debtor?—and that question has arisen on the construction mainly of the 82d and 83d sections of the statute.

In the opinions of the consulted Judges, this difficulty is dealt with as if it depended solely and exclusively on the meaning of the words *sequestration* and *bankrupt*. But it appears to me that the difficulty lies a great deal deeper. It would have ill become me to raise difficulties as to the meaning of the word *bankrupt* after my own decision in the case of Melville,[1] where I was at great pains to apply the canons of construction set forth in the opinions of the consulted Judges, and therefore I would not, so far as that case goes, have been disposed to differ from their Lordships. But I think that they have missed the pith of the difficulty, which still remains precisely where it appeared to me to lie before consultation.

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[1] 1st June 1842, ante, vol. iv. p. 1311.

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My *ratio dubitandi* lies in a different direction. The arrestments in dispute are not arrestments of the estate of the deceased debtor. The arrestments are not of an estate vested in the bankrupt—at least they are not so in the proper sense of the statute, or any part of it. They are arrestments of a portion of what was originally his estate. But that portion was taken out of the estate of the deceased debtor by proper diligence of law, and, no longer remaining in *bonis defuncti*, was vested in the executors, apart altogether from the deceased debtor. So much is this the case, that before the statute, after confirmation by an executor, arrestment would not have been a *habile* mode of attachment. The estate, after the death of the deceased debtor, could not have been so attached. It must have been attached in the shape, either of a previous confirmation of the executor, or, if afterwards, then by action and diligence against the person of the executor. But, in a competition between arrestment used after the death of the debtor, and the confirmation of an executor-creditor of that debtor, there could not have been a question that the arrestment would have been wholly inhabile as a legal diligence, and therefore not good or effectual as in a competition.

Now, looking to section 83 of the statute, my difficulty is, whether these arrestments, with which we are dealing, can by any possibility be other than what would have been good as against the estate of the deceased debtor? If not good, they would not have come into competition. The whole assumption of the enactment is that they are arrestments applicable to the estate of a debtor, which could be effected by diligence of arrestment; and what makes me more decided in that view of the matter is, that, when I go back to the previous statute, I find that its words are identical with those here used, and at that time sequestration of the estate of a deceased debtor was unknown. Under section 40 of the 54 Geo. III. there is no difficulty in seeing what the enactments have reference to; and when that clause is almost verbatim repeated in the present, without anything to betoken that the Legislature meant to apply the word "arrestment" to arrestment of a different character,—the fair construction is, that it was to be the same kind of arrestment as in the previous statute.

Every portion of the operative words in sect. 83 are contained in the previous statute, before sequestration of a deceased debtor was introduced; and I see no ground for the presumption that it was the intention of the Legislature to give the words in that section a more extended application than in the previous statute. Both statutes seem to have reference to the case in which arrestment could be a habile diligence. There is no reason given in this statute for extending it further to a new kind of arrestment never before known in law. The arrestments dealt with are those used in the life of the debtor; and, accordingly, the recent statute is utterly silent as to what was habile diligence against the estate of a deceased debtor,—the diligence of an executor-creditor. Now, it is a strong thing to say, that when these words in a statute of limited meaning are repeated in another statute which does not say it intends to introduce a new kind of arrestment never before recognised, and is silent as to the only form of diligence by which it was heretofore held competent to attach the moveable estate of a debtor deceased,—the confirmation of an executor-creditor,—it is a very strong thing to say that, under such a clause, you are inferentially to construe the words "arrestment of the estate of a debtor" in a way which no lawyer had previously ventured to do. Section 84 follows upon this, and deals with the confirmation of an executor-creditor, and with all the cases of diligence used within certain periods before and after the debtor's death. I think, therefore, that, between these two clauses, you have the whole that the statute meant to deal with. In the first place, it deals with arrestments used at the only competent time they could be used, viz., in the lifetime of the debtor. In the next place, it deals with preferences used within the periods mentioned in section 84. It gives no other period for equalisation, and these two clauses distinctly apply;—the one to a deceased debtor, and the other to a living debtor. Section 14 also is important in reference to this point.

Now, in these two statutes it is plain that the Legislature, with reference to the words [illegible] perfectly cognisant of the distinction between arrestment and confirmation of an executor creditor; that they applied each to a different state of matters, [illegible] being applicable to the case of a debtor who was alive, and confirmation [illegible] his death; and that forms an additional element to satisfy me

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that in construing this statute I am not to force upon it a sense which the Legislature itself seems to exclude by drawing this distinction between these two forms of diligence. This view is not in the least inconsistent with the opinion of any of the consulted Judges, but only with their result. It is not inconsistent with these reasons, viz., that the word "bankrupt" includes the estate of a deceased debtor, and that the word "sequestration" may apply to the one case as to the other. But then it lets in this consideration, that where the words do not necessarily bring it within that case, and where there is nothing discordant between applying the law of diligence as it used to be understood, and holding that the arrestments with which the statute is dealing cannot exist in the one case, and are the only arrestments which can exist in the other;—in the one case, confirmation of an executor-creditor is excluded, but not more so than arrestment of the estate of a deceased debtor is by section 83.

It might then be said that both clauses might apply to particular cases. Suppose the sequestration had been applied for the day after the debtor's death, and that the first deliverance had been a week after his death, there might have been arrestment within the sixty days, and there might have been diligence within so many days before the death—then both clauses would have come into operation; and I am still unable to satisfy my mind, in the absence of express words, that the distinction I have drawn is not sound. So far as the policy of the statute is concerned, I doubt whether that is a proper element for judicial consideration. But as illustrative, I can understand reasons for equalising the estate of a debtor, which will not, however, apply years after the debtor is dead. My opinion, however, cannot affect the judgment in this case. I am only anxious to keep myself open to reconsider the point when it arises.

Lord Curriehill.—The arrestment in dispute was executed on 14th April 1855; and the defunct debtor's estate having been sequestrated within sixty days thereafter, viz., on 12th June 1855, the question is, whether or not that arrestment is exempted from the operation of the enactment in the 83d section of the statute 2 & 3 Victoria, c. 41, that no arrestment or poinding of the funds of the bankrupt, used within sixty days before the date of the sequestration, shall be effectual?

No such exemption is expressed in that enactment. The sequestration of the estates of defuncts is expressly authorised in the preceding part of that statute; and the term "the sequestration," in the 83d section, is *prima facie* as applicable to this kind of sequestration as to the other kinds. These other varieties of sequestration are four in number, viz., (1,) Of the estate of a trader when applied for by himself, with the concurrence of one or more creditors of a certain amount; (2,) Of the estate of a trader who has retired to the sanctuary for a certain period; (3,) Of the estate of such a trader who is rendered a notour bankrupt, when it is applied for without his consent by such creditors; and (4,) Of the estate of a trading company; and the 83d section makes no distinction between the sequestration of the estate of a defunct and these other four varieties of the sequestration, in the provision that the sequestration shall produce such a retrospective effect on the diligence of arrestment or poinding used within sixty days before its date.

The context of the statute confirms this literal and *prima facie* meaning of the enactment. Throughout the statute, the phrase "the sequestration," is used as meaning all these varieties, except in cases where the meaning is expressly limited to one or more of them. In particular, the phrase is so used as including the sequestration of estates of defuncts. This has been illustrated very clearly in the opinions of the Court in the case of Lord Melville, 1st June 1842, to which I refer.

Moreover, the policy of this statute, and of the prior Bankrupt Statute 54 George III., which is thereby corroborated, is to equalise the ranking of creditors of insolvent estates, and, for that purpose, to cut down preferences attempted to be acquired by individual creditors, by means either of voluntary deeds of the debtors, or of legal diligence by the creditors, after, or within sixty days before, such public acts as are held in law to render the insolvency notorious. The acts of this kind are twofold,—the one being notour bankruptcy, produced by the proceedings set forth in the statute 1696, c. 5, and in the above mentioned statute 54 George III.; and the other being sequestration, whether or not accompanied by notour bankruptcy. Before sequestration of the estates of defuncts was introduced, there

were no means of working out such equalisation in reference to their estates, because there were no means of either rendering them notour bankrupts or of sequestrating them after their death. This was felt to be a defect in carrying out the policy of our law, and Professor Bell (Com. II. 88) desiderates a remedy for that defect. The Act 2 & 3 Victoria, which passed soon afterwards, supplied that desideratum by extending the process of sequestration to the estates of defuncts, and by enacting in unqualified terms that "the sequestration" should have this equalising effect. And not only is it an elementary canon of construction that the terms of a statute, even when they are ambiguous, are to be construed in the sense most conformable to the policy of the Act; but further, the 3d section of this statute expressly directs us to construe it "in the most beneficial manner for promoting the ends hereby intended."

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The main grounds upon which a different meaning is sought to be put upon this enactment, are that the arrestments to which it refers are described as being arrestments of the funds of the bankrupt, whereas a sequestration of a defunct's estate is competent, without any bankruptcy; that while the sequestration dealt with in the 83d section is a proceeding operating as a general arrestment or poinding of the estate for behoof of the creditors, the funds of a defunct debtor are not arrestable or poindable for his debts, and are attachable only by a confirmation *qua* executors creditors; and that the legislature, although it had this latter kind of diligence in its view, as appears from the 14th and 84th sections of the statute, did not expose it to the retrospective operation of the 83d section. But these considerations do not warrant the inference that sequestration of estates of defuncts is exempted from the operation of the 83d section.

If the enactment were held not to apply to any arrestments or poindings of parties who are not bankrupt in the technical meaning of that phrase, then the numerous sequestrations issued on the application of the debtors themselves, and also the sequestrations issued of the estates of debtors, in respect of their retiring to the sanctuary, would be exempted from the operation of this enactment, because bankruptcy, in this sense, is not necessary to render such sequestration competent. But arrestments and poindings of the estates of such debtors, although they are not bankrupt in that sense, are cut down by the retrospective effect given to sequestrations of their estates; and the term bankrupt is throughout the statute used as meaning merely the party whose estate is sequestrated. This also was very clearly demonstrated in the opinions in the case of Lord Melville already referred to.

Even if the funds of a defunct were not attachable by arrestment, this would be of no avail in this question, because the enactment does not render the sequestration a new species of arrestment, but only provides that it shall be *equivalent* to arrestment in its effects. But this argument proceeds upon a mistake. By the common law, the funds of a defunct, whose executor has been confirmed, are attachable by arrestment; *vide* The Globe Insurance Company v. Mackenzie, 31st May 1838, affirmed on appeal, 5th August 1850. And farther, since the date of the statute 4 Geo. IV. c. 98, the funds of a defunct, even where no confirmation of them has been expede, are attachable by the diligence of arrestment, as was decided in the case of Frith v. Buchanan, 3d March 1837. And as when the statute 2 and 3 Victoria, c. 41, was passed, the moveable funds of defuncts were attachable by arrestment, there is no incongruity in holding that that part of the 83d section, which declares in general and unqualified terms the sequestration to be equivalent to a general arrestment for behoof of the creditors, includes sequestration of the estates of defuncts. And holding that part of the enactment to include such sequestrations, the same expression, when repeated in the same general and unqualified terms in the same clause, and, indeed, in the very same sentence, cannot fairly have a different meaning put upon it.

The inference, again, from confirmation as executor creditor not being cut down retrospectively, as well as the diligence of arrestment and poinding, would have little weight, even if no good reason for the distinction could be suggested; because this enactment, even if the legislature had overlooked such confirmations in framing it, must receive effect so far as it goes.

But a confirmation as executor creditor is a proceeding which is *sua natura* different from the diligence of arrestment or poinding. The object and effect of such diligence is to confer upon the creditor using it a preference over the other

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creditors upon the funds so attached. But a confirmation as executor creditor, although commenced at the instance of an individual creditor, is a proceeding in the benefit of which all the creditors may participate, by appearing and being conjoined with the raiser. This is the nature of the proceeding as stated by Erskine, iii. 19, 34, and exemplified in the case of Lee v. Jones, 17th May 1816, F. C. Such a proceeding is thus in effect a species of process of distribution, although what is distributable among the creditors is the fund itself, instead of its proceeds realised by its being uplifted or sold. And ample provision is made for giving the other creditors notice to appear and obtain the benefit of such participation. First of all, an edict is published under the authority of the Commissary-court, which, as Erskine states (iii. 9, 31), "serves as an intimation to all concerned that they may appear in court on a particular day, specified in the edict." And farther, by the statute 4 Geo. IV. c. 98, already mentioned, it is enacted, "that notice of every application for confirmation by any executors creditors shall be inserted in the Edinburgh Gazette at least once immediately after such application shall be made, in evidence whereof a copy of the Gazette in which such notice shall have been inserted shall be produced in Court before any such confirmation shall be farther proceeded with;" and farther provision for this publication is made in the 9th section of the relative Act of Sederunt as to the Commissary-court of 12th November 1825. Thus, means similar to those which are prescribed by the bankrupt statutes for bringing forward creditors to rank in sequestrations, are also prescribed for bringing them forward for ranking in such confirmations. If all of them do come forward and obtain their rateable shares of the confirmed fund,—or, in other words, obtain in this form their fair dividends,—it would be unreasonable, in the event of their debtor's estate being sequestrated at any time thereafter, to compel them to relinquish this dividend to the trustee, in order merely that he might divide among them a second time the same funds, diminished by the expense of such an unnecessary and vexatious proceeding. And if any of them should fail to come forward and obtain a participation in that process of division, the blame would lie with themselves; and there would be no more reason for undoing such a division than there would be if it had taken place in a sequestration. Whether or not this difference between confirmation as executor-creditor, and the diligence of arrestment and poinding, was the reason why the Legislature did not include the former as well as the latter under the retrospective operation of the 83d section of the statute, can only be matter of conjecture. But, at all events, considering the nature and effect of a proceeding of the former description, it is easy to understand why the idea of cutting down such a proceeding may never have even suggested itself to the Legislature. And the circumstance that a completed proceeding of that kind is not interfered with, is no reason for inferring that sequestration of the estates of defuncts is exempted from the general unqualified enactment that the sequestration shall level such arrestments and poindings of the funds of the bankrupt as are used within sixty days of its date.

Lord Deas.—I am not prepared to say that the difficulties which were suggested by Lord Ivory at consultation have been very satisfactorily met in the opinions of the consulted Judges. But there are difficulties both ways, and, upon the whole, I agree in the result at which the consulted Judges have arrived. The main object of the hearing was to have an authoritative construction of the enactment in question; and, this being now attained, I do not think it necessary to go into the precise grounds upon which I concur in the construction which will now fall to be sanctioned.

The Court pronounced the following interlocutor:—"The Lords having resumed consideration of the cause, in pursuance and in respect of the opinions of the majority of the whole Judges, Refuse the desire of the reclaiming note, No. 13 of process, and adhere to the interlocutor reclaimed against: Find the appellants liable in additional expenses; allow an account thereof to be given in, and remit to the Auditor to tax the same, when lodged, and to report."

Mackay & Howe, W.S.—John Rogers, S.S.C.—Agents.

JOHN BANAGHAN, Pursuer.—*Pattison*—*F. W. Clark.*
JOHN SMITH, Defender.—*Penney*—*Moncrieff.*

No. 74.

Jan. 23, 1857.
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2D DIVISION.
Lord Neaves.
R.

Reparation—Relevancy.—Allegations which held relevant to support a claim of damages.

BANAGHAN, a cotton-waste dealer in Glasgow, pursued John Smith for damages on the following allegations:—"Early in the morning of the 15th December 1854, and about seven o'clock thereof, it being quite dark, the pursuer was aroused from his sleep by a heavy and violent knocking or kicking at the door and window of his house, and which was heard at a considerable distance in the neighbourhood. At the same time, his window-shutter was taken off by the defender, or his associate, Robert Aitken, who then accompanied him. The pursuer not knowing what was meant by these violent proceedings, was thrown into a state of great alarm. The kicking and knocking continuing unabated, the pursuer became seriously alarmed that the door would be broken open, and he was obliged to rise, naked as he was, from his bed, and open it, which was no sooner done than the defender, John Smith, manager for Messrs Aitken and Company, with Robert Aitken, one of the partners thereof, who were the parties who had assailed the house in such a violent manner, pushed in and charged the pursuer with having cotton-waste or other rags belonging to them in his possession. This the pursuer denied. But, notwithstanding of his denial, they demanded a light, and, on obtaining it, they, without any sanction or authority on the part of the pursuer, searched and ransacked the whole premises minutely over, examining every hole and crevice of his house, and maliciously conducted themselves in such a manner as was tantamount to charging him with theft or reset of theft, to the great injury of his feelings. They then left his house. The defender and the said Robert Aitken produced no warrant for searching the premises or attempting to break open the door, and had in fact neither warrant nor authority for so doing. The pursuer being an old man, in consequence of being obliged to stand in his night dress, caught a severe cold."

The Lord Ordinary pronounced the following interlocutor:—"Finds that the summons and record contain allegations relevant to support the pursuer's claim of damages, so far as rested on the ground that the defender, on the occasion libelled, violently entered and searched the pursuer's house, without any warrant or authority, with a view to the discovery of articles or property said to have belonged to him, or to Messrs Aitken and Company, and to that extent repels the defender's second plea in law, and appoints parties respectively to prepare and lodge draft of such issues and counter issues as they propose for the trial of the cause." *

In a tentative issue lodged, there was no allusion to injury to character.

The defender reclaimed.

LORD JUSTICE-CLERK.—It would be very strange were we to dismiss this action. They say in England that a man's house is his castle; and although a search is much more easily made here than in England, no man is entitled to force his way into a house in this way without a warrant. The allegations about catching cold seem mere nonsense; but the interlocutor of the Lord Ordinary seems quite right.

THE COURT adhered.

W. A. G. & R. ELLIS, W.S.—J. Y. PULLER, S.S.C.—Agents.

* "NOTE.—This may or may not be a frivolous action, and it has certainly not been libelled and maintained upon any clear or consistent grounds. But the Lord Ordinary thinks that there is enough of relevancy to support the action to the extent referred to in the interlocutor.

"From the tentative issue given in, it does not appear that the pursuer now means to insist on a claim of damages as for a charge of theft. If he meant to do so, the Lord Ordinary would consider this ground of action to be excluded, as although it is founded on in the summons, there seems to be no substantive or sufficient statement on that head in the record."

No. 75.

Jan. 27, 1857.
Carron Co. v. Stainton.

THE CARRON COMPANY, Pursuers.—*Penney—Moir—Mackenzie.*
HENRY TIBBATS STAINTON AND OTHERS (Stainton's Representatives), Defenders.—*Lord Adv. Moncreiff—D. F. Inglis—Young.*

Foreign—Jurisdiction—Refusal to sist an action pending a suit between the same parties in England.—A Scotch company having agents and offices in England, brought an action in Scotland against the representatives of a former agent in England to recover a debt claimed by them, and to obtain a security upon the real and personal estate of the deceased in Scotland. A decree for the administration of the testator's estate having been made in England, the Court of Chancery granted an injunction to restrain the company from continuing the action in Scotland, but upon appeal the order was discharged.

The company then brought another action in Scotland, and another suit having been instituted against the company in England, in which they appeared, the pursuers in that action alleging that the company had acquiesced in the English proceedings, asked for an injunction to restrain the action in Scotland, but it was refused;—*Held* (affirming judgment of Lord Mackenzie), that the jurisdiction of this Court being undoubted, there was no sufficient reason for sisting proceedings in order that the question might be tried in the Court of Chancery, as the most proper and convenient forum.

1st Division.
Ld. Mackenzie L.

The facts of this case were stated by the Lord Ordinary in his note:—

"The Carron Company was incorporated in Scotland, by Royal Charter, on 15th July 1773, and had several places of business in England, under local managers. Henry Stainton was their manager in London from 1808 to the 5th December 1851, when he died, domiciled in England. Besides considerable property in England, he possessed a landed estate and personal property in Scotland; and, in particular, he held 101 shares in the Carron Company, valued at upwards of L.70,000. The defenders, as his trustees and executors, proved the will in England, and on 12th July 1852 they were confirmed executors in Scotland—the moveable property given up in the inventory amounting to L.82,542.

"After Mr Stainton's death the Carron Company insisted that he was indebted to them for L.69,617, 1s. 6d., exclusive of interest, upon his accounts, as their agent, from 1825 to 1851. The company likewise claimed a right to hold his shares of their stock as a security for the sums alleged to be due to them from his estate under their charter, which provides, that if any of the partners should become debtor to the company, his shares were to be subject to the payment of his debt to the company in priority to any other creditors. When this claim was preferred the defenders instituted an administration suit in Chancery, and, in May 1852, the usual decree was made for taking accounts.

"In October 1852 the pursuers raised an action against the defenders in this Court, for payment of the sum alleged to be due to them, but although the summons was executed it was not called in Court, and fell, by the lapse of year and day, in consequence of an injunction obtained by the defenders from the Master of the Rolls, on the 15th November 1852, restraining the pursuers from proceeding with the action in Scotland. A motion to recal the injunction was refused by the Master of the Rolls, but on an appeal by the pursuers, the House of Lords dissolved the injunction on 11th July 1855.—5 H. L. Cases, 416; 24 Law Journal Reports (N.S.,) Chanc. 620.

"In the meantime some other proceedings took place in the administration suit. The pursuers, without prejudice to the appeal, made a claim before the Master in respect of their debt; but they declined then to prosecute it, and it was disallowed for want of prosecution. In February 1854 while the appeal was still in dependence, the defenders instituted another suit in the Court of Chancery against the pursuers, having for its object to compel a transfer of the shares of the Carron Company held by Mr Stain

ton at his death; and the pursuers appeared and defended themselves against that demand, but under a full reservation of their right to prosecute their claims in Scotland. On 17th July 1855, immediately after the injunction was dissolved by the House of Lords, the pursuers commenced a new action against the defenders in this Court, by a summons, concluding for payment of the sum of L.69,617, 1s. 6d, with interest; and this was afterwards conjoined with a supplementary summons, raised on 29th January 1856. Another attempt was made by the defenders to stay these proceedings in Scotland. With that view the defenders, in November 1855, founding on the second suit instituted by them regarding the shares of the Carron Company, applied to the Master of the Rolls for an injunction to restrain the pursuers, either absolutely, or from taking any proceedings other than such as might be necessary to obtain such security or priority as they might be entitled to by the law of Scotland; but that motion was refused, and an appeal having been taken by the defenders, the judgment of the Master of the Rolls was affirmed, with costs, by the Lord Chancellor and the Lords Justices, on the 18th December 1855.—(26 Law Journal Rep. p. 191.)

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"Notwithstanding these repeated failures to obtain an injunction in England, the defenders now maintain, that although the jurisdiction of this Court is undoubted, the proceedings should be stayed, in order that the question may be tried in the Court of Chancery, as the most proper and convenient *forum*. But the Lord Ordinary is humbly of opinion that no sufficient grounds have been stated to justify that course here."

The first and second pleas for the defenders were as follows:—"1. The present action is incompetent, or at least ought to be sisted, in respect of the dependence in the Court of Chancery of a suit for the administration of the estate of the late Mr Stainton, who was a domiciled Englishman, and for the settlement of all debts and claims against said estate, and in which suit the pursuers have already appeared, and made the present claim the subject of discussion and adjudication; and in respect also of the dependence in the same Court of Chancery of another suit for transfer of the shares, and for the accounts and payments specified in article 4 hereof, to which last-mentioned suit the pursuers, the Carron Company, are parties defendants, and have appeared and answered, and taken other proceedings therein. 2. At any rate, as the pursuers are in a position to prosecute the present claim in the suits now in dependence in the Court of Chancery for the administration of the estate of Mr Stainton, and the settlement of all claims against it, and for transfer of the shares, and for the accounts and payments aforesaid, and a number of the documents and papers connected with said estate, and with the matters embraced in the present action, being already produced in the said suits, and the witnesses acquainted with the facts and circumstances connected with the London agency of the Company being principally resident in England, the present action is incompetent, or at least highly inexpedient and inequitable as against the defenders, and they ought not to be called upon in this Court to answer the claims made in the present action."

The Lord Ordinary pronounced the following interlocutor:—"Repels the two first pleas in law stated in the record by the defenders: Appoints the case to be put to the roll, in order that parties may be heard on the points which remain to be determined; and, in the meantime, reserves all questions of expenses." *

* "Note.—After hearing a very able argument, the Lord Ordinary has no doubt that this Court has jurisdiction to entertain and give judgment in this action; and he thinks no sufficient grounds have been stated by the defenders for staying the proceedings, in order that the matters in dispute may be tried in the Court of Chancery in England.—(His Lordship then narrated the facts as above quoted.)

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The defenders reclaimed, and pleaded;—That this action should be sisted till the issue of the proceedings in Chancery; when, if the pursuers obtain decree, they can appear and get the full benefit from it.

"This is not an action calling upon the defenders for a general accounting for their intromissions as executors. Neither is it brought by a party claiming as a beneficiary under the will. It is an action by the Carron Company, established by Royal Charter in Scotland, to recover payment of a particular debt alleged to be due them by the representatives of Mr Stainton, who acted as their agent in London. In this respect the present case differs entirely from Brown's Trustees, 17th December 1830; Macmaster, 17th June 1834; and Munro, 4th July 1839,—being the decisions principally founded on by the defenders.

"Again, the defenders are not only possessed of a landed estate in the county of Stirling, which belonged to Mr Stainton, but they have been confirmed as his executors in Scotland, having given up in the inventory the shares of the Carron Company and other personal property, to the value of L.82,542. So far as regards these funds the defenders may be regarded as Scotch executors, and this element was held to be of great importance by the Court in deciding the case of M'Morine, 16th January 1845 (7 D. 270). No doubt Mr Stainton was domiciled in England, and his executors reside there. But as a large portion of the executry funds have been confirmed in Scotland, where the Carron Company carry on their business, it would be a very strong step to prevent them from proceeding with this action, the object of which is to operate payment of a particular debt out of the funds in Scotland, and particularly out of the shares of their own company, over which they claim a security by retention, in virtue of the provisions in their charter of incorporation.

"Another important specialty in the present case is, that it is not pretended by the defenders that there is any competition among the creditors of Henry Stainton, so as to render any administration suit in Chancery necessary so far as they are concerned. When an English executor is called to account by a creditor in Scotland, it is frequently urged as a reason for staying the proceedings, that he is not in safety to pay till all the claims against the estate are known; that he cannot call the English creditors into Court here; and that the Courts of England will settle the order of preference rightly for all concerned. Such was the argument used by an English executor, though unsuccessfully, in the case of Campbell, 2d March 1809 (Hume's Reports, p. 258). But there is no reason for any such argument here. For in answer to article 3 of the defenders' statement, the pursuers aver, 'that with the exception of the present pursuers, there are no known creditors of the deceased.' And the defenders, on their part, admit, 'that the explanation in this answer is substantially correct, except the statement that the pursuers are creditors of the deceased, which is denied.' Hence the administration suit in Chancery appears to have been instituted not for the protection of creditors, but for the benefit of parties claiming under the testator's will, and the interests of such parties ought not to be allowed to interfere with the rights of creditors. These observations apply with equal force to the second suit instituted by the defenders in Chancery for a transfer of the shares of the Carron Company, in February 1855, before the appeal against the injunction had been determined by the House of Lords. This second suit was long subsequent to the original action raised by the pursuers in this Court in October 1852, which was discontinued and rendered abortive solely in consequence of the injunction; and as the House of Lords discharged that order and declared that the Carron Company ought not to have been restrained from going on with their proceedings in Scotland, it appeared to the Master of the Rolls that the pursuers should now be placed as nearly as possible in the same situati[on] in which they would have stood if no such order had been pronounced, and t[hat] the new action commenced by them in Scotland 'must be treated exactly as i[f it] were the old action still subsisting.'

"As the case stands, it appears to the Lord Ordinary that the defenders h[ave] completely failed to shew that the question here raised can be more properly [or] conveniently tried in Chancery than in the Courts of this country; and the opini[ons] expressed by the House of Lords, and the Lords Justices in England, when [the] injunction sought by the defenders was refused, strongly confirm the conclu[sion]

No. 75.

Jan. 27, 1857.
Carron Co. v. Stainton.

The respondents were not called on.

Lord President.—The question of competency is not now before us. The question is one of expediency, but a case of expediency has not been made out. On the contrary, if I may judge from what has passed during the last three years,

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that no such case has been made out. It was urged by the defenders, that a number of the documents and papers, and some of the principal witnesses acquainted with the facts, were in England. There may be some truth in the statement. But the pursuers meet it by a counter allegation, that the books and accounts of the Carron Company, and the great bulk of the documentary evidence, of which a voluminous inventory has been produced, are in Scotland; and that if parole proof shall be necessary, the Scotch witnesses will probably be more numerous than the English; and they contend, therefore, that, so far as the matter of proof goes, the balance of convenience greatly preponderates in favour of Scotland. Besides, the Court have repeatedly disregarded such considerations as grounds for staying proceedings in Scotland. See Sir John Mires v. York Buildings Company, 2d January 1728, M. 8290; Parker v. Royal Exchange Company, 13th January 1846, 8 D. 365.

"When the defenders applied to the English Courts for an injunction to restrain the proceedings of the Carron Company in Scotland, first, in respect of the administration suit, and, afterwards, in respect of the second suit for the transfer of the shares, the argument in support of the motion on both occasions proceeded on the ground, that it was more convenient that the proceedings should take place in England than in Scotland, and in both instances the defenders were unsuccessful. In delivering judgment upon the appeal in the House of Lords, the Lord Chancellor stated, that he had no doubt of the jurisdiction of the Court to restrain proceedings in a foreign country, where this appeared to be expedient or necessary to secure the ends of justice; and he referred to 'instances of the interference of the Court in cases where matters in dispute could not be so conveniently disposed of in the country in which the subject in dispute was placed, as they could be before the Courts in England. Under this plea of convenience the Court of Chancery restrained the parties from litigation in another country.' Cases were also noticed where the Court had refused to interfere on the ground that the matter in dispute could be most conveniently disposed of in Scotland. In this state of the authorities, the Lord Chancellor expressed a decided opinion that the Carron Company, as a Scotch corporation, ought not to be precluded from suing in Scotland, and that it would be alike unjust and inexpedient to restrain them from doing so.

"When the new injunction was applied for and refused by the Lord Justices, on 18th December 1855, the Lord Chancellor stated that the second suit instituted in Chancery for the transfer of the Carron Company shares did not, in his opinion, vary the case, and observed,—'I must guard myself against admitting that, in any circumstances, a suit instituted here for an account, without any decree on which the other party could proceed, unless a special case is made, can be a foundation for restraining the defendant here from being an actor in his own country. It may be that he may get his remedy much quicker and speedier in his own country than he can get it here.' Lord Justice Turner said,—the argument in support of this motion has proceeded on the only ground on which it could proceed, that it was more convenient that the proceedings should take place in England, and that the suit should proceed here, than that it should proceed in Scotland. On that subject it is to be observed, that the Scotch Courts had first jurisdiction in this matter, by the proceedings taken in Scotland by the Carron Company. It is to be observed also, that this is not a case of extreme inconvenience in proceeding in Scotland, but that it is a case in which there is convenience and inconvenience on one side and the other, and it is a question on the balance of convenience. I have no hesitation in stating, that, in my opinion, in order to warrant interference in cases of this description before decree, it is incumbent on the party who applies to the Court for an injunction, to make out an exceedingly strong case to restrain a defendant from proceeding in the exercise of his legal rights. I think the motion must be refused with costs.'"

No. 75. it would be very inexpedient to prevent the party having an interest to get decree from proceeding with his case. Whether anything may hereafter occur which may be a reason for stopping short is a point about which I say nothing at present.

Jan. 28, 1857. Kerr v. Hamilton.

Lords Ivory and Curriehill concurred.

Lord Deas.—I am of the same opinion. I concur very much with the observations of the Lord Ordinary in his note, and think it unnecessary to go into detail. The reclaimers, throughout their argument, assumed that the *onus* lies on the other party of making out a strong case of expediency in going on here, and a strong case of inexpediency in going on in England. I doubt if that be a sound view. They conceded the competency of the action in this Court. They conceded that the Court has jurisdiction, and that the whole question is one of convenience and expediency. This being so, it appears to me that the *onus* lies on the reclaimers, in the first instance at all events, to make out a case of inconvenience and inexpediency in proceeding here, which they have not even attempted to do, and which I do not see how they could have done if they had attempted it.

The Court adhered, with additional expenses.

Gibson-Craigs, Dalziel, & Brodie, W.S.—Mackenzie & Baillie, W.S.—Agents.

No. 76. Robert Malcolm Kerr and Mandatory, Pursuers.—*Sol.-Gen. Maitland —Millar.*

Archibald Hamilton and Others, Defenders.—*Lord Adv. Moncreiff— J. Lorimer.*

Process—Act 13 & 14 *Vict. cap.* 36—*Proof before answer.*—In a declarator by a proprietor against certain feuars for a yearly payment by them for the use of certain roads and bridges under their feu-contracts,—*Held* a proper course for the Lord Ordinary, before answer, to order proof of the practice since the date of the feu-contracts—probation not being renounced; and *observed* by Lord Deas, that since the Act 13 & 14 Vict. cap. 36, the objection to proofs before answer, in certain cases, has been thereby much taken away.

Jan. 28, 1857. 1st Division. Lord Neaves. C.

The facts of this case were thus stated by the Lord Ordinary in the note appended to his interlocutor:—

"This action is brought by the pursuer, as superior of the lands of Hillhead, to declare and enforce his alleged right to, or payment of, sixteen shillings yearly, originally imposed on certain feus held by the defenders of portions of that property.

"Gibson was the original proprietor of Hillhead, which is situated near the river Kelvin. He built a bridge over the river, and entered into an agreement (No. 11 of process) with David Smith, a neighbouring proprietor, for the use of a road adjoining the bridge, and connecting it with a public thoroughfare. For this servitude or privilege, Gibson was to pay Smith a sum of L.15 a-year in name of ground-rent, the arrangement commencing from 1820.

"Gibson, or Reid his trustee, thereafter feued out certain portions of Hillhead to Hamilton, the defenders' author, for payment of a small feu-duty, with taxed entries in common form. The feu-contract further contained the clause founded on by the pursuer, whereby it was declared 'that the said John Hamilton shall, along with the other feuars of Hillhead, have such a right in all time coming, as the said Andrew Reid and his foresaids can give to the use of the bridge made and erected by the said James Gibson across the river Kelvin, and the roads leading to and from the said bridge, through the lands feued by the said David Smith on both sides of the river from the trustees of Archibald Campbell of Blythswood, and the said James Gibson and also the said John Hamilton or his foresaids, shall have right to the use of all the other roads and bridges made or to be made by the said Andrew Reid or his foresaids, or the said James Gibson or his foresaids, for the use of the feuars of the lands of Hillhead. Declaring that the said John Hamil

ton and his foresaids shall pay yearly the sum of sixteen shillings for the use of the foresaid roads and bridges.' No. 76.

"Gibson, who had also granted other feus of Hillhead, then conveyed the whole property to the Faculty of Physicians and Surgeons in Glasgow, by whom it was immediately feued out to him again, so far as not already feued. The effect of these transactions was simply to vest the Faculty with the mere superiority, the *dominium utile* of the lands being partly in the original feuars and partly in Gibson himself. The pursuer is precisely in the position of the Faculty. Jan. 28, 1857. Kerr v. Hamilton.

"In these circumstances, the question arises, as to the pursuer's right to this yearly sum of sixteen shillings. If it were part of the proper estate of superiority, his claim would be good. But it is thought that it can not be so considered. It is neither part of the *reddendo*, nor is it a feudal casualty. It is an annuity declared a real burden, but not necessarily or naturally attached to the superiority."

The defenders pleaded—(1), no title to pursue; (2), no right or title to the annual payment claimed by the pursuer.

The Lord Ordinary, on 24th November 1854, pronounced the following interlocutor:—"Finds that the pursuer has not produced or set forth any good right or title to sue for, or recover the sums of money libelled: Therefore, and to that effect, sustains the first and second pleas in law for the defenders, dismisses the action, and decerns: Finds the defenders entitled to expenses," &c. *

The pursuers reclaimed, and on 12th December 1855 the Court pronounced the following interlocutor:—"In respect the defenders refuse to renounce probation, recall the interlocutor of the Lord Ordinary reclaimed against *in hoc statu*, and remit to his Lordship to proceed with the cause, reserving all questions of expenses."

On 14th November 1856, the Lord Ordinary pronounced the following interlocutor:—"Finds it advisable that, before determining the cause, the following questions of fact should be inquired into under the 48th section of the statute 13 & 14 Vict. c. 36, viz., 1st, Whether, from the 24th day of April 1828 till the raising of the present action, the annual sum of 16s., stipulated in the feu-contract No. 32 of process, was paid by the defenders and their author to James Gibson, sometime of Hillhead, and applied by him towards, or in part satisfaction of the sum of L.15, payable for a servitude or right of road connected with the lands of Hillhead, in terms of the agree-

* "NOTE.—If the pursuer cannot claim this payment as superior of the lands, it is doubtful if he can found in this action on any other title. But neither does the right seem to have been assigned or disponed to the pursuer as a subject separate from the superiority. It is not mentioned in the conveyance in favour of his authors or himself, and there seems no assignation to him that can be held to cover it. It does not seem to have passed with the disposition of the lands granted by Gibson to the Faculty, but if it did, it would immediately have reverted to Gibson by the feu-disposition which the Faculty granted to him again. If it was no part of the proper superiority estate, it would pass as much under a disposition in feu as under a disposition of the *plenum dominium*.

"The pursuer is not said to be the party who is now bound to pay the *cumulo* sum of L.15 to Mr Smith, and there seems reason for holding that this payment of 16s. is a mere contribution towards the larger payment. Neither is the pursuer at least at present the creditor in that payment of L.15, so as to entitle him to this as a part of it. On the other hand, the pursuer is not the proprietor of any of the roads or accommodations for which the payment is imposed. He seems thus to have no equitable claim to uplift this sum, and if, as already assumed, it is not a proper part of his superiority estate, but a separate right, or *jus crediti*, to which he holds no disposition or assignation, express or implied, his title fails, and his demand must be unsuccessful."

No. 76. — Jan. 28, 1857. Kerr v. Hamilton.

ment No. 11 of process: 2d, Whether no such sum of 16s., or any part thereof, was paid by the defenders or their author to the Faculty of Physicians and Surgeons of Glasgow, or was demanded from them by the said Faculty between the said month of April 1828, when the said Faculty acquired the superiority of the said lands of Hillhead, and the 10th day of November 1842, when they conveyed the superiority to the defenders: 3d, Whether the feu-duties of the said lands of Hillhead, stated and warranted in the titles of the said Faculty and the pursuer respectively, as amounting in all to the cumulo sum of L.133, 3s. 11¾d., amounted to that sum, exclusively of the sum of 16s. now in dispute: Therefore, before answer, appoints the said questions of fact to be tried before the Lord Ordinary himself, without a jury, on a day to be afterwards fixed, the defenders taking the lead in the proof." *

The pursuer reclaimed, and pleaded;—That the proof allowed was not relevant to the issue. He craved judgment on the merits. But on a question by the Court, he refused to allow the case to go to judgment on the assumption that the facts were as stated by the defender.

The respondents were not called on.

Lord President.—I see no reason for disturbing the interlocutor of the Lord Ordinary. His Lordship has thought it proper to have certain matters expiscated before giving judgment, and the mode proposed by him for doing that is expedi-

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* "Note.—Under the remit made by the Court in this case, the Lord Ordinary has reconsidered the averments of parties, in order to see whether any inquiry into disputed facts might advantageously be made at this stage.

"Some material points seem already to be fixed by admission or by appropriate written evidence. It is admitted that an agreement existed, being No. 11 of process, between Mr Gibson of Hillhead and Mr David Smith, by which the proprietor of Hillhead agreed to pay the sum of L.15 for an important right of road for the use of his lands. The pursuer himself was, at one time, in right of that agreement, as the party entitled to receive the stipulated payment of L.15.

"The defenders say that Mr Gibson, in feuing out the lands of Hillhead, allocated this sum of L.15 among the different feuars. The Lord Ordinary thinks that this allegation, whatever it means, can only be proved by the feu-contracts, or other documents, fixing the rights of parties. It appears, that in some feu-contracts or charters, to which the pursuer himself was a party, the feuars were taken bound to pay to Smith a certain proportion, *eo nomine*, of the sum of L.15 referred to. But the feu-contract of the defenders is not expressed in the same way, and it cannot therefore be said, on the same grounds, that the 16s. in question is, in their case, an allocation of the L.15. The 16s. is made payable in the defenders' contract for roads, but it is not made payable to Smith, nor is it declared to be a proportion of the L.15. If it be meant that Gibson, or Reid his trustee, in granting this contract, intended the payment to stand on this footing, it is thought that such intention cannot competently be made the subject of a general proof.

"It seems to the Lord Ordinary, however, that the mode in which the parties acted in the matter, may be a legitimate subject of inquiry. One question here is, whether this payment of 16s. forms a part or appendage of the superiority estate, and there may be some ambiguity in the terms of the deed in regard to it. But, in April 1828, within a few days after the date of the defenders' feu-contract, the superiority estate was conveyed to the Faculty of Physicians, and if from that time to the raising of this action, a period now of upwards of twenty years, the sum of 16s. has always been paid to Gibson, and has gone *pro tanto* to relieve him of his liability for the L.15; if it was never paid to the Faculty of Physicians during the fourteen years for which they were superiors; and if, as the pursuer alleges, it has never been paid to him; if, moreover, in the titles both of the Faculty and of the pursuer, the feu-duties were estimated at a certain cumulo sum, of which the 16s. formed no part, these points seem to be elements for consideration, which ought not to be overlooked, and as to which, at any rate, it seems advisable that inquiry should be made before the case is finally disposed of."

tious in itself, and falls under his own cognisance. If the case had been allowed to take its course under his Lordship's interlocutor of 14th November last, the proof would most probably have been completed during session. But the pursuer has reclaimed, and prayed us to repel the defences, and to declare in terms of the libel. Upon the merits, however, the defenders have not yet been heard, for the first discussion related to the pursuer's title, and this last discussion was upon the proof allowed by the Lord Ordinary under our remit. I cannot say that, on looking into the case, the matters which the Lord Ordinary has wished to have expiscated are totally impertinent to the case. Moreover, they have pressed themselves on his Lordship's mind before proceeding to give judgment. For my own part, I should also like to have them cleared up; and I am rather confirmed in that view by the circumstance that the pursuer will not allow the case to be decided on the assumption that these matters of fact are as stated by the defenders. I think, therefore, that we should not disturb the interlocutor of the Lord Ordinary, and that the proper course is to send the case back to him.

Lord Ivory.—I am of the same opinion. I do not like this habit of coming here and raising discussions on every little question in the conduct of a case, and I agree that the best test of the pertinency of these averments is, that the pursuer has so little confidence in his own view, that he will not allow the case to go to judgment on the assumption that they are as stated by the defender. What the Lord Ordinary has proposed is probation before answer. I do not say what my opinion shall be when these facts are admitted, or proved, or disproved. When, in the preparation of a case, the Lord Ordinary has thought that on part of the case he would like to have some more light, I cannot interfere with his discretion. As to deciding the case on the merits before it has been brought up to that point before the Lord Ordinary, it would be *pessimi exempli* to sustain such a proposal.

Lord Curriehill.—The practice which has rather crept into the Outer-House of deciding on the relevancy, has been reprobated by your Lordship. The Lord Ordinary has here so far followed your Lordship's directions. He has pronounced no judgment on the relevancy, and has saved that question by allowing proof before answer. When the facts are ascertained, that question shall be decided. It is said that they are clearly impertinent; but the question here is, what is the meaning of certain documents under which the parties have been acting for nearly thirty years? and under mutual contracts it is always an important element in the construction of them to see how the parties have been acting, for they are supposed to know their own meaning. That is all that the Lord Ordinary has proposed to ascertain. I concur with your Lordship.

Lord Deas.—I entirely agree with your Lordship; and I only wish to take the opportunity of making a single general observation. Since the Judicature Act was passed, the practice has been discountenanced of allowing proofs before answer. The objection to that course has been the delay and expense. Were it not for that objection, there can be no doubt that it would frequently be desirable to have the facts precisely ascertained in the first instance, in place of deciding *in limine* matters of law and relevancy which may never require to be decided at all. It has always appeared to me, since the Act 13 & 14 Vict. c. 36 was passed, that the objection to proofs before answer, in certain cases, has been thereby much taken away. Under sect. 48 of that statute the proof can be led before the Lord Ordinary without delay, at very little comparative expense, and in a manner most satisfactory as to its results. And when the Lord Ordinary, in the exercise of his discretion, directs a proof before answer, under that enactment, on points necessary to satisfy or remove difficulties in his mind, I should, for my own part, require a strong case to be made out before interfering with that discretion. In the present case, I agree with your Lordship that it is impossible to say that the facts averred may not have a bearing upon the question to be decided, as, indeed, is indicated by the reclaimer's refusal to have the case decided on the assumption that these facts are admitted.

The Court adhered.

Miller & Crawford, S.S.C.—James F. Wilkie, S.S.C.—Agents.

No. 77.
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Jan. 28, 1857.
Russell v.
Hutchison.

JAMES RUSSELL, Pursuer.—*Ld.-Adv. Moncreiff—Macfarlane.*
KEITH HUTCHISON (Inspector of the Poor of the Parish of Old Deer) AND OTHERS, Defenders.—*Fraser.*

Poor Assessment—Act 8 & 9 *Vict. cap.* 83 *sect.* 37—*A* bona fide *lease is the criterion of the annual value of the lands let.*—An agricultural lease of ordinary endurance, and containing the usual stipulations, provided that the tenant (who was the landlord's brother), should expend L.500 in draining, and should receive a deduction of L.50 per annum from his rent for five years;—*Held* (affirming judgment of Lord Ardmillan), that in imposing assessment under the Poor-Law Act, the rent in the lease was the criterion of the value of the lands, and the deductions in favour of the tenant in this case were not regarded as proof of the rent being less than the annual value.

1st Division.
Ld. Ardmillan.
C.

THE funds requisite for the relief of the poor of the parish of Old Deer are raised in virtue of the Act 8th & 9th Vict. cap. 83. This Act confers upon parochial boards powers for imposing the assessment upon all lands and heritages according to their annual value, and section 37 provides "that in estimating the annual value of lands and heritages, the same shall be taken to be the rent at which, one year with another, such lands and heritages might, in their actual state, be reasonably expected to let from year to year, under deduction of the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same."

The pursuer is a landed proprietor in the parish of Old Deer, and the object of this action was to set aside the assessment on his own land, which he averred was over-rated, and on two farms belonging to the defender Mr James Ferguson, and occupied by his brother, also a defender, Mr John Ferguson, which he averred were under-rated, for the year from Whitsunday 1853 to Whitsunday 1854. The grounds of action were thus summed up by the pursuer:—"The parochial board have, on the one hand, subjected the pursuer's home-farm, and other grounds in his personal occupancy, to the valuation of a professional land-valuator, and have ordered land recently brought into cultivation by him to be valued, and the valu added to his assessable rental; while, on the other hand, and through th influence of the defenders, they have refused to order a valuation of th defenders' said farms, notwithstanding the strong averments made, an which are true in point of fact, of their being under-rated, and have refuse to order the 100 acres recently brought into cultivation by the defender M John Ferguson from heath to be valued, or the true value thereof to b added to the defenders' assessable rental. The resolution of the board, o the motion of the defenders, to assess upon the pursuer's newly cultivate ground, was passed at a meeting held on 7th June 1853, and the resolutio to act differently in regard to the defenders' own newly cultivated groun of 100 acres was passed on the 11th July thereafter, there being only a fe weeks between the two meetings; and although the defenders refused appoint a valuation to be made of the Messrs Ferguson's lands, on the pr tence that their rent was ascertainable from the lease, they, in several oth instances, appointed the true value of farms belonging to other persons be ascertained, although under leases at specified rents. Against this i consistent conduct of the board in unduly favouring the defenders, Mess Ferguson, the pursuer protested for remeid as accords of law."

It appeared that Mr Ferguson had let the farms to his brother on a nin teen years' lease in usual terms, with a deduction on one of the farms (Ne ton) of L.50 for five years, in lieu of all improvements. The parochi board took the rent in the lease, as being, in their opinion, a fair and f

one. It was higher than the valued rent upon which the property-tax was assessed, "and being so, they did not agree to the demand of the pursuer, who did not offer to pay the expense, to have it specially valued merely to gratify him." The proceedings of the parochial board in regard to the objections by the pursuer to the alleged over-valuation of his own property and the under-valuation of the defenders' property were detailed. The pursuer was either personally present or represented at all the meetings, and in fixing the valuation upon the pursuer's property of which he complained, the parochial board stated that "they did so with an earnest desire to deal out equal justice to Mr Russell as to the other rate-payers." It farther appeared that the amount at which the pursuer estimated the defenders' farms to be under-valued was about L.20.

No. 77.
Jan. 28, 1857.
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Hutchison.

In these circumstances the pursuer pleaded;—That whatever the principle of assessment adopted, all the lands and heritages in the parish ought to be dealt with equally and on the same footing.

The Lord Ordinary, on 20th March 1855, pronounced the following interlocutor:—"Finds that no sufficient grounds for reducing the assessment complained of have been alleged by the pursuer: Finds that where lands are possessed under leases for usual terms, and with usual conditions, the yearly rents payable under such leases afford the best criterion for ascertaining and determining the annual value, under section 37 of the Poor-Law Amendment Act, and that no special and unusual provisions appear in the leases in process, so as to take the case out of the general rule; the mere circumstance that the landlord and tenant are brothers not being sufficient to create such specialty, where there is a written contract of lease: Therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuer liable to the defenders in expenses," &c.*

The pursuer reclaimed, and pleaded;—That according to the terms of the lease, the farm of Newton must now be improved to the extent of L.500. This was therefore, in point of fact, an improving lease, which was not to be taken as the true criterion of the value of the farm during the whole currency. Inquiry ought therefore to be made how far the farm was improved.

The defenders founded on the case of Ainslie v. Turnbull as conclusive.

Lord President.—This action is founded on two grounds—the over-valuation of the pursuer's own lands, which has not been pressed, and the under-valuation of the Messrs Ferguson's land. The pursuer has not stated the extent to which that affects him, and it may be a small extent. But the allegation that lands in the parish are under-valued is a relevant allegation on the part of a proprietor, and in many cases it may be important in its consequences. The allegation here, however, is not very specific. The lands are in a peculiar position. They are not [illegible] lands, the value of which is to be ascertained by persons of skill. They are [illegible]. That affords *prima facie* evidence of their value, unless something appear to indicate that there are special reasons for the rent being less than the annual value of the lands. There are leases in which it would be clear that the rental stated is not a fair valuation of the land at the time the lands came to be valued. There are im-

* "Note.—The general rule as regards valuation under the 37th section of the statute was distinctly laid down in the case of Ainslie v. Turnbull, 12th July 1854. The parochial board have here proceeded in the usual manner, and have adopted the actual rent payable under current leases of ordinary endurance as the criterion of value. That there may be an exceptional case, in which such a criterion would be deceptive, is beyond doubt; but very precise and special averments, or very unusual and suspicious provisions in the leases, are necessary to raise such a case. There are none such here. To the landlord the rent is truly the value during the lease, and the 34th section deals with the rights of landlord and tenant, as measured by the same estimate of annual value. The authority of the case of Murray v. [illegible], 25th May 1852, is not opposed to the case of Ainslie, nor, it is thought, to the interlocutor."

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proving leases in various parts of the country, which profess to proceed on a small rent, in consideration of the improvements to be made; and there are very long leases, for example, in the west of Perthshire, where the rent is no fair test of the present value of the land; but the leases in the present case are of ordinary endurance. There is no stipulation in them of an unusual character. One of them, indeed, contains a stipulation as to draining. That is not an unusual stipulation. It is an ordinary stipulation; and although, under almost all leases, there may be a variation one year from another in the value of the lands, by reason of a certain amount of improvement taking place, or change in the markets, it is not intended that there shall be a new valuation of these lands every year. That is out of the question. The valuation is presumed to be fairly stated in the lease, unless something appear to the contrary. Now, in this case, the board had various discussions, at which the reclaimer was present or was represented. The matters of fact set forth at these meetings are stated in the minutes,—which rather appear to me to contain more than the usual amount of discussion as to the valuation of these lands. It is not averred that either of the farms were let at an under-valuation, and therefore it appears to me that there is no ground for holding that the board in this case did not make sufficient inquiry as to their value. If that be so, it follows that the reasons of reduction fall. There may be cases in which special inquiry would be allowed, but it is not to be allowed without very strong statements. It would be exceedingly inconvenient and expensive were it otherwise, and the statement of which proof is to be allowed must be a very strong one indeed. The lease is not to be conclusive in all cases; but there would require to be a very specific statement made against it. There is no such specific statement here, and therefore I adhere to the interlocutor of the Lord Ordinary.

Lord Ivory.—I concur. The case of Ainslie fixed this, at least, that there is not to be a valuation of the lands from year to year. Generally speaking, under a *bona fide* lease, the object of both parties must be to give and receive such an amount of rent as, taking one year with another, shall be the fair value of the subject during that lease. An improving lease, in which the prestations might vary from year to year, may not be conclusive proof of the value of the lands, but it must always be an element in the valuation, and unless in very strong cases, it is not to be assumed to be other than a *bona fide* contract. The pursuer here makes an objection to his own valuation. That is not supported otherwise than that it is in excess if the assessment on the other lands is under-rated; because the objection is, that if the other parties had been assessed more, his proportion of the assessment would have amounted to so much less. That is relevant, if established. But to what extent it is made out, is an important consideration in a question of this kind. The pursuer's averments may import a legal interest to sue; but when you examine his interest, and measure it by the interest allowed by the statute—viz. the correction of the assessment to the extent the party is injured by it—the interest of this pursuer is practically of a very evanescent kind. It is simply this—that a sum of L.20 shall be divided over the parish. Now I am not disposed to say that that is not a legal interest, sufficient to give a legal title to sue in a very rigorous sense; but it is not a ground on which the Court ought very readily to interfere with the proceedings of the board, where the lease itself, and the proceedings, show that there has been no tangible departure from the working of the statute. The board seems to have given all the attention in their power to this matter, and the result has been, that they have repelled the objections now stated to us. Now we are here to correct when the board fall into error, but not to scrutinise in such a stringent way every possible question that may be raised in the course of their proceedings, as absolutely to paralyse their general duties and usefulness.

As to the L.500, I do not enter into any considerations in regard to it. There is no substantial departure from the statute in the actings of the board. A fair and honest attempt has been made by them to fulfil their duties. These leases are of the ordinary kind, and there is no such interest on the part of the pursuer as would induce the Court to strain at a construction such as shall overturn the proceedings of the board so honestly gone about.

Lord Curriehill.—I entirely agree. The rule of valuation set forth in the statute is, that the assessable value shall be that for which the lands may be expected

to let one year with another. The statute prescribes no rule for ascertaining that valuation. That is left to the discretion of the parochial board itself; and it is well that it is so, for the members of that board have a material interest in having the valuation correct, inasmuch as it is upon themselves that the assessment falls. In the case of Ainslie, the Court decided, that in ordinary circumstances the rent stated in a lease, where there is no cause to doubt that it is a *bona fide* lease, is as near an approach to that value described in the statute as can be got. It is proposed here to supersede the lease, and have a valuation. Is a neutral man who knows nothing of the farm as likely to know the true value of the land as the landlord and tenant—the one having the interest to get as much rent as he can, and the other to pay as little as he can? What they agree upon, is the nearest approach to the true rent that we can get. There may be exceptions, to which your Lordship has referred, as in the case of the Blair-Drummond mosses in Perthshire, or of old leases intended to endure for several generations. But here there is nothing unusual in either of the leases. There is no doubt a stipulation as to draining, and the rent is calculated with regard to that improvement. But you cannot go into every minute detail, otherwise the lease would be useless as a criterion of value altogether. Further, the board here have not adopted the rent without enquiry, and that is more satisfactory to my mind than the valuation of a professional man; and therefore I think this is not an exceptional case. I also am for adhering.

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Lord Deas.—I entirely agree with your Lordship in the chair. There is no allegation in this record that any of the leases were entered into collusively, or that the rents were fixed at an undervalue from favour to the tenants or otherwise. Neither is there any allegation that the parochial board acted unfairly or collusively, or that they did not exercise their discretion to the best of their ability. They took into view the fact (as we see from a minute of 5th June 1851), that L.500 was to be expended by the tenant in draining, along with the fact that, in consequence of his doing so, he was to receive a deduction of L.50 per annum for the first five years; and, with these facts before them, they satisfied themselves and came to the resolution that the rent stipulated for the remainder of the lease was a fair rent. I see nothing stated to entitle us to overrule that resolution.

The Court adhered, with additional expenses.

Morton, Whitehead, & Greig, W.S.—Jollie, Strong, & Henry, W.S.—Agents.

No. 78.

Alexander Anderson (MacRa's Factor), Petitioner.—*Fraser*.

Judicial Factor—Special Powers.—Special powers granted to a judicial factor on a mortification to compromise an action brought by him against certain *ex officio* trustees, on the ground of gross negligence in allowing certain funds belonging to the mortification to be invested in the name of the treasurer in his individual name, whereby the money was lost. *Question*, to what extent do *ex officio* trustees undertake the responsibilities, and become bound to the same strict diligence as trustees under private trusts?

The petitioner was, in 1853, appointed judicial factor upon the trust-estate of the deceased Alexander MacRa, who was an ironmonger in Bristol, and died in 1780. A sum of L.1666, 13s. 4d. was directed by Mr MacRa to be held in trust, in the first place, for behoof of certain annuitants, who are all now dead, and ultimately for behoof of as many indigent boys of the name of MacRa as the remainder of the bequest could support. The last annuitant died in 1850.

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1st Division.
Ld Mackenzie.
C.

The trust has been in operation since about the year 1786. The trustees who accepted and acted were eight in number, all resident in Aberdeen, and holding official positions there. It is in virtue of their official positions that they are trustees of Mr MacRa.[1]

[1] MacRa v. the Principal of Aberdeen College and others, 1st February 1786, Dict. 15,948.

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In 1825 the whole trust-fund, L.1666, 13s. 4d., was lent out on heritable security. It was repaid in 1845, and receipt of the amount was acknowledged and the security discharged by six of the eight trustees. The money was then lent by the trustees temporarily to the Northern Investment Company until another suitable heritable security could be obtained. They granted as a document of debt a promissory-note payable to "James Nicol, advocate, Aberdeen, as treasurer for the trustees of the late Alexander MacRa." In January 1847, at a meeting of the trustees, at which three only of the eight were present (and by the trust-deed five are requisite for a quorum), the agent, Mr Nicol, reported that a suitable heritable security had been found, and he was accordingly authorised so to lend the money. About six months afterwards, namely, 21st June 1847, Mr Nicol uplifted the money from the Northern Investment Company. In place of lending it on the heritable security as directed, it remained unsecured in his hands, or those of his firm, Nicol and Monro, whose estates were sequestrated in November 1850, and the whole fund lost, with the exception of a dividend of about L.500 from the estates of the bankrupts.

The petitioner lodged a claim upon the sequestrated estate of Nicol and Monro for L.1704, 3s. 2d.

The object of this petition was to obtain the authority of the Court to accept of a sum of about L.964 in full of a claim of about L.1532, which the judicial factor had made against the trustees of the fund, to make good that part of the fund which the factor alleges had been lost in consequence of gross negligence on their part.

The petition stated, that when the bankruptcy of Messrs Nicol and Monro occurred, the parties interested in the management and proper application of the mortified fund laid a memorial before counsel for their opinion as to the liability of those trustees who had acted, and were acting, at the time when the fund was misappropriated by Messrs Nicol and Monro, to make good the loss to which that misappropriation had given rise. Such an opinion was obtained; and, in accordance therewith, the petitioner had prepared a summons against those trustees for the purpose of enforcing payment of the whole amount of the mortified fund, and accumulated interest, as at the date of its misappropriation, making up the said sum of L.1704, 3s. 2d., under deduction of all dividends to be obtained from the estates of Messrs Nicol and Monro, and James Nicol. But before this summons had been adjusted and executed, proposals were made to the petitioner for a compromise of the claim by the payment of such a sum as, with the dividends received and to be received from the estates of Messrs Nicol and Monro, and James Nicol, should make up the principal sum which formed the amount of the mortified trust-fund, but without any of the interest due.

The amount of principal to be thus paid was about L.1160. The amount of interest due, and now proposed to be given up for an immediate settlement, was about L.600, exclusive of the expenses incurred to the trust, which were estimated at about L.100.

The proceedings were laid before counsel, who recommended a compromise. The Lord Ordinary then remitted to Mr James Duncan, W.S., to inquire into the facts. His report was very minute. It appeared that the claim of the factor was directed against twenty-three trustees, many of whom had acted sometime between the years 1832 and 1850, in virtue of their office of senior minister of Aberdeen, senior bailie, dean of guild, or deacon convener of the craftsmen of that burgh; and the Reporter's opinion was, that the loss of the money had arisen so much more directly from an act of fraud on the part of the treasurer, than as a direct consequence of negligence of an extraordinary kind on the part of the trustees, that the judicial factor might find difficulty in having the trustees (against whom the want of

bona fides was not alleged) subjected to a penalty as full as if it had been they themselves who had misapplied and appropriated the money. And, in the whole circumstances, the Reporter was very strongly of opinion that it would be highly advantageous for the trust-estate were the Court to authorise the judicial factor to accept of the terms of compromise offered by the late trustees. The judicial factor was himself of this opinion. He stated, that laying altogether out of view the circumstances of peculiar hardship in which the claim originated, he had been advised that a serious ground of litigation might arise from the fact that the trustees were, in this instance, official parties, who maintained that, in facilitating the management of such a mortification, they did not undertake the responsibilities, and were not to be held bound to as strict diligence as trustees under private trusts; and that they had no view or intention to take such an immediate and direct superintendence and management as would render them in any way pecuniarily responsible for the actings of the factor, whom all or most of them found in the administration of the mortified fund on their becoming connected with it. There would be difficulty also in proving the acts of intromission of the successive trustees for which liability was sought to be imposed on them. The representatives of some of them were moreover in impoverished circumstances; and the petitioner understood that, should the offer of compromise be refused, it was in contemplation by the parties who were in better circumstances, against whom the claim was made, seriously to dispute their liability; and should the petitioner be forced into a protracted litigation, in which it was at least possible that he might be unsuccessful, the whole of the trust-fund, in this event, would probably be exhausted.[1]

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The Lord Ordinary reported the case, expressing himself also favourable to the compromise.

Lord President.—It would be very unfortunate if the Court had no power to authorise a judicial factor to enter into a transaction of this kind. In this case the balance is greatly in favour of entering into a compromise, and we shall grant the requisite power for doing so.

The Court pronounced the following interlocutor:—"The Lords, on the report of Lord Mackenzie, Ordinary, authorise the petitioner to accept of the offer of compromise to which the petition relates; and on payment by the late trustees or their representatives, of such a sum as (with the dividends received from the estates of Nicol and Monro, and James Nicol) shall make up the capital sum of L.1666, 13s. 4d., being the amount of the principal of the mortified fund, to discharge the said trustees, and their heirs and representatives, of all claims competent to the petitioner, as judicial factor, or to those beneficially interested in the said mortified fund, in respect of the actings and intromission of the said trustees with the said fund."

Jollie, Strong, & Henry, W.S.—Agents.

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[1] *Petitioner's Authorities.*—Attorney-General v. Caius College, 31st May 1837, …'s Chancery Reports, vol. ii. p. 150; M'Dougall, 24th June 1853, ante, …xv. p. 776; Dalmahoy, 9th July 1836, 14 S. & D. p. 1125; Anderson, 7th …ch 1855, ante, vol. xvii. p. 597; Falconer, 17th Feb. 1792, Dict. 16,380; …son, 10th July 1835, 13 S. p. 1093.

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Jan. 29, 1857.
Hay v.
Paterson.

JOHN HAY (Inspector of the Poor of the City Parish of Edinburgh), Pursuer.—*A. B. Bell.*

ALEXANDER PATERSON (Inspector of the Poor of the Parish of Dalkeith), Defender.—*D. F. Inglis—Baillie.*

DAVID M'DONALD (Inspector of the Poor of the Parish of Laurencekirk), Defender.—*Cook—Lee.*

Poor—Settlement—Parish—Idiotcy and Insanity.—Held (applying the principle of the judgment of the House of Lords in Adamson v. Barbour, and reversing the judgment of the whole Court in Thomson v. Morris, altering also the judgment of Lord Neaves in this case), that the burden of supporting a pauper lunatic in pupillarity, whose father was alive, but had no settlement except in the parish of his birth, fell not upon the parish of the lunatic's birth but upon the parish of the father's birth.

1ST DIVISION.
Lord Neaves.
C.

ROBERT GREIG was born in the parish of Laurencekirk. He never acquired a residence by settlement in any other parish in Scotland. For eight or nine years prior to 1847 he was resident in Ireland. In 1848 he and his family became destitute, and applied for and received relief from the city parish of Edinburgh for three months. These advances were afterwards repaid by the parish of Laurencekirk. In 1853 Greig was for some time confined in the prison of Edinburgh. At the date of this action he was resident in Fifeshire.

Thomas Greig was his lawful son, and was born in the parish of Dalkeith on 28th April 1838. In December 1853, in consequence of the imprisonment of his father and otherwise, Thomas Greig, then residing in Edinburgh, became destitute, and an object of parochial relief. Since his infancy he had been subject to fits of epilepsy, and since the date of his destitution in 1853, had been confined as a lunatic in the Morningside Asylum. For five years before the date of this action he had been admittedly in an insane state. The father was earning from 8s. to 11s. per week, out of which he had himself, a wife, and several children to support.

This action was brought in May 1854 by the parish of Edinburgh for repayment by the parish of Laurencekirk, or by the parish of Dalkeith, of the alimentary advances and sums expended in the boarding and supporting of Thomas Greig, first in the poors'-house of Edinburgh, and thereafter in the Asylum at Morningside for the insane.

There was no dispute as to the facts, and by joint minute the defenders, with the view of saving expense, agreed to relieve the pursuer in terms of the libel, and to pay his expenses, under reservation, *inter se*, of their respective pleas and non-liability pleaded by each. The question therefore was, whether the parish of the father's birth (Laurencekirk) or the parish of the pauper lunatic's birth (Dalkeith) was liable.

Pleaded for Dalkeith;—As the alleged pauper is a minor, and is a lunatic, or at least imbecile or fatuous, and is not forisfamiliated, his settlement follows that of his father, as the head of the family of which he is a member. Farther, the father of the pauper had no settlement in the parish of Dalkeith, and has no settlement in any parish within Scotland, therefore the parish of Laurencekirk, as the parish of the father's birth, is bound to support the pauper.

Pleaded for Laurencekirk;—The maintenance of the pauper lunatic is a burden separable from that of the maintenance of his father's family, and must be borne by the parish of his own and not of his father's birth.

The Lord Ordinary, on 2d March 1855, pronounced the following interlocutor:—"Finds that Thomas Greig, mentioned in the record, is a proper object of parochial relief, and entitled to the same: Finds that the parish of Dalkeith, as the parish of the said pauper's birth, is bound to relieve the

parish of Edinburgh, at whose expense he is now supported, of the burden of his maintenance, and that the parish of Laurencekirk, as the parish of his father's birth, is not bound so to do: Therefore, sustains the defences for the parish of Laurencekirk, and assoilzies the defender, David M'Donald, inspector of said parish, from the conclusions of the action, and decerns: Repels the defences for the defender, Alexander Paterson, inspector of the parish of Dalkeith, and finds, declares, and decerns against him in terms of the alternative declaratory and petitory conclusions of the libel: Finds the parish of Dalkeith liable in expenses to the parish of Laurencekirk, and also to the pursuer," &c.*

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Paterson (for Dalkeith, the parish of the pauper's birth) reclaimed, and pleaded;—That the case of Barbour was decisive of the question that a child must follow his father's settlement, however that settlement might be constituted. Settlements by birth equally with settlements by residence enured to the children. It was clear that when Thomson v. Morris was decided, that question was not settled, and, therefore, the majority of the Court there addressed their minds to the question—some of them under the impression that the birth-settlement would not avail the children, and some of them that it would. That judgment, therefore, was open to remark, both as pronounced in ignorance of the principle since established, and as shewing that the reasoning by which the different members of the Court then arrived at the same result was not precisely the same. But the question arose, what was to be the judgment now when it had been decided that residential settlement was not stronger than settlement by birth? A lunatic,—at all events, a lunatic, whose lunacy, as in this case, had commenced during pupillarity,—was in the same position as a pupil. There was no difference between a lunatic pupil and a sane pupil. In the case of a pupil there was an absolute incapacity to acquire a settlement for himself, and it therefore followed that he must take the parent's settlement, viz., the settlement of his father, if legitimate, and of his mother if illegitimate. In the present case, it was admitted that the lunatic had not acquired any settlement for himself, and there was the same incapacity. There was no distinction in this respect between an idiot and a pupil. They both laboured under a legal incapacity. The settlement of the lunatic in this case was therefore in the parish of the father's settlement, which was Laurencekirk, the parish of his birth.

Pleaded for Laurencekirk, the parish of the father's birth;—The judgment in Thomson v. Morris was not displaced by the decision in Barbour v. Adamson. There was no conflict between the cases. In Barbour v. Adamson the children were pupils, whose father had been transported. In Thomson v. Morris, and in the present case, the pauper was a lunatic above pupillarity, whose father was able-bodied, and was maintaining himself and the rest of his family. It had been decided in M'Tear v. Lindsay that an able-bodied man had no claim to relief on account of his children, and that the children themselves had no claim to such relief. A lunatic child, how-

* "NOTE.—Apart from the authority of the case of Thomson v. Morris, 19th July 1850, ante, vol. xii. p. 1266, the Lord Ordinary's judgment in the present case would probably have been different from that which he has pronounced. He can see no general principle on which a minor lunatic, who has not acquired a residential settlement, should be thrown on his own birth-settlement while his father is alive. It seems clear that a pupil, whether of sound or unsound mind, follows the settlement of its father; and it is difficult to discover how that settlement should be changed merely by the arrival of puberty or the existence of insanity. But the case of Morris is a direct authority; and although the decision of the House of Lords in the case of Barbour v. Adamson, 1 M'Queen's Rep. 376, suggests adverse analogies of great weight, the Lord Ordinary has not thought himself entitled to depart from a clear precedent still standing unaffected by any express contrary judgment."

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ever, was admitted in this case to be a proper object of parochial relief i itself. It must therefore be a special and exceptional case. The 59t section of the statute dealt with it as such, excluding, in such cases, th principle of keeping families together. If this was an exceptional case i one respect—as giving a child a claim to relief not otherwise possessed- was it not also an exceptional case, as giving the child in such a situatic a settlement of its own? Who was the pauper? Not the father, because t claims of the lunatic to relief had been admitted altogether irrespective the father—but clearly the lunatic himself. His settlement, therefore, mu be in the parish of his own birth, unless he had acquired and retained son other settlement. In this case the pauper had acquired no settlement, a the judgment in Thomson v. Morris, which distinguished this as a peculi class of cases, ought to be applied.[1]

Lord President.—This case is one which required very particular attention. is obvious that the Lord Ordinary has felt considerable difficulty in regard to He has felt himself, as it were, pressed between two opposing forces, and was n clear which of them ought to have the greatest influence in moving him to a co clusion. He seems to have yielded to the one to which in his position the great deference was due in a question of this kind; being, in his view of it, a dir decision on the point, and the other merely an inference from decisions on a c lateral point. I have given to the case all the attention which its peculiari demands, and I have come to the conclusion which I shall now state.

The facts of the case are simple enough. The person who is the object of t litigation was born, it is said, about 1838, in the parish of Dalkeith. The appli tion for support, in reference to which we are now considering this case, was co menced in 1853. At that time this party was fifteen years of age. His father w imprisoned, and the boy became an object, it is said, of parochial relief, both in co sequence of the imprisonment of his father and in respect of his own condition. I own condition was this: that from infancy he was feeble, and the subject of disea and five years before this litigation, that is to say while he was yet a pupil, he h become a lunatic. That is averred on the part of Paterson. It is admitted on t part of Macdonald, and is a settled point in the case.

The father of the lunatic was born in the parish of Laurencekirk, and does n appear to have acquired a settlement elsewhere. It is admitted by both parti that he has no other settlement. Therefore his settlement was in the parish Laurencekirk. There is no question here in regard to any settlement by residen The competition is between the parish of the father's birth settlement and the pari in which the lunatic was born. The Lord Ordinary has found that the parish which the lunatic was born is the parish liable for his aliment.

It is stated in the record, and admitted,—and has been the condition of t argument throughout,—that this pauper lunatic was a proper object of paroch relief. In what precise sense that statement was made I do not know. It is n made in the words which were used in another case, viz. that he was an object parochial relief *in his own right*, and whether that is meant to be said I do not kno But it is very clear that he was an object of parochial relief in this sense that rel was rightly furnished to him. His father was imprisoned: he himself, at fift years of age, was helpless, and there was this further element in his case, th although his father was able-bodied, the obligation which, in the general ca attaches to a father to maintain his family does not necessarily attach in the ca of a lunatic in the condition of life of this party, because the provisions of the Po Law, and other provisions connected with the police of the country, may make necessary that the lunatic should be separated from the family; and, in such a ca the obligation to furnish that sort of maintenance would not attach to a father the condition of life in which this family is.

[1] Thomson v. Morris, 19th July 1850, ante, vol. xii. p. 1266; Barbour v. Ad son, H. of L. 2d July 1851, 1 Macqueen, 376; Gibson v. Murray, 10th Ja 1854, ante, vol. xvi. p. 926; Hay v. Thomson, 6th February 1856, ante, vol. x p. 510; Hay v. Oliphant, 6th February 1856, ante, vol. xviii. p. 508; M'Ta Lindsay, 27th Feb. 1849, ante, vol. xi. p. 719—affd. H. of L. 26th March 185

The question now is, who is to be liable for the maintenance furnished to him?

It is a general principle, as regards pupils, that their settlement is in the parish of their father's settlement. It is also a principle that, while they are pupils, they cannot acquire settlements for themselves, even by living separate from their father. After they cease to be in pupillarity, and enter into the more advanced stage of life, they may acquire settlements for themselves by separate residence. I speak of children not subject to disability. But, in regard to lunatic children, it has not been decided—except in the case of Morris, so far as I know—that a lunatic child, though beyond pupillarity, is in a different position from a pupil. There are many reasons in respect of which the conditions of the two may be assimilated. But till the case of Morris arose, it had not been decided that a lunatic child never separated from his father has any settlement different from that of the father. There is very little of decision as to the point of time at which the settlement a child has through its father flies off. In ordinary cases it may be very soon after pupillarity. When a child becomes able-bodied and works for himself, he may acquire a settlement by residence. Questions may then arise as to the settlement which may have been acquired by himself; or if he has not acquired a new settlement, questions may arise as to his proper settlement. Upon that I do not wish to give any opinion at present. But, in the case of a lunatic who has not a capacity to acquire a settlement himself, it has never been decided, except in the case of Morris, that his settlement is other than that of his father when the application for relief is made.

But it had been previously decided that the settlement of a lunatic child is in the parish of the parent's settlement. I do not observe in the report of the case of Morris that any reference was made, either in the argument or in the opinions of the Judges, to the case of Gladsmuir, in which that point was very deliberately considered and decided. It was there decided that a lunatic child takes the settlement of its parent,—not of its own birth. The case of Gladsmuir is a leading case in the Poor-Law of Scotland. Many points were disposed of in that case, some of which had the authority of previous decisions, some not. One of the points was, that a natural child takes the settlement of its mother, and not the settlement of its own birth; and that this rule applies where the child is a lunatic, as well as where the child is not a lunatic. Another point decided there, and which had some authority from previous decisions, was, that a child living separate from its parent while in pupillarity does not acquire a separate settlement. And a third point decided there was, that, as regards the settlement of a lunatic child, the liability to maintain it during pupillarity and after pupillarity rests upon the parish of the mother's settlement, where it is a natural child. In that case the demand for relief was made in reference to aliment furnished before the child had attained the years of puberty, and also after the child had attained the years of puberty, and as to the continuing liability thereafter to maintain the child. All that matter was discussed after the child was past pupillarity, and before it had attained majority. The decision was, that the liability rested on the parish in which the mother had her settlement, and not upon the parish in which the child was born. But I see no reference made to that decision in the case of Morris. It appears to have been overlooked.

Now, that decision goes a certain length towards solving the present case. I am quite aware that in that case the mother's settlement was not in the parish of her birth. It was acquired by residence, and confirmed, I may so say, by marriage in the same parish. It was a settlement acquired by her. But that decision established an important principle, viz. that the obligation to support the child did not rest upon the parish of the child's birth in a competition with the parish in which the mother had a settlement. I am not aware that that decision has been at any time disputed. I have never heard it questioned. I hold it to be a standing decision, and one which is to be much regarded in law. The question comes to be, whether that decision or the decision in the case of Morris is to rule this case. I see no room for distinction between the case of Gladsmuir and the case of Morris except in one point, and that point is strongly pressed in the case of Morris, and appears to have weighed with the Court in that case as well as in some subsequent cases. It is this, that the parent's settlement was a birth settlement, not one acquired by residence; and it was argued, that although the child might claim a settlement, and the obligation to afford relief might rest on the parish in which the parent had a settlement in the case where that settlement was acquired by residence

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or otherwise, the same rule did not hold in a competition between the parishes of birth—and that, in the latter case, the obligation rests on the parish of the pauper's own birth, and not on that of the parent's birth. That distinction—that principle is urged in some of the opinions in the case of Morris, and it was the basis of decision in some subsequent cases. But that distinction or principle has, I think, been wholly overturned and displaced by the judgment of the House of Lords in the case of Barbour. And I confess that if I had been called on to give an untrammelled opinion before the occurrence of either of these cases, I should have been obliged to say that I could see no reason for distinction between the case in which the settlement of the parent had been acquired by residence, and the case in which it belonged to him by birth—the nature or origin of the parent's settlement is, I think, immaterial. Such would have been my view before these cases occurred. The only question with me would have been, where is the settlement of the parent? —and, I think, that principle was distinctly laid down by the House of Lords, in altering the judgments of this Court in the case of Barbour and the previous case of Jedburgh. If that be so, I think there is a plain ground for not being bound by the decision pronounced in the case of Morris, which adopted the distinction that has since been displaced by the House of Lords. I do not say that all the Judges proceeded on that ground in that case of Morris. But it was an element which entered strongly into the decision, and so much so, that it ruled the decision in a subsequent case. But it is no longer part of our law, and I do not see that the judgment in the case of Morris would have been the same if the principle had been recognised that, where the question is what is the settlement of the parent, it is of no consequence how that settlement has been obtained Upon these grounds, I am of opinion that the child here, a lunatic, and in puberty, takes the settlement of the parent. The parish in which the parent has a settlement is liable to maintain it. That is settled by the case of Gladsmuir. It makes no difference whether the parent's settlement was acquired by residence or belonged to him by birth. That is settled by the decision of the House of Lords in the case of Barbour; and taking these two principles, which are now fixed in our law, they lead to the conclusion that the parish of the father's settlement is liable for the maintenance of this lunatic. Whether, at any after period, by the father acquiring a residential settlement elsewhere, or by the lunatic attaining majority or otherwise, any change may be introduced into the position of parties, I do not speculate upon at present. I do not say that the mere circumstance of the child attaining majority will make a difference. But I do not mean to shut the door upon that question, which has not now been argued to us. Circumstances may arise to change the position of parties. But as regards this cause, I am of opinion that the interlocutor of the Lord Ordinary should be altered, and the liability to maintain the pauper lunatic imposed on the parish in which the father has a settlement.

Lord Ivory.—I am entirely of the same opinion, and would have refrained from adding anything to your Lordship's observations, were it not that we are pronouncing an opinion which is to clash with previous decisions of the Court. The case of Morris, if we were to follow it literally, is undoubtedly a direct authority for the Lord Ordinary's judgment. As such his Lordship has bowed to it, although he has taken the opportunity of stating that, but for it, his judgment might have been different. The judgment of that case also bears apparently on the face of it a degree of weight which perhaps it is not entitled to in itself, for there were circumstances yielded to by some of the Judges who acquiesced in that judgment—among whom I was one—from which it would appear that they acquiesced, because at that time it was understood that there was a principle of construction of the statute which had been acted upon, and which was to be acted upon, and which, whilst it remained, we were not disposed to disturb,—a principle by which, prior to the case of Morris, the birth-place of the individual pauper was taken as a satisfactory element for fixing the liability to the exclusion of the settlement derived from parentage or otherwise. There was a pre-eminence given to such a parish. But the case of Barbour has completely subverted that previous decision, and a most valuable judgment it is in this respect, that it has displaced the application of an element not very satisfactory in itself, and which disturbed the unity of construction, and the simplicity of applying it, which otherwise would have been attained.

The true principle which applies in all these questions is resolved by the answer to the question, Who is the pauper, and what is the settlement of the pauper?

Now it is undoubtedly a general principle—at least during a child's pupillarity, and I think equally so up to the age when the child is able to act for himself, and emancipate himself in his own right—that where a child is the object of relief, it takes a settlement derivative from the parent. The father's settlement is the settlement of the family born in wedlock,—the mother's that of a natural child. In the case of Morris, it was held that that rule was to be applied differently in the case of a lunatic child. The disturbing principle is the emancipation of the child. The birth settlement comes to be displaced by the settlement acquired by the child. But the birth settlement never is lost till such settlement is acquired by it. The child's own birth-place only comes in when settlement by marriage, or settlement by residence, have been acquired, and have been displaced. It comes in then, because there is no settlement to which to resort. A difficulty, which sometimes has made it not so easy to apply that principle, has been suggested in the argument in the present case. That is in the case of the child of an able-bodied parent, and the question, therefore, Who is the pauper? seems to me to be of importance for establishing the liability.

It is said that the father, being an able-bodied man, and the child being presumed to live in family with him, the law will presume that he is able to support his children, and in his own right, therefore, he cannot be recognised as a pauper, so long as he is not reduced to a state of disability, even though unable to support his family. But in the present case, where we are dealing with a pauper lunatic, there may be an exceptional principle introduced, just as in the case of an able-bodied mother with a family deriving a settlement through her, and as regards whom the same question may be put,—Who is the pauper, the mother, or the child? Is the mother, then, by being able-bodied, excluded from relief? But the law has introduced an exception in such a case, from the necessity of the thing. It is said, from natural infirmity and the weakness of the sex, that the mother does not come within that larger principle which affects an able-bodied father, and according to which he is presumed to be able to support his family; and, therefore, although he is excluded from relief, she is not, because it is supposed that she has not the same means of supporting her family, nor the same strength to put these means in action, as an able-bodied father would have. But that presumption arises from a circumstance of a precisely analogous kind to the present. If the natural infirmity in the case of a mother comes into play, so here, the lunacy of the child, which makes it an extraordinary and an exceptional case. The father is reduced, by the extra expense necessary for the aliment of the lunatic child, to the same position in which the law has dealt with the case of a mother alimenting an ordinary family, and, therefore, I am not disturbed at all with the difficulty that here we have an able-bodied father, for we have him reduced to a state of disability—not from bodily infirmity, but from extraordinary causes, such as the law will treat as an exceptional case.

But truly, when you look a little deeper into the matter, it does not appear to me that this difficulty as to the father being able-bodied and the pauper lunatic entitled—according to the admission of parties—to be alimented, as in his own right, materially affects the present question, because, if you hold that it is the father's settlement that is to regulate, as in the case of a widowed mother, still it is the settlement at the time the child became the subject of relief that is to be taken. What is to be the effect of withdrawing the child from the circle of the family, and making it the child of the public:—whether that is to be held equivalent to ordinary emancipation, which disturbs the family connection, and places the child in a different position from the children for whom the father is liable—these considerations may raise questions of difficulty, which we must dispose of when they occur. But it does not disturb my opinion, that from the moment the child is taken possession of by the parish and separated from the family, that from that moment the child may be held no longer to follow the settlement of the father. There may or may not be thus created that ambulatory character in his settlement that separation shall operate—just as marriage in a woman—so that thenceforth the settlement of the child may be the settlement of a child in its own right, although, up to the point of separation, the settlement of the father is the settlement of the child. Therefore, it matters little here whether we are to consider the father or the child [illegible] pauper, for the father is bound to aliment the child up to the

No. 79. — Jan. 29, 1857. Hay v. Paterson.

period of separation, and, therefore, whether you say that the child has become a burden by reason of lunacy and withdrawal of his father's protection, or whether you take the father as the pauper by reason of his child's lunacy, is of little consequence in the solution of this question.

A distinction has been taken between puberty and pupillarity. But that is of no consequence here. The parishes are at one, that the pauper became an object of relief at the age of eleven. The condition of the argument is, that the lunatic is in pupillarity, and while in the family of the father; and that is conclusive, upon the principle of the case of Gladsmuir—which I agree is a most important case—but still more from the principle laid down in the case of Barbour, that when a child is separated from a family, the question is, what was the settlement of the child at that moment? It appears to me that here it was a settlement derived from the father, and that the settlement of the father being the settlement of his birth, that parish must now be liable. I must observe that this introduces an easily applied rule, and a very simple one, which must be of great benefit to parishes in the country; for the simpler the rule, the less the litigation. If the father had died, and it was in consequence of his death that this child was thrown on the parish, there would be no difficulty as to who was the pauper, unless the mother were alive, and in a position to take upon her the burden of maintaining her family. But if the whole family had been thrown on the parish, can there be any doubt that, as to such children, they would have followed the settlement of the father at the time of his death, and that that would have been the settlement of his birth? That would have been the very case to which the principle of the case of Barbour applies. If so, how would it have been possible to say that, in such a case, a lunatic child eleven years of age, and living in family, is yet to be separated from the rest of the family? That would introduce elements to effect a change not truly within this question—something which happened afterwards, in order to regulate what went before. The question is, what was the child's settlement at the moment of separation? It is that which regulates, and thus it is that the parish of the father's birth must here be liable.

Upon the whole, therefore, I agree in the proposed judgment. My only hesitation was, whether we ought not to have called in the other Judges, since we are practically displacing their judgment. But that judgment has been already displaced by the judgment in the case of Barbour, and as I think that the Lord Ordinary is with us in the view we now take of the question—and we are unanimous, it would be wrong to put parties to that expense.

Lord Curriehill.—In this case the pauper is not the father of the lunatic, but the lunatic himself, as is stated by the parties on the record, and is established by a final finding of the Lord Ordinary; and the question is, in what parish has he his settlement? This will be best ascertained by tracing his history from the date of his birth on 28th April 1838 to the present time.

His settlement at the time of his birth was not in Dalkeith, in which he was born, but in the parish of his father's settlement—it being an established rule, that the parish in which a father has his settlement, is also the parish of settlement of his infant children. And the parish of the father's settlement was Laurencekirk, as is ascertained by the joint minute of admissions lodged by the parties. It matters not as to this question, how his settlement came to be in that parish; the fact that it was so being judicially admitted by the parties, and being the condition of the argument. Hence Laurencekirk was the parish of the lunatic's original settlement.

His settlement continued to be in the same parish during his pupillarity, which continued until 28th April 1852, because, according to the same minute of admissions, no change took place in the parish of his father's settlement during that period; and the pupil did not then acquire, and was not capable of acquiring, a separate settlement for himself.

During the latter part of that period the pauper was not only in pupillarity, but in a state of insanity—it being further admitted by the parties on the record, that he was in that state from the time when he was about eleven years of age. It is thus also clear, that on 28th April 1852, when he attained the age of puberty, Laurencekirk continued to be the parish of his settlement.

During the period of about twenty months, between April 1852 and December

1853, when the lunatic was removed to the asylum, and became a charge upon the parish, his settlement still continued to be in the parish of Laurencekirk. During that period no change on his settlement did or could take place, he being not only a minor and unforisfamiliated, but also in a state of insanity, and in no way capable of changing his prior settlement. Laurencekirk having thus been the parish of his settlement down to the moment of his being placed in the asylum, that proceeding had not, and could not have, the effect of *ipso facto* changing that settlement. And Laurencekirk, as it thus continued to be the parish of his settlement at the time when he was placed in the asylum, and became an object of parochial relief, continues of course still to be so.

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The case of Thomson v. Morris, 19th July 1850, is adverse to this opinion. And I would have followed that case as a precedent, if the principle of it had not been overturned. But I think that it has been overturned by the judgment of the House of Lords in the case of Barbour v. Adamson; and that the opinion which I have expressed is in conformity with that authority.

Lord Deas.—The pauper in this case is the son of Robert Greig, who was born in the parish of Laurencekirk. The pauper himself was born on 28th April 1838, in the parish of Dalkeith. Consequently he was about sixteen when this action was brought in May 1854; and about fifteen in March 1853, when his father was imprisoned, and he himself became (as is admitted) an object of parochial relief. It is farther admitted that the pauper had been insane for four or five years previously—that is to say, he had become insane when in pupillarity, and consequently he never acquired, nor was capable of acquiring, any settlement for himself. His settlement, at the time he became a pauper, was thus his father's settlement; and if the father, as head of the family, had been applying for relief in his own right, it is clear enough that the parish of the father's settlement would have been the parish liable for such relief, although the extent of it might have materially depended on the helplessness of his lunatic son. But the peculiarity arises from the relief being claimed not by the father, but directly by or for the son as a pauper in his own right, and from its being admitted (as it is in the record) that the son is the pauper. The question at issue, therefore, is what is the parish of the son's settlement?

This settlement might be either direct or derivative. Owing to his incapacity, the son could have no *direct* settlement, except a settlement by birth, which every person obtains by the mere act of coming into the world; and which, although it may be suspended, is never lost, but may always be fallen back upon when every other settlement fails. The characteristics of a proper birth settlement—viz. its being inherent and permanent—obviously cannot be attributed to a *derivative* birth settlement—for the child may have been forisfamiliated or survived the parent before falling into poverty—the marriage which connected the husband and wife may have been dissolved; and so on. These and other considerations led, not unnaturally nor unphilosophically, to an understanding, which was recognised and acted on in Thomson v. Morris, that whenever a birth-settlement was to be resorted to, and the birth-place admitted of ascertainment, the only two points of inquiry were, 1st, Who was the pauper? and 2d, Where was he born? In that case, as in this, it was admitted that the lunatic was the pauper; and there being no residential settlement, either direct or derivative, the Court, not inconsistently with former practice, held that the parish liable was not the parish of the father's birth, but the parish of the pauper's own birth.

But the moment it was settled, as it was by the judgment of the House of Lords in Adamson v. Barbour, that children, not yet forisfamiliated, who became paupers in their own right by the desertion of the father (or, what would be the same thing, his imprisonment or transportation), fell to be maintained, not by the parish of their own birth, but by the parish of their father's birth—the principle recognised and given effect to in Thomson v. Morris was necessarily set aside. It must now be held that a birth settlement may be derivative just as much as a residential settlement. Had the children in Barbour's case not been deserted by the father, no relief could have been claimed either for or by them, because the father would have been the pauper, and the law presumes every able-bodied father to be capable of maintaining his family, however different the fact may be. It was just because the consequence of the desertion was to make the children paupers in their own right that they became entitled to parochial relief. But, although paupers in their

No. 79. own right, and resorting to a birth-settlement (there being no other), their settlement was held to be in the parish of their father's birth, and not in the parish of their own birth. I can draw no distinction between the case of pupil children who become paupers in their own right by the father's desertion or transportation, and the case of this lunatic, who, while he was still a member of his father's family, is admitted to have become a pauper in his own right by his father's imprisonment and inability to maintain him. Consequently I concur with your Lordships in holding Laurencekirk to be the parish liable to maintain the pauper.

Jan. 29, 1857. Walker v. M'Isaac.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor of the Lord Ordinary reclaimed against, except in so far as it finds that Thomas Greig, mentioned in the record, is a proper object of parochial relief, and entitled to the same: Find that the parish of Laurencekirk, as the parish of birth of Robert Greig, father of the pauper the said Thomas Greig, is bound to relieve the parish of Edinburgh, at whose expense the said Thomas Greig is now supported, of the burden of his maintenance; and that the parish of Dalkeith, as the parish of the pauper's birth, is not bound so to do: Sustain the defences for the parish of Dalkeith, and assoilzie the reclaimer, Alexander Paterson, inspector of the said parish, from the conclusions of the action, and decern: Repel the defences for the defender, David M'Donald, inspector of the said parish of Laurencekirk: Find, declare, and decern against him, in terms of the alternative, declaratory, and petitory conclusions of the libel: Find the inspector of the parish of Laurencekirk liable in expenses to the pursuer of the action, the inspector of the parish of Edinburgh; allow an account thereof to be given in, and remit to the Auditor to tax the same when lodged, and to report: Find no expenses due to the parish of Dalkeith, as in the question between that parish and the parish of Laurencekirk, and decern."

JAMES MORGAN, S.S.C.—SCOTT, RYMER, & SCOTT, W.S.—W. & J. COOK, W.S.—Agents.

No. 80.

ISABELLA WALKER, Pursuer.—*D. F. Inglis—Patton.*
PETER M'ISAAC, Defender.—*Logan.*

Reparation—Seduction—Issue.—In an action of damages for seduction it is not necessary to put in issue that the pursuer was previously "a person of virtuous conduct and untainted character."

Jan. 29, 1857. 2D DIVISION. Ld. Benholme. R.

THE pursuer brought this action of damages, alleging that she had been long courted by the defender, and that he had promised to marry her, and that, "relying upon his false assurances, and in consequence of the belief and expectation induced by his statements and actings," she had, on a certain day, "yielded to his solicitations, and was prevailed on to permit the defender to have carnal knowledge of her person, whereby she lost her virginity."

The defender, admitting intercourse on the occasion libelled, denied any assurance on his part that he would marry her, or that she had then lost her virginity, and he alleged that he had frequently had intercourse with her before during a series of years, and that, "in her intercourse with other men she frequently exhibited great levity and want of propriety of demeanour such as was, or seemed to be, inconsistent with a notion of her being a virtuous person."

The pursuer proposed the following issue:—"Whether the defender, for sometime previous to the 14th May 1855, courted the pursuer, making false professions of his intention to marry her? And whether the defender, on or about the said 14th May 1855, by means of such courtship or false pro

fessions, seduced the pursuer, and prevailed upon her to permit him to have carnal connection with her person; to the loss, damage, and injury, of the said pursuer. Damages laid at L.1000 sterling." No. 80. — Jan. 30, 1857. Spence v. Taylor.

The defender, on the other hand, proposed that the issue should be in the following terms:—"Whether the pursuer, being, previous to the 14th of May 1855, a person of virtuous conduct, and untainted character, was, on or about that date, seduced by the defender, and was in consequence prevailed on by him to permit him to have carnal knowledge of her person, to her injury and damage?"

When the case came before the Inner House (on the Lord Ordinary's report), the defender maintained that the form proposed by him was the invariable form in all cases of the kind,—had been deliberately settled, and was necessary to the justice of the case, the word "seduce" not being a *nomen juris*.[1]

For the pursuer, it was contended;—That the words "of previously virtuous conduct, and of untainted character," ought not to be in the issue; seduction on the false pretence of intention to marry was language which would be perfectly intelligible to the jury, and the pursuer would be entitled to a verdict if, at the time, she was living virtuously.

Lord Justice-Clerk.—I think the word "seduce" quite enough. There is no word the jury understand so well. In the cases quoted to us there very likely was no discussion, or the pursuer, knowing the facts, wanted her previous character put into the issue in order to strengthen her case. At the same time, though I do not think the pursuer here bound to follow the same course, she will probably make very little way with the jury if she do not make out her character to have been good. On the other hand, although we have often gone back on forms of issues deliberately settled, it may be well that we speak in the robing room to our brethren in the other Division. Promise of marriage, as here alleged, if distinctly made out, may go a great way, even if it should turn out that the pursuer's conduct early in life was not correct.

Lord Murray.—I do not object to the alteration of the usual issue in these cases, but I would rather not strike out these words without consulting the other Division.

Lord Cowan.—I observe the conclusion of the summons is put on loss of character, and there is a specific statement in the record to the same effect, which is my only source of difficulty. I am not satisfied that any such issue has been previously matter of deliberate judgment.

On a subsequent day—

Lord Justice-Clerk.—After talking the matter fully over with the First Division, we have resolved that the issue stand as proposed by the pursuer.

M. M'Gregor, S.S.C.—Hill & Robertson, W.S.—Agents.

Charles Spence, S.S.C., Pursuer.—*Gifford*. No. 81.
John Taylor and Others, Defenders.—*Patton*—*A. B. Shand*.

Process—Conclusions of summons.—Under a summons which, on an allegation that a committee possessed funds, concluded for payment of an account against the members of the committee, as such, "but not personally,"—*Held* (*aff.* judgment of Lord Ardmillan—*abs.* Lord Wood), that the pursuer, who had admitted on the record that the committee had no funds, could not obtain a decree of simple condemnation.

The grounds of this action sufficiently appear from the summons. It was brought by Charles Spence, S.S.C., against John Taylor, George Mathers, and W. H. A. Strathern, accepting and remanent members, at Jan. 30, 1857. — 2d Division. Ld. Ardmillan. R.

[1] M'Farlane on Issues, p. 378, and cases there cited; Kay v. Wilson's Trustees, 9th March 1850, ante, vol. xii. p. 845; Fraser, Personal Relations, vol. i. p. 198.

No. 81.

Jan. 30, 1857.
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Taylor.

least alleging themselves to be the remanent members, of a committee appointed by various persons, related, or claiming to be related, to the late Miss Jean Innes, of Stow, for the purpose of investigating their several rights and claims to the estate of the said Miss Jean Innes; and Alexander Colston, alleging himself to be an assumed member of said committee, and it concluded,—"Therefore the defenders, as members, or alleged members, of the foresaid committee, and as employers of the pursuer, or otherways liable to him for doing the business for which this action is raised, ought and should, in so far as they have funds applicable thereto, but not personally or individually, be decerned and ordained to make payment of the sum of L.126, 15s. sterling," &c.

The pursuer alleged that the committee were empowered to raise a common fund for defraying all their expenses, and for the employment of agents and counsel for conducting that proceeding;—that he had been asked on behalf of the committee "whether he would hold the members of committee, jointly and severally, liable to him for his legal charges and costs for conducting the necessary proceedings in the intended lawsuit to be raised as to the Stow succession, or not."

This was followed by a minute in the following terms:—"Mr Spence, in the circumstances, gives his professional services, on the condition of receiving such payments to account as the funds can afford, besides his outlay; and of course holding only the parties, and not the committee, personally liable."

The pursuer said that he was then appointed law-agent for the claimants, and had given much time to their interests. "He has barely, however, received from them more than the actual outlay to which he has been put: and the sum now sued for is the balance of the account which has been incurred to him. The defenders have at present ample funds in their possession."

The pursuer arrested on the dependence a certain sum of L.80 in the defenders' hands, but this sum the defenders maintained to be applicable only to a certain specific purpose, and not to the general purposes of the litigation; they stated expressly that they, "as committeemen, have no funds at their command applicable to the general purpose of promoting the litigation in reference to the Innes succession."

The pursuer being called upon to state whether he craved a proof of his allegation respecting funds being in the defenders' hands, lodged a minute stating,—"The object of the present action is to constitute the pursuer's claim, so as to prevent prescription, and enable him to make it good by his hypothec or otherways. The defenders are sued merely *qua* trustees. The conclusion against them is limited, and the pursuer, *in hoc statu*, declines leading any proof regarding the trust-funds, but respectfully craves judgment without any such proof."

The Lord Ordinary pronounced the following interlocutor:—"In respect that the pursuer has judicially stated that he does not now aver that there were at the date of this action funds in possession of the defenders, applicable to payment of the account sued for, and in respect that the action as laid is founded on the averment of the possession of such funds, and is not a mere action of constitution; Assoilzies the defenders from the conclusion of the action as laid, and decerns: Finds the pursuer liable in expenses." *

* "NOTE.—It is necessary to consider the structure of the summons, and the nature of the averments of the pursuer, in order to judge whether this action be, as is now urged, merely an action of constitution. The pursuer did allege that the defenders were in possession of funds,—that he was entitled to payment of his account,—that payment was refused by the defenders, and that therefore action was rendered necessary. The documents on which the pursuer's demand is reste

The pursuer reclaimed, maintaining, that though he must now admit that the defenders had not funds in hand, he was still entitled to his decree of constitution, as they might get funds hereafter, or he might be in a position to compel them to take steps with a view to procuring them. No. 81. — Jan. 31, 1857. Earl of Kintore.

Without calling on the defenders' counsel,—

Lord Justice-Clerk.—I suppose there is no doubt about this case. The action is raised against these people as members of committee. The statement made was, that they had ample funds in their hands. Well, an opportunity was given to prove that. The pursuer declined to do so, and we must hold that there are no funds. The natural conclusion then is, that the action ought to be dismissed; but the pursuer says, "No, I must have decree, because if they ever have funds I may make it available." The object is, that this committee may be forced to raise funds. Now I regard that as an unfair perversion of this action. These people may be liable to a declarator to compel them to raise funds, and when such an action is brought we may consider it. The agent here agreed to act for these people—he must have known that he was just taking his risk. He seems to have thought that he would get payment out of them, but he now admits that they have no funds.

Lord Murray.—I can come to no other conclusion than that at which the Lord Ordinary has arrived.

Lord Wood was absent.

Lord Cowan.—I agree also. This action is for payment, and the summons avers that the defenders have funds. This allegation is met by a denial. The pursuer at last admits that there are none, and so the very basis of liability is cut off. I do not say whether or not the pursuer is in a position to bring a proper action of constitution—but this is not such an action. This agent was asked on what terms he would take the business, and he said he would take it not holding the committee liable—the meaning of which is, that he is to go directly against the parties for whom the committee acted.

The Court adhered, and found the reclaimer liable in additional expenses.

Party, Pursuer's Agent.—George Monro, Defenders' Agent.

The Earl of Kintore, Petitioner.—*Moir—Irvine.* No. 82.

Entail—Act 10 *Geo. III. cap.* 51 (*Montgomerie Act*)—11 *&* 12 *Vict. cap.* 36, *sect.* 19 (*Entail Amendment Act*).—Prior and subsequent to the passing of the Entail Amendment Act in 1848, an entail proprietor executed improvements of the nature contemplated by the Montgomery Act, but did not obtain decree therefor. He craved and obtained authority under the Entail Amendment Act to execute bonds for two-thirds of three-fourths of the sums so expended by him. Having exhausted the powers so given him, he again applied for authority to grant bonds for the full amount of two-thirds of his expenditure subsequent to 14th August 1848;—*Held* (in conformity with the opinions of the whole Court), that the previous procedure formed no bar to his obtaining such authority.

After the Earl of Kintore succeeded to his entailed estates of Kintore and Haulkerton, he executed various improvements of the nature contemplated by the 10 Geo. III. cap. 51, partly before and partly after the passing of the Entail Amendment Act, 11 & 12 Vict. cap. 36, but had not obtained Jan. 31, 1857. — 1st Division. Ld. Mackenzie L.

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shew that the existence of funds, applicable to payment of his account, was necessary to his action for payment. Accordingly the conclusion is for payment, and is based on the averments of the existence of such funds. These averments he declined to instruct by proof; and the Lord Ordinary is of opinion that the absolvitor of the defenders is the legitimate result of the pursuer's failure to instruct [illegible] of action. That the pursuer used arrestments in order to attach a[illegible], is an additional indication of his own view of the action, showing [illegible] brought to enforce payment, and not as a mere constitution."

No. 82. — Jan. 31, 1857. Earl of Kintore.

decree therefor to the extent of three-fourths of his expenditure provided for by the Montgomery Act. Amongst the sums so expended were the following, viz.:—From 31st December 1847 to 31st December 1850, the sum of L.8978, 11s. 10d.; and subsequent to 31st December 1850, the sum of L.3200, 0s. 9d.

In 1851 the Earl presented an application, under the 11 & 12 Vict., for authority, *inter alia*, to grant bonds and dispositions in security, in respect of the expenditure of L.8978, 11s. 10d., but limiting the application to two-thirds of three-fourths thereof, in place of two-thirds of the whole expenditure, so far as regards the period subsequent to the passing of the Entail Amendment Act. The Court accordingly granted authority to the extent of L.4489, 5s. 11d., "in terms of the statute."

Of the sum of L.8978, 11s. 10d. of expenditure sustained in that petition, there was expended on improvements *subsequent* to 14th August 1848, the sum of L.8608 15 10

Of which two-thirds, being the sum for which the petitioner was entitled to grant bonds, is	L.5739	3	10
And two-thirds of three-fourths of the same sum, being the amount for which the petitioner had granted bonds in respect of that expenditure, is	4304	7	11
Difference, . . .	L.1434	15	11

In like manner in 1852, with reference to the sum of L.3200, 0s. 9d., the Court, on a similar application, granted authority, "in terms of the prayer of the petition," for the execution of bonds and dispositions in security to the extent of two-thirds of three-fourths, being L.1600, 0s. 4d. The expenditure so sustained was, as already stated, entirely subsequent to 14th August 1848; and two-thirds thereof, for which the Earl would have been entitled to grant bonds if he had availed himself of the full powers of the Act, is L.2133, 7s. 2d., leaving a balance of L.533, 6s. 10d. For this sum, and the above balance of L.1434, 15s. 11d.—in all L.1968, 2s. 9d.—the Earl now craved authority to grant bonds and dispositions in security in usual form.

Two of the three consenting heirs were pupils. A tutor *ad litem* was appointed to them, but he did not state any objections to the application.

There had been exactly similar procedure in regard to the Kintore estates, as to which also a similar application was now made.

The Lord Ordinary remitted to Mr Campbell, W.S., to report.

Mr Campbell presented two reports, applicable respectively to the Haulkerton and Kintore estates, but being in substance the same. He referred to the case of Gordon, 12th November 1851 (ante, vol. xiv. p. 16), in which it was decided that the annualrent to be granted under the 16th section in respect of expenditure on improvements executed subsequent to the passing of the Act was to be calculated, not on three-fourth parts of the sums expended, in terms of the 13th section, but on the whole of the sums expended, in terms of the 14th section, and that the bond and disposition in security to be granted in respect of such expenditure, in terms of the 18th section, was to be for two-third parts of the whole expenditure. And he stated as his opinion, that at the time when the petitioner presented his former petitions, he was entitled, under the statute, to obtain authority to grant bonds and dispositions in security for the amount of expenditure, which should include the sums for which the petitioner now craved authority, and that the petitioner was still entitled to obtain that authority, unless the proceedings which took place under these petitions should bar him from

doing so. The Reporter did not think that these proceedings formed a bar to the present application. No. 82.

The Lord Ordinary reported the case to the First Division, who, on 28th June 1856, pronounced an interlocutor, appointing the papers to be laid before the whole Judges for their opinions on the question, whether the prayer of the petition should be granted? Jan. 31, 1857. Earl of Kintore.

The consulted Judges returned the following opinions:—

Lord Justice-Clerk.—I am of opinion that the prayer of the petition, mentioned in the prefixed interlocutor, should be granted.

I am unable to find any reason why a party who has obtained, under one application, authority to grant bonds over the estate for a certain portion of the money he has expended on the entailed estate, may not, at an after period, obtain authority to grant bond for the remainder of the sum. His power does not seem to be affected by the fact that he had previously obtained authority to grant bond for a portion of the money expended. He may exercise his power in the way and at the times which the circumstances of his family or his own views in regard to them suggest. If he has the privilege under the statute, then he may exercise it in the way he chooses. He may not have known of the extent of his privilege, or been disinclined to avail himself of it to the full extent. His views alter: but he is only claiming authority to exercise a power still remaining in him.

The tutor *ad litem* does not oppose the application, and we have no argument on the part of the heirs of entail. I must say that, on a point as to which the Division entertained so much difficulty as to consult the whole Court, it would seem to be the appropriate, if not necessary duty of the tutor *ad litem*, to state the grounds of opposition on the part of those with whose interests he is charged. As he has not done so, I have looked to the point with more jealousy, but have not encountered any difficulty.

The interlocutors disposing of the former applications are in themselves no bar to the prayer of this petition. Nor indeed could the Court by any form of interlocutor exclude another application,—if the heir in possession has, under the statute, the privilege he claims.

Lords Wood, Murray, Cowan, Handyside, Neaves, and Mackenzie, concurred in the opinion of the Lord Justice-Clerk.

Lord Ardmillan.—I am of opinion that the prayer of this petition should be granted, and I concur in the views expressed by the Lord Justice-Clerk. The chief, if not the only, difficulty arises from the terms of the 19th section. But I do not think that the 19th section can be fairly construed so as to exclude this application. A power, within certain limits, but up to the measure of these limits, is granted by statute. It has been partially exercised: but within the limits, there remains a power not exercised. The application now made is for authority to exercise that remaining power. The statute does not say that only one bond can be granted—nor that, if more than one, they must be of same date and under one application. I see nothing to prevent a new application, if within the power. To whatever extent the bond is granted, it operates under the 19th section as a discharge. If the bond has exhausted the power, the discharge is total.

Lord Benholme.—I am of opinion that the prayer of the petition referred to in the interlocutor of the Court of 28th June 1856, ought to be granted.

The objection arising from the petitioner's previous proceedings will probably assume its most definite shape, by referring to the 19th section of the Entail Amendment Act, which is as follows:—"And be it enacted, that the granting, under authority of this Act, of any bond of annualrent, or bond and disposition in security, in respect of any improvements executed, or to be executed, on an entailed estate in Scotland, shall operate as a discharge of all claims for or on account of such improvements, against such estate, and the rents and profits thereof, and the heirs of entail succeeding thereto, save and except the claims under such bond of annualrent, or bond and disposition in security themselves."

It can hardly be disputed that the bonds and dispositions in security, already executed by the petitioner, in terms of the previous interlocutors of the Court, were granted "under the authority of this Act." The petitioner himself must admit this, [illegible] that they are valid and effectual, so far as they go.

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It may also be said that, in one sense, these bonds were granted in reference to the whole improvements upon the entailed estate; since in his several petitions, he stated the full amount of these improvements, and craved authority to execute bonds to the amount of a certain proportion of the improvement monies.

But, considering what was the true intention of this clause, I cannot hold that it will operate so as to exclude the petitioner from exhausting the full remedy which was competent to him under the statute, and which he would have adopted, had he been earlier aware of his legal rights.

The consequence of the petitioner having fallen into this mistake, under his present proceeding, is no doubt somewhat different from what it would have been, had he preferred the other mode of proceeding, competent under the statute, of granting bonds of annualrent. Had the petitioner executed such bond of annualrent as is directed by the 13th section, in reference to monies expended on improvements, subsequent to the passing of the Act; or had he executed such bond of annualrent as is directed by the 14th section, with reference to monies expended on improvements previous to the passing of the Act,—in either case the mistake would have been fatal. The proceeding could not have been considered as taken under the authority of the Act—the two several kinds of bonds of annualrent being different, not merely in their amount, but also in their style and effect. The result would probably have been, that the bond executed by mistake must have been set aside, and a new and appropriate bond executed in place of it.

But under existing circumstances, the mistake committed affects merely the amount of the bond and disposition in security. It may thus be still held as granted "under the authority of the Act." But in substance it is granted "in reference" only to three-fourths of the improvement money; and to that extent only, in my opinion, it can be held to operate a discharge.

It is possible that the argument in favour of the objection might be made to assume a more formidable aspect than that in which at present it appears to me. I cannot help regretting that we have had so little assistance from the bar. I am not aware that the minute presented for the petitioner makes any mention of the 19th section of the statute; and as the tutor *ad litem* does not oppose the application, no argument on that side has been addressed to the Court. But after the best consideration that I could give to the case, I have been unable to form any other opinion than what I have expressed.

To-day the case was advised,—

Lord President.—We have no remarks to make. We have only to give judgment in terms of the opinions of the consulted Judges.

The Court pronounced the following interlocutor:—"The Lords having resumed consideration of this cause, with the opinions of the consulted Judges, Grant warrant to the petitioner for execution of a bond and disposition in security, or bonds and dispositions in security, for the sum of L.1968, 2s. 9d., in terms of the statutes: interpone their authority, and decern; and remit to the Lord Ordinary to see the deeds executed, and to report."

Mackenzie & Baillie, W.S.—Agents.

No. 83. The Earl of Eglinton and Winton, Petitioner.—*Sol.-Gen. Maitland—Mure—Montgomerie.*

Entail—Act 10 *Geo. III. cap.* 51 (*Montgomerie Act*)—*Act* 11 & 12 *Vict. cap.* 36, *sections* 14, 18, *and* 26; *and Act* 16 & 17 *Vict. cap.* 96 (*Entail Amendment Acts*).—An heir of entail in possession having obtained decree under the Montgomerie Act for three-fourths of his expenditure on improvements subsequent to the passing of the Entail Amendment Act of 1848, applied for authority to uplift and apply trust-funds in payment *pro tanto* of his *whole* expenditure. But he afterwards restricted the proposed application of the trust-funds to three-fourths of his expenditure; and having obtained such authority, and exhausted the powers so conferred on him,—*Held* (in conformity with opinions of the whole Court), that he was afterwards en-

titled, under sect. 14 of the 11 & 12 Vict. cap. 36, to grant bonds of annualrent for the remaining one-fourth, being the whole amount of his expenditure. No. 83.

Observed (*per* Lord Wood), that it is competent to an heir of entail to avail himself of the provisions of both the 14th and 26th sections of the 11 & 12 Vict. cap. 36, in reference to any sum of improvement outlay, the one not being exclusive of the other. Jan. 31, 1857. Earl of Eglinton.

Entail—Improvements.—The expense of fitting up a hydraulic ram and erecting a gas work for supplying Eglinton Castle and offices with water and gas, sustained as proper improvement expenditure—but the expense of erecting a racket-court disallowed.

THE petitioner was heir of entail in possession of the entailed estates of Eglinton and others. This petition was founded upon the Entail Amendment Acts 11 & 12 Vict. cap. 36, sections 14 & 18; and 16 & 17 Vict. cap. 96, and prayed for authority to execute bonds of annualrent, or bonds and dispositions in security over the entailed estates, in respect of certain improvement expenditure by the petitioner. The circumstances in which this petition was presented were these:—In March 1854, the petitioner presented an application to the Court, under the Entail Amendment Act, for warrant to uplift and receive from his grandfather's trustees certain surplus trust-funds, amounting to L.10,000, in repayment *pro tanto* of several sums of money which had been expended by him in improvements upon the entailed estates. A remit was made to Mr Inglis, W.S., to inquire generally as to the circumstances of the case, and also to men of skill to inspect the operations in question, so far as the same had not already been found and declared by decree of the Court, and to report whether the improvements were of the nature contemplated by the statutes, and whether, and how far the sums charged in the accounts had been *bona fide* expended or incurred in these improvements. 1st Division. Ld Mackenzie. C.

In the course of the proceedings, it appeared that the improvement outlay consisted of the following items:—

1. Expenditure between the terms of Martinmas 1849 and Martinmas 1851, amounting to L.9396, 0s. 10¾d., and *for three-fourths of which decree had been obtained* by the petitioner against the next heirs of entail, in terms of the Act 10th Geo. III. cap. 51, upon the 16th day of March 1853.

2. Expenditure between Martinmas 1851 and Martinmas 1853, but for which no decree had been obtained, L.4063, 12s, 3¾d.

Of this sum there had been expended upon improvements of the nature contemplated by the statutes, consisting of buildings, and additions to Eglinton Castle, and draining the lawn parks, farm-houses and steadings, and planting, ...				L.3637	5	11¾
The balance of L.426, 6s. 4d. had been expended on improvements of the nature of repairs, and upholding of the subjects, and otherwise.						
3. Between Martinmas 1849 and Martinmas 1853, expenditure in fitting up a hydraulic ram at Eglinton Castle, ...	L.407	0	0			
Erecting a gas-work for supplying the castle and offices with gas, . . .	1031	17	10			
Erecting a racket-court at the castle,	864	0	9			
				2302	18	7
For all which no decree had been obtained.						
Making together, .				L.5940	4	6¾

These sums were reported to have been *bona fide* expended in improvements.

Under the above remit, Mr Inglis reported that it appeared to him that the petitioner would be "entitled to receive from the trustees of the late Earl the surplus of trust-funds, amounting to L.10,000, in repayment of the sum of L.5940, 4s. 6¾d.; and in repayment, *pro tanto*, of so much of the sum of

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L.9396, 0s. 10¾d., declared by the aforesaid decreet to have been expended between the terms of Martinmas 1849 and Martinmas 1851, as the petitioner can legally claim out of the trust-funds—but what that amount may be seems to be doubtful. In the case of Sir J. S. Richardson,[1] the question was raised, whether an heir of entail, who has constituted improvement outlay against the next heirs, and obtained decree for three-fourths thereof, is entitled to repayment, out of trust-funds or consigned money, of the full amount of the expenditure, or of the three-fourths only which have been created a debt against the heirs of entail? The Court expressed doubt upon the point, but as in that case the fund was insufficient to meet more than three-fourths of the expenditure, authority was granted for applying it in repayment of the sum declared to be a debt against the succeeding heirs, leaving the question open as to whether the petitioner was entitled to payment of the remaining fourth out of consigned or trust-funds, in terms of the 26th section of the Act.

"The question then raised does not appear from the reports to have been again brought before the Court, and it therefore seems to be questionable if the petitioner is entitled in the present application to have the trust-funds applied towards repayment of more than three-fourths of the improvement expenditure, as ascertained by the decreet of declarator."

A report was thereafter made by Lord Neaves, Ordinary, to the Court, when—in addition to the difficulty which had occurred to Mr Inglis in regard to the extent to which the petitioner was entitled to receive repayment of the sum for which decree of declarator had been obtained—his Lordship stated that he had some doubts in reference to the expenditure which had been made in the erection of the racket-court. As the amount of trust-funds was, however, insufficient to pay more than three-fourths of the sum declared by the decreet, and the other expenditure, under deduction of the expense of the racket-court, the petitioner gave in a minute, in accordance with a suggestion to that effect from the bench, stating that, "in the meantime, he limited the prayer of his petition for application of the trust-funds to the extent of L.10,000, in repayment, *pro tanto*, of L.7047, 0s. 8d., being three-fourths of the amount for which it is stated in the petition that decree of declarator had been obtained under the Act 10th Geo. III. c. 51, and of the sum of L.3637, 5s. 11¾d., part of the sum of L.4063, 12s. 3¾d., stated in the petition to have been expended in improvements under the said Act, between Martinmas 1851 and Martinmas 1853, reserving to the petitioner to apply further hereafter, if additional trust-funds should emerge."

Thereupon, the Court granted warrant and authority for uplifting the trust-funds, amounting to L.10,000, and applying the same in the manner mentioned in the minute. That sum was accordingly uplifted by the petitioner; and it was stated in the present petition, and was instructed by a discharge produced, that, with it, there had been paid off the whole of the L.7047, 0s. 8d., and also the sum of L.2952, 19s. 4d. to account of the L.3637, 5s. 11¾d., thus leaving a balance of this latter sum still subsisting undischarged of L.684, 6s. 7¾d.

By the above arrangement all questions were avoided in the former application in regard to the one-fourth of the sum for which decree had been obtained, as well as with regard to the amount of the expenditure at Eglinton Castle. The present application was now made with the view of obtaining authority to charge the estates by bonds of annual rent or bond and disposition in security with these sums.

These sums were (1,) L.2349, 0s. 2¾d., being the remaining fourth of L.9396, 0s. 10¾d., for three-fourths of which decree had been obtained under the Montgomery Act, and payment made under the former petition:

[1] Richardson, 22d June 1853, ante, vol. xv. p. 762.

(2,) L.684, 6s. 7¾d., being the balance remaining unpaid of the sum of L.3637, 5s. 11¾d. not constituted in terms of the Montgomery Act, of which partial payment was obtained out of the trust-fund, under the decree in the former application; and (3) L.2302, 18s. 7d., which was also not constituted under the Montgomery Act, and, in terms of the arrangement above mentioned, was not included in the decree in the former application.

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The Lord Ordinary remitted to Mr Inglis, W.S., as in the former petition, to report. And Mr Inglis brought under the consideration of the Court the following points:—First, Whether the petitioner was entitled to charge the estates with the remaining fourth of the expenditure declared by the decree obtained in virtue of the Montgomery Act? and, second, To what extent the sum of L.2302, 18s. 7d., expended at Eglinton Castle, formed a proper expenditure in terms of the Act?

The Lord Ordinary (Mackenzie) reported the case. The three next heirs of entail being the three eldest sons of the petitioner, who were all in pupillarity, the Court appointed a tutor *ad litem* to them, and on 19th February 1856, pronounced an interlocutor appointing the petitioner and the tutor *ad litem*, if so advised, to prepare and interchange mutual minutes.

The tutor declined to lodge a minute.

The petitioner lodged a minute, in which he set forth the above procedure; and, after referring to the decisions in the cases of Gordon[1] and Fleeming,[2] he stated that it was clear, both from the express terms and the manifest intention of the 14th section of the 11 & 12 Vict. cap. 36, that that provision was made irrespective of the limitations of the Montgomerie Act. The amount on which the annual rent was to be calculated was "the whole of the sums expended;" and, therefore, it could not be restricted to the portion only of those sums for which decree had been obtained against the heirs of entail. The intention to dispense with these limitations would be seen more clearly if the 13th and 14th sections were read together: the former of these sections provides that where improvements have been executed prior to the passing of the statute, the heir in possession shall only have power to charge the estate with three-fourths of the amount for which he has obtained decree; while the latter section provides that where the improvements have been executed subsequent to the passing of the statute, he shall be entitled to charge the estate with the whole amount. It could not be maintained that any prejudice was done to the heirs of entail in charging the estate with the whole improvement outlay made after the passing of the statute of 1848, because, in acquiescing in the decree of declarator under the Montgomerie Act, they did so in the full knowledge of the provisions of the 14th section, which made the whole, and not three-fourths, of the outlay chargeable on the estate.

A further question had, however, been suggested, which seemed to be the one of most importance in the present case, viz. whether, when proceedings had been taken under the 26th section of the Act, and a certain amount of funds obtained, but not sufficient to repay the whole improvement outlay, it was competent thereafter to have recourse to the remedy provided in the 14th section, for the purpose of charging the unpaid balance upon the estate.

The petitioner submitted that there was no difference in principle as to this matter between a balance of expenditure already constituted which the trust-fund was inadequate to pay, as in the present case, and expenditure made upon subsequent improvements. The 14th section gave right to charge upon the estate the whole constituted expenditure, and the only ground upon which any part of it could not be charged, was, that it had been already paid. It was because he got payment of that part of it, and not

[1] Gordon, 12th November 1851, ante, vol. xiv. p. 15.
[2] Fleeming, 17th February 1855, ante, vol. xvii. p. 451.

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because he presented a petition under the 26th section, that the petitioner could not now charge against the estate the three-fourths which were paid. And there being no fund out of which he could get payment of the remaining fourth, his right to charge it against the estate was precisely the same that he would have had so to charge the whole expenditure if there had been no trust-fund at all, or, what would have been the same thing, if it had been entirely exhausted by other and preferable purposes.

Even if any difficulty of a formal kind could have arisen in consequence of the sum now in question having been the subject of an application under the 26th section, all room for such a question was removed in the present case, by the minute restricting the prayer of that application to the three-fourths; so that the matter must be dealt with upon the footing as if the former petition had never embraced the remaining fourth.

On 28th June 1856 the Court pronounced the following interlocutor:—"The Lords, in respect of the general importance of the question involved, appoint copies of the papers to be laid before the whole Judges, with a view to obtaining their opinions on the question whether the prayer of the petition should be granted as regards the sum of L.2349, 0s. 2¾d. sterling mentioned therein, and referred to in the report by Harry Maxwell Inglis, and in the minute for the petitioner."

The following opinions were returned by the consulted Judges:—

Lord Justice-Clerk.—In the page above referred to, in the report of Mr Inglis, the precise sum is not actually mentioned; but I understand the sum of L.2340, 0s. 2¾d. to be the fourth of the larger sum mentioned in that page, for three-fourths of which decree under the Montgomerie Act has been obtained.

I must, as in the case of Lord Kintore, express my surprise and disappointment, that in a matter deemed of so much difficulty by the Division as to require the opinions of the whole Judges, the tutor *ad litem* (the same, I see, for all the three pupil heirs) has not thought it proper to state the grounds on which the objection is understood to rest to the proposal of the petitioner,—even although the question had, in the case of Richardson, been stated to be of great difficulty by the head of the Court.

The Court have not the aid they ought to have,—and any decision to be come to can have little authority in disposing of another case, in which a party may appear to oppose a similar application.

The point is very well stated in the minute for Lord Eglinton. The contrast between the 13th and 14th sections of the Law of Entail Amendment Act is very remarkable. By the 13th section, in regard to the amount of improvements executed before the passing of that Act, and for three-fourths of which decree, in terms of the Montgomerie Act, has been obtained, it was not intended to create an additional burden on the heirs of entail, and authority is only given to grant a bond of annualrent for the amount so fixed.

But the reasons for restraining that authority in cases where the burden on the heirs of entail for improvements made before the passing of the Act was already fixed, did not apply in cases where the improvements were executed after the passing of the Act; and hence the bond of annualrent is not limited to the sum contained in the decree.

The terms of the 14th section declare—"That where an heir of entail in possession of an entailed estate, holden by virtue of any tailzie dated prior to the said 1st day of August 1848, shall execute improvements on such estate subsequent to the passing of this Act, and obtain decree for three fourth parts of the sums expended thereon, in terms of the said recited Act of the 10th year of the reign of His Majesty King George the Third, and shall also obtain the authority of the Court as after-mentioned, it shall be lawful for such heir of entail to execute in favour of any party he may think fit a bond of annualrent in ordinary form over such entailed estate, or any portion thereof, binding himself and his heirs of taillie to make payment of an annual rent, during the period of twenty-five years from and after the date of such decree, or during such part of the said period of twenty-five years as may remain unexpired at the date of such bond, such annual

rent not exceeding the sum of L.7, 2s. for every L.100 of the whole of the sums expended as aforesaid, and so in proportion for any greater or less sum, and being payable half-yearly, by equal moieties at the terms of Whitsunday or Martinmas, beginning the first term's payment at the first term of Whitsunday or Martinmas after the date of the bond for the proportion of annualrent then due, with legal interest and penalties in case of failure."

The section takes the very case of decree having been obtained for three-fourths of the sums expended in improvements executed subsequent to the passing of the statute, and then declares that it shall be lawful for the heir of entail to grant a bond of annualrent (at the rate and for the time prescribed) for every L.100 of the whole of the sums expended as aforesaid. These words are explicit, and, in my judgment, exclude construction. The power is given. The Court cannot limit it. The very case of a prior decree is supposed as the very state of things in which the bond may be granted for every L.100 of the whole sums expended, and hence incompatibility between the exercise of that authority and any prior decree cannot be urged on the terms of the enactment. The doubt stated in the case of Richardson does not affect my mind. The remark by Mr Montgomerie is quite satisfactory:—"It cannot be maintained that any prejudice is done to the heirs of entail in charging the estate with the whole improvement-outlay made after the passing of the statute of 1848, because, in acquiescing in the decree of declarator under the Montgomerie Act, they do so in the full knowledge of the provisions of the 14th section, which makes the whole, and not three-fourths, of the outlay chargeable on the estate."

But I must further add, that I do not think the view of any tacit consent or understanding or arrangement can apply to the case. Under the Montgomerie Act parties are called for their interest, in order that they may oppose. If parties do not oppose when so called on, I do not view it as a case of tacit consent, but as a proof that there is no ground of objection to outlay and to the decree sued for, and that the parties could not help themselves or avoid such decree.

But over and above the right to obtain a decree for three-fourths of the sum expended, the power is given to grant bond of annualrent for the whole of the sums expended as aforesaid, *i.e.* for three-fourths of which the decree may have been obtained.

We are not warranted to deny effect to that power—if the matter is otherwise rightly carried through under the statute.

I am therefore of opinion, that the prayer of the petition, bearing date the 7th of August 1855, should be granted as regards the sum of L.2349, 0s. 2¾d. sterling, mentioned therein.

Lord Handyside.—I concur in the opinion of the Lord Justice-Clerk.

Lord Ardmillan.—I concur in the opinion of the Lord Justice-Clerk.

Lord Wood.—The opinion of the consulted Judges is asked in relation only to the sum of L.2349, 0s. 2¾d., being the one-fourth of the sum of L.9396, 0s. 11d. of expenditure on improvements, as to which decree of declarator was obtained, the remaining three-fourths having been paid out of the trust-funds mentioned in the proceedings.

My opinion concurs with that of the Lord Justice-Clerk.

In the first place, looking to the provisions of the 13th and 14th sections of the Entail Amendment Act (1848), I agree with his Lordship in holding that, in virtue of the latter, an heir of entail has the privilege of granting a bond of annualrent for the whole amount of the sum expended on improvements subsequent to the passing of the Act, for three-fourths of which he may have obtained decree, in terms of the Montgomerie Act. I think it impossible, upon any sound reading of the 14th section, to hold that, by having taken that decree, the privilege thereby conferred is restricted to granting a bond of annualrent in respect of three-fourths only of the sum expended, and that it cannot be granted in respect of the whole amount. In my opinion, the provisions are expressed in terms which do not admit of such a limitation being attached to them. I can see no ground, whether in respect of tacit consent or understanding, or otherwise, on which the substitute heirs of entail can maintain, that by an annualrent on the full amount of the improvement outlay being allowed to be charged on the estate where a previous decree has been taken for three-fourths of it, any prejudice is done them.

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Assuming that so far a correct view has been taken of the provisions of the Act 1848, then,

In the second place, with regard to a point also noticed in the minute for the petitioner, the Earl of Eglinton, I think it is competent to an heir of entail to avail himself of the provisions of both the 14th and 26th sections of that Act, in reference to any sum of improvement-outlay, the one not being exclusive of the other. I cannot perceive how, where a sum of expenditure has been constituted by decree, in terms of the Montgomerie Act, the heir of entail can be precluded from—on the one hand, getting payment *pro tanto* under the 26th section, to the extent of the trust-fund that may be applicable to that purpose; and—on the other hand, under the 14th section, granting bond of annualrent in reference to the amount remaining unpaid. Upon any other view, if there were a trust-fund which was sufficient to pay only one-half or two-thirds of the sum expended, the heir of entail would be compelled either to rest satisfied with that, relinquishing all claim for the remainder, or to throw himself entirely upon the relief to be obtained in virtue of the provisions of the 14th section. I can find nothing in the terms of any of the provisions of the Act to warrant their being so restricted in their operative effect. When a decree has not been obtained for the improvement expenditure, there would seem to be no ground for contending that benefit may not be taken, by the heir of entail for his relief, both of the 26th and the 16th sections of the Act. In that case, how could any just objection be stated to the heir of entail separating the expenditure into two parts, and making application to the Court under the 26th section in regard to the one—the sum thereof being equal to the whole amount of the disposable trust-fund—and under the 16th section in regard to the other? Indeed, it would appear that in the case of no decree in terms of the Montgomerie Act having been obtained, the Court had not felt any difficulty, for our opinion is not desired in regard to the sum of L.684, 6s. 7d., being the balance not paid out of the trust-fund, of a sum of L.3637, 5s. 11¾d. for improvement-outlay, which had not been constituted by decree. But if the heir of entail is there entitled to grant a bond of annuity in respect of such balance, I can see no room, in the terms of the 14th section of the Entail Amendment Act, for drawing a distinction between that case and the case where a decree has been obtained, and denying to the heir of entail in the latter the privilege which he would have in the former.

But no doubt the present case is marked by this peculiarity, that the application as originally made by the petitioner the Earl of Eglinton, was for payment in ful[l] out of the trust-fund, of the whole sums expended on improvements, embracing a[s] well the sum for which decree had been obtained, as those for which it had not. This, as I understand it, was done when in error as to the amount of the trust fund, and in the belief that it would cover all the sums for which there was an[y] claim. Be that, however, as it may, it does not appear to me, that—when the fac[t] has proved to be that the trust-fund is not adequate to discharge the whole, so th[at] a portion of the expenditure in regard to which decree had been obtained, viz. one fourth, is left unliquidated after payment (in terms of the restriction of the pray[er] of the petition then before the Court) of the other three-fourths—the circumstan[ce] of the petitioner having taken the course of procedure which was originall[y] adopted, can bar him from now resorting to the provisions of the 14th section, [to] procure the relief in virtue of them, which he might have competently had, if [he] had originally made his claim the subject of separate applications, or put it alte[r]natively in one petition, craving application of the trust-fund to its amount, a[nd] authority to be given under the 14th section *quoad ultra*. If indeed the heir [of] entail is not entitled to combine the two modes of relief, but must elect the one [or] the other, the case would be different; but as I have already stated, that is a vi[ew] of the statutory provisions which I have not been able to adopt. Therefore, up[on] the whole matter, I am of opinion that the prayer of the petition ought to [be] granted as respects the said sum of L.2349, 0s. 2¾d.; for I need hardly rema[rk] that if competent in so far as it is founded on the 14th section, it is equally so [in] so far as alternatively founded on the 18th section of the statute, which make[s it] lawful for the heir of entail to charge the entailed estate, by bond and dispositi[on] in security, to the extent and in the manner there provided.

Lords Murray and Cowan.—We concur in the opinions of the Lord Justi[ce-] Clerk and Lord Wood.

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Lords Benholme, Neaves, and Mackenzie.—We are of opinion that the prayer of the petition, bearing date 7th August 1855, ought to be granted, as regards the sum of L.2349, 0s. 2¾d. sterling mentioned therein.

1. The Entail Amendment Act of 1848 draws a distinction between improvements executed previous, and improvements executed subsequent to the passing of the Act. And this distinction has been held to apply, both to such improvements as have been made the subject of decree, in terms of the Act 10th George III., and to improvements of the nature contemplated by that Act, but which, from irregularity or omission of the statutory forms, cannot be made the subject of such decree. The 13th & 14th sections of the statute authorise two different kinds of bonds of annual-rent, where decree has been taken; the difference between them being founded upon this distinction. And section 16th establishes the same difference, where the bond of annual-rent has to be granted for improvements which cannot be made the subject of decree.

The difference between the two styles of bonds of annual-rent does not consist merely in the amount upon which the annual-rent is calculated; being three-fourths in the one case, and in the other the whole of the sum expended in improvements. There is also an important difference in regard to the parties against whom the annual-rent is to operate, or rather in the date at which the sinking fund (if it may be so called), established by the terms of the bond, is to commence.

Under section 13th the annual-rent is not to bear more than the legal interest during the lifetime of the granter. And the period at which the twenty-five years commence, which, by means of larger annual payments, eventually extinguish the capital sum upon which the bond was calculated, does not arrive till his death.

In the other case, the twenty-five years of the sinking fund commences with the date of the decree, and operates, in the first instance, against the heir of entail himself, who has made the expenditure. If that heir should survive a few years, the burden upon the subsequent heirs of entail will not be heavier than it would have been, under the former kind of bond. For although the annual payment will still be in the proportion of four to three, the length of time which the burden has to last will be diminished, in the proportion which the years of the expender's survivance bear to the whole period of twenty-five years. If the expender should survive for twenty-five years, the burden on the succeeding heirs of entail is worked off altogether.

The two styles of bond, therefore, are by no means so unequal in their operation, as might be supposed, if the different amount upon which the two are calculated be alone considered.

We do not consider that any correct or adequate description of the two styles of bonds is given, by stating that by the one style of bond the heir has power to charge the estate with three-fourths only, and by the other, has power to charge it with the whole of the sum expended; nor do we think that there is much in the observation of the petitioner, to be found on page 5 of his minute, to the following effect:—"It cannot be maintained that any prejudice is done to the heirs of entail, in charging the estate with the whole improvement-outlay made after the passing of the statute 1848; because, in acquiescing in the decree of declarator under the Montgomerie Act, they do so in the full knowledge of the provisions of the 14th section, which makes the whole, and not three-fourths of the outlay, chargeable on the estate." This explanation seems unsatisfactory, because, by the 15th section, the very same arrangement and distinction is established, in regard to improvements which cannot be made the subject of decree of declarator. It would appear, therefore, that if any explanation were required in regard to the difference as to the amount in the bond, introduced respectively by the 13th & 14th sections, it is to be found in the different operation of the bonds in regard to the commencement of the sinking fund. Had the 14th section (like the 13th) specified the sum upon which the annual-rent was to be calculated as no more than the sum for which decree had been obtained against the subsequent heirs of entail, it would have been somewhat incongruous and unjust. For, by the style of the bond, the heir himself, who takes the decree, is to bear his share in liquidating the capital; and a long survivance on his part, might deprive him of the whole benefit of the decree already obtained.

Upon a full consideration of the two different styles of bonds of annual-rent, it

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cannot be concluded, that the Legislature intended that the latter style of bond should bear heavier, comparatively, upon the subsequent heirs of entail, than the former style. One thing only appears to be quite certain, that under the latter style of bond, a more speedy liquidation of the burden is secured, in reference to all concerned.

But, whatever weight may be attached to this explanation, we are of opinion that, in regard to the amount upon which the bond of annual-rent is to be calculated, the words of the 14th section are too clear and explicit to leave any room to doubt that it was the whole sum expended, and not merely the three-fourths for which decree had been obtained.

2. The 26th section of the statute introduces a remedy, or rather a privilege, in favour of heirs of entail, which appears to us to be altogether independent of the remedies and privileges introduced by the 13th, 14th, 15th, and other sections of the Act.

These latter remedies are to be taken against the entailed estate or against the heirs of entail; whereas the remedy of the 26th section, is to be taken against no estate and no persons directly; but against pecuniary funds arising from the sale of, or the liquidation of damage done to the estate, or from additional funds being invested under trust, towards the purchase of additional estates to be entailed. Against such funds the Legislature has introduced a more extensive remedy than is, by any of its provisions, competent against the entailed estates themselves, or against the heirs of entail.

As regards the disposal of such funds in paying improvements, the privilege conferred upon the heir of entail is very extensive. It is not confined to monies for which decree has been obtained under the Montgomerie Act; or even to improvements of the nature specified in that Act. It extends to all permanent improvements; whether past or future.

This section makes no reference whatever to the Montgomerie Act. Had that Act never been passed, the operation of section 26 would have been just as extensive as it is. And that the Montgomerie Act was ever passed, does not, in our opinion, suggest any restriction upon the operation of that section. In short, we consider the remedy of section 26 to stand clear of all other statutory remedies, either under the Montgomerie Act, or under the previous sections of the present statute which have reference to it.

Section 26 plainly contemplates a liquidation of the whole sums by which the estate has been permanently improved. That these sums, besides constituting permanent improvements, are also of the nature contemplated by the Montgomerie Act, and have been made the subject of decree against the heirs of entail, to the extent of three-fourths,—suggests no good reason why the 26th section should not apply to them; and still less, any good reason why, if it do apply to them, that remedy should not be taken as is given in that section. That the heir of entail has taken decree in terms of the Montgomerie Act, for three-fourths of the sums he has expended on improvements, seems no reason for depriving him of his remedy against the disengaged fund, or the additional trust-fund. It was plainly the intention of the Legislature that he should have, as against those funds, remedies of a peculiarly extensive kind.

Considering, therefore, that section 26 is in its nature and in its terms plainly independent of the statutory remedies in the 13th, 14th, and 15th sections of the present Act, as well as of the Montgomerie Act, we are not moved by the doubt expressed by the Lord President in the case of Richardson, which also seems to have recurred in an earlier stage of the present case; but think that the petitioner, had the consigned funds been sufficient, would have been entitled to have obtained out of them, the whole sums expended by him in improvements, and not merely the three-fourths for which he had obtained decree under the Montgomerie Act.

3. But the petitioner, out of those funds, has obtained payment of only three-fourths. The funds did not admit of his obtaining payment of the whole. And the question is now raised, whether, in regard to that fourth part, he is to be deprived of the remedy provided by the 14th section, in respect that he has already, to a limited extent, been enabled to avail himself of the remedy introduced by section 26?

We are of opinion that this question ought to be answered in the negative

Here again, we think that the two remedies are independent of each other. The effect of the petitioner's former proceedings under section 26, is just to strike off, by payment, three-fourths of his claim for improvement outlay. To the extent of one-fourth, his claim remains exactly what it was before. And as under section 14, he would formerly have been entitled to grant bond of annualrent calculated upon the whole amount of his outlay,—so there still remains to him, notwithstanding the payment made to him out of the consigned fund, to the extent of three-fourths, the power of granting bond of annualrent for the remaining one-fourth.

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Of this date the case was advised.

Lord President.—In this case, as in the case of the Earl of Kintore, the judgment will be in terms of the opinions of the consulted Judges.

The only other point upon which the reporter expressed a doubt, was whether the expense of erecting a racket-court properly formed part of the expenditure contemplated by the statute.

Sol.-Gen. for the petitioner.—This is a separate building, and therefore must come under the head of offices. It is not unsuitable to the position in life of the petitioner. The offices are adjuncts of the mansion-house, and this is an adjunct of the offices.[1]

Lord Deas.—I doubt whether this is for the improvement of the lands and heritages.

After consultation—

Lord President.—The opinion of the Court is, that this does not fall within the provisions of the statute.

The Court pronounced the following interlocutor:—"The Lords, on report of Lord Mackenzie, and on consideration of the opinions of the consulted Judges on the point referred to in the interlocutor of 28th June 1856, and in conformity to the opinions of the majority of the whole Judges on the foresaid point, and having heard counsel for the parties, Disallow the sum of L.864, 0s. 9d. expended in the erection of a racket-court at Eglinton Castle, in respect such expenditure is not expenditure falling under the provision of the statute referred to in the petition: Find and declare, that in addition to the sum of L.2349. 0s. 2¾d. mentioned in the petition, the sums of L.684, 6s. 7¾d. and L.2302, 18s. 7d., subject to deduction of the said sum of L.864, 0s. 9d., amounting together, after said deduction, to the sum of L.2123, 4s. 5¾d. sterling, have been expended by the petitioner in improvements on the entailed lands and estates of Eglinton, mentioned in the petition, of the nature contemplated by the Act 10 Geo. III. c. 51; and decern: Farther, they find and declare that the whole of the said sums, after deduction as aforesaid, was expended on improvements executed subsequent to the passing of the statute 11 & 12 Vict. cap. 36: Grant warrant to and authorise the petitioner" . . . . to execute "(1) An annualrent during the period of twenty-five years from and after the date of the decree already obtained by the petitioner, being the 16th day of March 1853, such annualrent not exceeding the sum of L.7, 2s. for every L.100 of the foresaid sum of L.2349, 0s. 2¾d.; and (2) An annualrent during the period of twenty-five years from and after the date of the said decree before pronounced, such annualrent not exceeding the sum of L.7, 2s. for every L.100 of the foresaid sum of L.2123, 4s. 5¾d., payable the said annualrents half-yearly, by equal moieties;" . . . . "all in terms of sections 14 and 16 of said Act 11 & 12 Vict. c. 37; or otherwise" . . . . to grant bonds and dispositions in security over said estates, or any portion thereof, other than the mansion-house, offices, and

[1] Fraser v. Lovat, 27th Feb. 1840, ante, vol. ii. p. 684.

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policies, for two-thirds of the sum on which the amount of the bond or bonds of annualrent, if granted, would be calculated; "all in terms of and agreeably to the 18th section of the said Act 11 & 12 Vict. cap. 36: Interpone their authority, and decern; and remit to the Lord Ordinary to see the deeds executed, and to report."

HUNTER, BLAIR, & COWAN, W.S.—Agents.

No. 84.

GEORGE HINTON BOVILL AND MANDATORY, Petitioners.—*Gordon.*
WILLIAM DICKSON AND TRUSTEE, Respondents.—*Patton.*

Expenses.—Expenses of a petition to the Court to apply a judgment of the House of Lords allowed where the interlocutor appealed and affirmed was not one that exhausted the case, which had to be farther proceeded in.

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2D DIVISION.
R.

SEE ante, vol. xvi. p. 619, and H. of L. in this volume.

This action had three conclusions.—1. For delivery of goods under a contract. 2. For damages. 3. Failing delivery, then for payment of a sum of money. An interlocutor disposing of the first conclusion in favour of the pursuers, and directing the case to be proceeded with as regards the remaining points, was taken to appeal and affirmed, with expenses. The pursuer now petitioned the Court for application of the judgment, to have the case put to the roll, "that the other conclusions of the action may be disposed of," and "to find the petitioners entitled to the expenses of this application."

The respondents did not resist any part of the prayer except that as to expenses, and contended that there was a fixed rule that the unsuccessful parties were not found liable in the expenses of a petition to apply a judgment of the House of Lords when the petition was not opposed.[1]

The petitioners maintained that that rule applied only where the judgment of the House of Lords was one which exhausted the cause. This was a case where it would not do to put in an extract of that judgment. Farther procedure was necessary.

LORD JUSTICE-CLERK.—I think this is a case where a petition was necessary. Although our interlocutor is affirmed there is an addition made to it, and the whole conclusions of the action are not yet disposed of. The petition might possibly have been rendered unnecessary by a letter of consent, but we have not that here.

The rest of the Court concurred.

THE following interlocutor was pronounced:—"Apply the judgment of the House of Lords: Find the petitioners entitled to the expenses of this application: Allow an account, &c., and appoint the case to be farther proceeded in."

CAMPBELL & SMITH, W.S.—MELVILLE & LINDESAY, W.S.—Agents.

No. 85.

WILLIAM ANDERSON, Pursuer.—*Gifford.*
ALEXANDER TORRIE, Defender.—*Fraser.*

Reparation—Agent and client—Pactum illicitum.—A party pursued his former agent for the loss and damage he had sustained by his culpable and wilful negligence, against which he was "bound by law and express agreement to guarantee" the pursuer. Among the pursuer's allegations were,—that diligence against his effects had been carried through owing to the defender's neglect to intimate a sist and against his person owing to his having sold his goods, which a creditor had poinded; the pursuer being induced to disregard the poinding by receiving a lette

[1] Magistrates of Dingwall v. Mackenzie, 20th December 1832, Sh. vol. xi. p. 224 Duncan v. Clyde Trustees, 1st June 1853, ante, vol. xv. p. 707.

rom the defender, saying that the poinding was illegal, and should be disregarded, nd that he, the agent, would guarantee him against the consequences. *Objections.* —1. That the agent was not responsible for not having intimated the sist, as the terlocutor granting it contained no order for intimation. 2. That he was not sponsible under the guarantee, as it was *pactum illicitum.*—*Repelled.*

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See ante, vol. xvii. p. 804.

2d Division.
Lord Neaves.
R.

William Anderson, a farmer in Aberdeenshire, pursued Alexander Torrie, n Aberdeen advocate, for damages in the following circumstances.

In 1852 John Anderson, the pursuer's brother, raised an action of count nd reckoning against him for his alleged share of funds intromitted with r him. The pursuer alleged that the claims against him were groundless; it that, when he was from home, and in absence of his agent, John Ander- n obtained, on 5th January 1853, a decree in absence against him for a ndom sum of L.600. This decree was extracted, and a charge given, on th January, at the pursuer's residence, but he was not at home, and it s only two or three days afterwards that he learned that the decree had been nounced. He immediately went to Aberdeen and waited upon the defender, d instructed him, as his agent, to get him reponed in common form against e decree in absence, and to defend the action, and he supplied him, at the same e, with funds to consign the expenses, and to prepare a petition for reponing. otwithstanding this, on 4th February, the day after the expiry of the arge, the pursuer was surprised by the arrival of a messenger-at-arms, who eeded to poind the whole crop and stocking of every description in virtue the decree. He immediately went to Aberdeen, where he ascertained it, though the defender had presented the usual petition for reponing on st January (which commenced by praying the Court "to sist execution of e said decree,") he had not lodged defences to the action, as he should have ne, and the Sheriff, consequently, did not repone, but pronounced this terlocutor:—"In respect of the consignation, meantime sists execution, and ows the petition to be seen till 3d February next." But this sist was not imated by the defender till after the poinding had been executed, and the sequence was, that, when the petition came to be considered, it was resisted John Anderson, on the double ground that the defences had not been lodged, d that the decree obtained had now been implemented by the poinding, d the Sheriff dismissed the petition, with expenses. The pursuer advoca- this process to the Court of Session, but the judgment of the Sheriff was ered to (6th June 1855.) John Anderson having thereafter taken steps arry out the poinding by sale, the pursuer has been obligеd to advocate process of poinding also; and, with a view to open up the whole pro- ings, he has brought a reduction of the decree in absence, with diligence, he intimated to the defender all these proceedings, and that he held n liable for them all. He frequently represented to him the hardship he s exposed to from the subsisting of the poinding, while he had his rent pay, and his lease expired at Whitsunday 1853; and he alleged that rrie "advised him to dispose of his stock just as if it had not been ded, and, both verbally and in writing, offered to guarantee him against consequences of so doing." The written guarantee referred to was a er in the following terms:—"*Aberdeen*, 10 *Feb.* 1853.—Sir,—I wrote u yesterday, and I have received no answer; it is ridiculous for you to ak of not taking your cattle to the market for sale. I told you that I ready and willing, and still am, and I hereby judicially offer to guaran- you against any loss or trouble for carrying on the business of the farm, it had not been poinded. You know, or ought to know, that an illegal nding may be disregarded, and the more especially when I offered, and offer to guarantee you ag^{t}. any loss or trouble. Go to market and sell the highest price, and buy in the cheapest market.—Your obd^{t}. (Signed) Torrie."

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The pursuer, after delaying as long as he could, at last, trusting to the guarantee, and Torrie's assurances that the poinding was illegal, disposed of part of the stock, whereupon his brother charged him with breach of poinding, and he was apprehended and carried to prison in Aberdeen, and was only liberated conditionally after some time. This process of breach of poinding was also in dependence, so that the pursuer had been involved in four litigations, all directly or indirectly through the conduct of Torrie.

The summons concluded for L.1000, "as the amount of the loss and damage sustained, in consequence of the defender's failure through gross and culpable, or wilful negligence, to get the pursuer reponed in the usual and ordinary form, against a decree in absence pronounced in an action at the instance of John Anderson, and which loss, injury, and damage, has accrued and is accruing to the pursuer, by and through poindings of his goods, his apprehension for alleged breach thereof, expensive and tedious litigation, and in various other ways, against all which the defender is bound, both by law and by express agreement, to guarantee and relieve the pursuer," &c.

The defender pleaded;—1. The action is not relevant. 2. The defender having fulfilled all that he was employed, or which he was bound to perform, there are no grounds for a claim of damages against him. 3. The defender is not liable for non-intimation of the sist, in respect, (1), That the creditor, John Anderson, or his agent, knew of it; (2), Because the creditor was bound, in any view, to have become acquainted with the deliverance of the Sheriff, the same being merely a decree in the course of the process; and, (3), Because no intimation whatever had been ordered by the Sheriff upon the creditor.

Tentative issues were lodged by the pursuer.

The Lord Ordinary, after hearing a debate on the relevancy, reported the case to the Second Division, without a decision, but with the subjoined note.*

The pursuer argued;—That all the difficulties in which he had been placed had sprung from the defender's failure to intimate the sist, without which it had proved entirely nugatory, so that John Anderson had been able to proceed in *bona fide* to execute the poinding, and so, by having obtained part-implement of his decree, ultimately to defeat the petition for reponing.[1]

In the Inner House the defender argued;—The action was laid in part upon fault as an agent, and in part on a contract of guarantee, but it was not relevant on either branch. The procedure for reponing took place

* "NOTE.—The Lord Ordinary thinks this action clearly relevant as an action of reparation for the damage suffered by the pursuer, through the defender's alleged gross negligence, in not taking due steps to have the pursuer reponed against a decree in absence, pronounced in the Sheriff-court. But the pursuer further contends, that he has a separate claim upon a guarantee said to have been granted by the defender, and under which the pursuer was induced to violate a poinding executed of his goods, and was in consequence apprehended, and dealt with 'as a criminal.' The Lord Ordinary has doubts of the relevancy of such a demand in any circumstances, as founded on a mere obligation of guarantee. But further, he does not think that this is here libelled as a separate ground of action. The true *medium concludendi* seems to be that the pursuer has suffered injury, in various ways no doubt, but all through the defender's negligence. The attempt to make a separate claim and plea on the guarantee, apart from the reparation for negligence, seems an *ex post facto* thought; and on the whole, the Lord Ordinary thinks that there is really only one ground of action to go to issue, leaving to the pursuer to shew the damage of every kind thence arising.

"The point of relevancy, however, is so much mixed up with the adjustment of the issues which were ordered before answer, that the Lord Ordinary has reported the whole case without a decision."

[1] 1 & 2 Vict., c. 119, sect. 18.

under the authority of Act of Parliament, which never contemplated a sist without reponing, and the Sheriff did wrong in not at once giving decree of reponing,—instead of which he merely granted a sist. It was, moreover, imperative on the Sheriff to order intimation of a sist.[1] Here, however, that was not done, so the agent had not failed in his duty. But, even if it were the duty of an agent in the ordinary case to intimate a sist, it could not be so when the interlocutor granting it was wholly irregular and incompetent. So far as this action was laid on the guarantee, it could not be sustained. It amounted to a *pactum illicitum*. It was a guarantee, not against any injury arising from fault, but a guarantee against the consequences to follow from a direct violation of the law.

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LORD JUSTICE-CLERK.—A decree in absence went out against the pursuer on 5th January. He was not aware of it, and it was extracted, and a charge given, of which he did not know till the 21st. He went off to Aberdeen—saw his agent, giving him instructions to get him reponed,—giving him full information as to the charge, and lodging with him money to enable him to consign the expenses, that he might apply to the Sheriff.

Of the character of the application to be made, the agent alone was the judge. He did apply on 31st January, and of same date an interlocutor was obtained thus: "in respect of the consignation, meantime sists execution."

The prayer of the petition for reponing had been very properly framed to obtain a sist, because at the expiry of the charge, the party holding the decree was at liberty to poind. In the previous case (Anderson v. Anderson) there was discussion raised on the procedure in the Sheriff-court, as to whether or not the first duty of the Sheriff was not to have reponed before granting the sist. That discussion is out of place here. It is enough that execution was proceeding when the defender himself applied for a sist, and obtained it. The truth is, he seems to have thought that there was no hurry, and so let the time for intimation pass, and then the execution went on. But truly, as Lord Deas remarked in the earlier branch of the case in June 1855, a sist of execution which was not to be intimated, would have been nugatory. There seems great propriety in the sist being granted, and whether it was ordered to be intimated or not, it was clearly the agent's first duty to have intimated it.

Whether this was an irregular interlocutor that was pronounced is not the question before us, but it will not do for the agent who applied for it to say that it was wrong. That takes place which it was the agent's duty to prevent, and which he had the means of preventing, and I think he is clearly liable in the consequences.

Then comes the question as to the damages on the guarantee.

The pursuer tells the defender of his surprise at the poinding—that his rent is coming due, and his lease to an end, and that he requires to sell everything, but his hands are tied. He intimates to him his difficulties as holding him responsible, and his reply was, that the poinding was illegal, and he should proceed to manage as if it had never taken place, and he will guarantee him against the consequences. Is he not clearly responsible for such advice? It is said this was not done as a professional man, and not in the character of his agent, but I confess I think the action sufficiently includes reparation for the consequences of his breach of the poinding.

I purposely abstain from entering into the question as to the form of the interlocutor in the Sheriff-court, because, whether it was right or wrong, the agent at least did obtain his first object—the means of stopping the diligence, and it was his duty to have used them.

LORD MURRAY.—I have no difficulty, except as to the letter of guarantee, and the extent to which it is to be insisted in. Anderson applies to Torrie in his difficulty, and he executes this ridiculous guarantee, and now he turns round and says "It is *pactum illicitum*, the opinions it contains are unsound, and I may give as much unsound advice as I please, and if any one follows it, and so commits breach of poinding, or does any other wrong, he alone is responsible." That defence will not do.

LORD WOOD was absent.

[1] Stephenson v. Dobbins, 17th February 1852, ante, vol. xiv. p. 510.

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LORD COWAN.—I agree. There was a summons raised against this farmer—a decree was got in absence, and a charge given. He came down from his farm to Aberdeen to get the requisite legal steps taken to relieve him from the effect of this diligence. He tells his agent fully the position in which he stands, who then presents an application to the Sheriff, and asks a sist of execution. I think the Sheriff did right in pronouncing the interlocutor he did. If he did wrong, he was misled by the petition itself, but I do not think he was wrong. I do not read Lord Curriehill's opinion in the former branch of this case as implying a different view on the only point now before us; and, moreover, the rest of the Court did not concur with him, and disposed of the question then before them against his opinion. Now, the sist of diligence having been thus obtained by the agent, the circumstances certainly present a case of gross negligence. The defender's counsel assumed that after the petition was presented and a deliverance was obtained, the agency ceased. I do not think so. The defender, as I hold, continued to be agent for the pursuer until the object of the application was secured. After the sist was got, it was his duty to take care that an intimation of that sist should be sent immediately to the opposite party. I think he was bound to do everything necessary to place his client in a state of effective protection against the diligence. I do not hold that intimation required to be ordered by the interlocutor itself. Intimation is inherent in such an order, and it was the agent's duty to his client to have it made to the party doing diligence. In the circumstances set forth in the record, I have no hesitation in holding that a relevant case is stated by the pursuer for inferring this liability against the agent.

On the other point, I have nothing to add to the views stated from the Chair.

THE COURT sustained the action as relevant.

ALEXANDER GIFFORD, S.S.C.—PATRICK PAUL, S.S.C.—Agents.

No. 86.

GEORGE MORRIS, Pursuer.—*Millar*.
THE MONKLAND RAILWAY COMPANY, Defenders.—*D. F. Inglis—Mackenzie.*

Process—Issues—Relevancy—Damages.—A foreman of a locomotive brought an action of damages against the Railway Company, his employers, on the ground that, while sitting on the pushing frame of his engine, in the execution of his duty, sprinkling sand on the rails, the engine came in contact with a quantity of rubbish on the line, whereby his leg was broken—that the accident occurred in a dark morning in February, when he could not see the obstruction, and in a cutting, where the line was unprotected by a ditch or dyke. The action held relevant, and issues adjusted to try the question.

Feb. 3, 1857.
1ST DIVISION.
Ld. Ardmillan

THE pursuer was in the service of the Monkland Railway Company, as fireman on one of their locomotive engines, and he brought this action of damages against the Company, for injuries sustained while in the performance of duty. His allegations were to this effect:—that on the morning of the 8th February 1856, while sitting on the pushing frame of his engine, sanding the rails, which were wet and slippery, it being part of the pursuer's duty to sand the rails when necessary, the engine came in contact with a large quantity of blaize or rubbish, composed partly of large stones, and partly of earth, which lay across the rails, and one of his legs, having struck the same, his leg was broken close above the ankle joint, and otherwise seriously injured. That the accident occurred in a cutting, one side of which rose almost perpendicularly, and was composed of materials easily loosened by rain or the ordinary action of the weather—that the line of rail was unprotected by ditch or dyke—that obstructions on the line, and danger to trains passing along, had been caused by the fall of rubbish at this place on previous occasions—that this was known to the defenders, but that they, notwithstanding, did not adopt proper means or ordinary precautions to prevent any part of the cutting from getting detached, or falling on the line of rails. He pleaded;—That the accident was occasioned by the fault, negli-

gence, or want of precaution on the part of the defenders, or of those for whom they were responsible, and, therefore, that they were bound to make reparation. He proposed the following issues:—"1. Whether the pursuer was in the service of the defenders, as fireman on one of their locomotive engines, on the eighth of February 1856? 2. Whether, while the pursuer was employed as aforesaid on such locomotive, on the morning of that day, at a part of the defenders' line of railway, between Kerse Mains and the bridge which crosses the turnpike road to the west of a place known as the 'Snab,' one of the pursuer's legs was broken through the fault of the defenders, and to the loss, injury, and damage of the pursuer? Damages laid at L.400 sterling.

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The defenders pleaded;—That there was no relevant statement to support the action, and, also, that the accident was occasioned by the pursuer's violation of the defenders' regulations, and by his own culpable and reckless conduct.

They proposed the following issues:—"Whether the pursuers was in the service of the defenders as fireman on one of their locomotive engines on the 8th of February 1856? 2. Whether, while the pursuer was employed on such locomotive on the morning of that day, and at a part of the defender's Borrowstounness line of railway, between Kerse Mains and the bridge which crosses the turnpike road to the west of a place known as the 'Snab,' one of the pursuer's legs was broken, through the fault of the defenders, by coming in contact with a quantity of blaize and other substance which had fallen on the line, and to the loss, injury, and damage of the pursuer? Or, Whether the pursuer's leg was broken by coming in contact with the said blaize or other substance, through his fault or carelessness in sitting on the frame or buffer or other part of the engine, with his legs, or one or other of them, hanging down towards the ground? Damages laid at L.400 sterling."

The Lord Ordinary, on 13th December 1856, pronounced an interlocutor sustaining the relevancy, and reporting the case for the adjustment of issues.

D. F. Inglis—The first issue must be matter of admission. The essence of the pursuer's averment is, that this rubbish had fallen on the line unexpectedly, and that the defenders ought to have prevented it. In specifying the cause of injury, the rule is that the injury must be connected with the immediate cause of the injury, and then that cause of injury must be connected with the negligence and fault of the defenders.[1] That rule had also been adopted in the Second Division. Applying that rule, the issue proposed by the pursuer was defective.

The following issues were approved of:—1. It being admitted that the pursuer was in the service of the defenders, as fireman on one of their locomotive engines, on the 8th of February 1856—

2. Whether, while the pursuer was employed as aforesaid on such locomotive, on the morning of that day, at a part of the defenders' line of railway, between Kerse Mains and the bridge which crosses the turnpike road to the west of a place known as the "Snab," one of the pursuer's legs was broken through the fault of the defenders, by coming in contact with a quantity of blaize or other substance which had fallen on the line, and to the loss, injury, and damage of the pursuer?

THOMAS PADON, S.S.C.—WOTHERSPOON & MACK, W.S.—Agents.

[1] Swift v. Christie, 10th June 1854, ante, vol. xvi, p. 922; Maclachlan v. [illegible]on, 23d May 1855, ante, vol. xvii, p. 773; Dargie v. Magistrates of Forfar, [illegible] January 1856, ante, vol. xviii, p. 343.

No. 87. ROBERT FOULIS, Pursuer.—*Penney—Ross.*

LADY FOULIS AND OTHERS (Sir David Foulis' Trustees), Defenders.—*Pyper—Broun.*

Feb. 3, 1857.

Foulis v. Foulis.

Trust—Vesting.—Trustees were directed to hold the truster's whole estate for payment of the liferent to his widow, and "on the termination of her liferent," to dispone certain portions to each of the three sons of the truster *nominatim*, and to divide the residue among them equally, the share of any son predeceasing the truster and his spouse to go to his issue, or failing such issue, to the surviving son or sons equally, or their issue. The two eldest sons died unmarried;—*Held* (affirming judgment of Lord Handyside), that the provisions to the sons had vested *a morte testatoris*, and the trustees were bound, on the widow executing a renunciation of her liferent, to convey the whole estate to the surviving son.

Expenses.—Expenses incurred in an action as to construction of a trust-deed, allowed out of trust-funds.

2D DIVISION. Ld Handyside. L.

THE late Sir David Foulis executed a trust-disposition and settlement, whereby he disponed to Lady Foulis and others, as trustees, his whole heritable and moveable property, under the reservation of his own liferent, for the following purposes:—1st. For payment of debts, &c. 2d, "Immediately on my decease," to make over to Lady Foulis, "for her absolute use and disposal," his whole furniture, and "for her liferent use during all the days of her life, while she shall survive me," the income derived from his whole heritable and moveable property. 3d, For providing a sum of L.400 for an outfit to his youngest son Robert Foulis, declaring that in event of the said sum having been paid by the truster himself during his life, then the interest thereof should go to Lady Foulis as part of her liferent provision, "and the said capital sum of L.400 shall be held and subsequently disposed of as part of my reversionary trust-funds." The 4th purpose of the trust was in these terms,—"On the termination of the liferent above appointed in favour of my said spouse, I direct and appoint my said trustees to convey and make over my heritable estate, and the reversion of my moveable estate, as follows, videlicet."—Different portions of the heritable property were provided by the truster for each of his two eldest sons, and a sum of money to the youngest; and to the three, equally among them, the whole reversion of the estate, whether heritable or moveable, that should remain after fulfilling the purposes above mentioned. There then followed this clause,—"But providing always, that in event of my said sons predeceasing myself, my said spouse, their mother, and leaving lawful issue then the lands or others appointed to be made over to him or them who shall so predecease, shall be conveyed to his or their children respectively equally among them, my intention being that the lawful children of any of my sons who shall predecease myself and my spouse shall be entitled equally among them to the full provision intended for their father had he survived and also providing, that in the event of any of my said sons predeceasing myself and my said spouse, without leaving lawful issue, then the lands or others appointed to be made over to him or them who shall so predecease shall be conveyed by my said trustees to my son or sons equally who shall survive, or to their lawful issue."

Sir David died in 1843. His trustees made up titles to his property, and were infeft. His two eldest sons died without leaving issue in 1853 and 1855. Dr Robert Foulis, the youngest and now only surviving son, having entered into an arrangement with his mother Lady Foulis, who had survived both her husband and her two eldest sons, by which she agreed to renounce the liferent of the trust-estate conferred upon her by the trust-deed, called upon the trustees, on such renunciation being executed, to convey the trust estate to him, in terms of the provisions of the trust-deed, in the same way as if her liferent had been terminated by her death. The trustees not being

of opinion that their duty permitted them to comply with this demand, Dr No. 87.
Foulis raised this action, concluding for declarator that the trustees were
bound, on Lady Foulis executing a renunciation, to convey the estate to Feb. 3, 1857.
him. He pleaded, that the liferent in favour of Lady Foulis did not sus- Foulis v. Foulis.
pend the vesting of the provisions in favour of the truster's sons, but only the payment of these provisions; and their provisions having vested at Sir David's death, and they having died without issue, the pursuer, on expeding a general service to them, was entitled to the whole succession, in respect of his mother's renunciation.

The defenders pleaded;—The rights of the pursuer had not vested, and were contingent on his survivance of the liferentrix.

The Lord Ordinary pronounced the following interlocutor:—"Finds that, on the sound construction of the trust-deed, the liferent constituted in favour of Lady Foulis did not suspend vesting in favour of the truster's three sons, but that their rights under the deed vested *a morte testatoris:* Finds that, by the predecease of the pursuer's two elder brothers without issue, the pursuer is entitled to succeed to their shares, and to vest the same in his person by service to them: Finds that, on expeding services vesting their shares in him, the pursuer will be entitled to the fee of the whole estate, heritable and moveable, of the truster, and that, on his mother Lady Foulis executing and delivering a renunciation of her liferent, whereby the same will be terminated, the pursuer is entitled to demand, and the defenders, the trustees, are bound to grant, a disposition and conveyance in favour of the pursuer, and his heirs and assignees, of the whole trust-estate of the late Sir David Foulis; therefore, under the qualification of expeding and producing said services, finds and declares, and decerns and ordains, in terms of the conclusions of the summons: Finds the defenders entitled to retain their expenses out of the trust-estate, and decerns." *

* Note.—(After the statements and quotations in the text.)—"The question raised is whether there is a suspension of vesting in the three sons till the death of Lady Foulis.

"The defenders read the words, 'predeceasing myself and my said spouse,' as signifying the survivance by the beneficiaries of both and each, while the pursuer held that by their survivance respectively of one the grammatical force of the expression was satisfied. The Lord Ordinary notices this point, but doubts if, by the pursuer's gloss, the testator's meaning is satisfied. He rather thinks that the words used imply the beneficiaries outliving also the testator's surviving spouse, at the termination of whose liferent the trustees were appointed to convey. Nevertheless, the Lord Ordinary is of opinion that vesting took place on the death of the truster, and that the period only of conveyance or payment was suspended. He has formed this opinion on a consideration of the presumed purpose of the truster in making his settlement, on the general character of his deed, and on his apparent intentions towards his three sons individually, as the direct objects of his parental regard, exhibited by the bestowal on each of them of separate properties. It is thought that the clause regarding the sons leaving lawful issue, was intended by the truster to guard against any doubt of the succession being carried forward to issue in case of predecease, just expressing by words of explanation of his meaning and wishes what the law would supply under the principle *si sine liberis*, and not to constitute a conditional institution suspensive of vesting.

"The Lord Ordinary has kept in view the later decided cases on the subject of vesting, and in particular attended to those cited at the debate. But the point being intention, to be gathered from the special character of the deed of settlement, in each case, he deems it sufficient to say that in his judgment the preponderating weight in this case is in favour of the beneficiaries having taken a vested interest, *a morte testatoris*.

"The Lord Ordinary has found the defenders entitled to their expenses out of the trust funds, as he thinks they were entitled, before disponing, to ask to have the construction of the trust-disposition judicially determined."

No. 87.

Feb. 3, 1857.
Foulis v.
Foulis.

The defenders reclaimed, and pleaded;—On a fair construction of the trust-deed there could not be held to be any vesting of the fee of the trust-estate prior to the decease of the liferentrix. The truster had made a manifest distinction between the provisions to his widow, which were to take effect "immediately on his decease," and those to his sons, which were not to come into operation till "the termination of her liferent." The estate was absolutely conveyed to the trustees, who were to hold it for fulfilment of the purposes of the trust till Lady Foulis's death. Until that event the estate was expressly "vested" in the trustees alone, who were appointed then to convey it to the three sons or their children, or such of them as might survive. No one of the sons predeceasing Lady Foulis could have alienated his portion so as to disappoint his brothers.[1] The terms of the deed plainly shewed there could be no vesting till the death of Lady Foulis, there was not only a condition of survivorship, but also an ulterior destination, both of which grounds had been held to militate against the vesting of provisions.[2] The provision with reference to the subsequent disposal of the L.400 also shewed that no vesting was intended. The decision of the Court in the case of Pretty conclusively fixed that, unless vesting took place under the deed, the period of conveyance could not be anticipated by the device of renouncing the liferent.[3]

Lord Justice-Clerk.—This is a very clear case indeed, and one in which I have no difficulty. I agree with the Lord Ordinary, though I am not prepared to adopt all the views expressed in the interlocutor.

I begin with the preliminary question. Is there a liferent to be maintained necessarily against the will and interest of this lady? It is not alleged that any undue practices have been resorted to to procure her renunciation. By that renunciation her liferent is terminated. The deed directs the trustees,—"*Quarto*, on the termination of the liferent above appointed in favour of my said spouse,"—"to convey and make over" the truster's heritable estate, in the manner then set forth. There is nothing in the deed compelling the widow to accept the liferent, or forbidding that the fee should be given to the parties entitled to it. I look at this provision as in favour of the widow, securing to her her liferent; but if she does not wish to retain it, what is to prevent her renouncing her liferent? I hold, that unless it can be shewn that there is something to compel the trustees to hold the trust-estate for some unknown parties, the object of the truster is very clear in the provisions of this deed. In relation to issue of a deceasing son it is not to suspend the fee, but to prevent the rights of the issue of any of his sons, who might predecease his widow, from being defeated; or, if one of them should predecease the widow, that the rights of the one survivor should not injure the other. There is nothing in them giving an interest to the issue of the children as against the children themselves.

By the decease of both of his elder brothers, the pursuer in this action is the only party entitled to claim the fee of the estate on the termination of the liferent, which may be terminated by her renunciation as well as by her death; and if Lady

[1] Pretty v. Newbigging, 2d March 1854, ante, vol. xvi. p. 667; Pearson v. Casamajor, 18th July 1839, M'L. and Rob. p. 685; Newton v. Thomson and Others, 27th January 1849, ante, vol. xi. p. 452; Wood v. Cope, 8th March 1850, ante, vol. xii. p. 855; Earl of Home v. Bothwell, 3d December 1747, M. 2989; Elchies, *voce* Clause No. 4; Campbell, 16th December 1747, M. 2991.

[2] Provan v. Provan, 14th January 1840, 2 D. 298; Johnston v. Johnston, 2 D. 1038; Wood, and Richardson's Trustee, v. Cope, 12 D. 855; Stewart v. Stewart, 13 D. 1836.

[3] *Pursuer's authorities.*—Wallace v. Wallace, 28th January 1807, M. App. *voce* Clause 6; Majoribanks v. Brockie, 18th February 1836, xiv. S. D. p. 521; Maxwell v. Wylie, 25th May 1837, xv. S. D. p. 1005; Forbes v. Luckie or Downie, 26th January 1838, xvi. S. D. p. 374.

Foulis does not wish to retain the liferent, and renounces, is it to be held that he is not entitled to the fee which vested in him *a morte testatoris?* No. 87.

While substantially adhering to the view of the Lord Ordinary, I am not inclined to affirm all the propositions of his interlocutor; particularly, I do not consider that service as heir to the brothers is necessary. Feb. 3, 1857. Foulis v. Foulis.

Lord Murray.—I am of the same opinion with your Lordship as to there being no necessity for a service here. I hold that the leaning is in favour of vesting, and all rights of fee are held to vest unless there be something that operates directly to prevent them. It is contended by one of the parties, that in the clause in this deed we may for "and" read "or," but that is always a painful thing to do, and I would rather decide the case upon other grounds, if there are other such good grounds. I am inclined to throw this clause out of view altogether; and, on the whole matter, I am of your Lordship's opinion, which goes upon a general principle that is quite clear.

Lord Cowan.—I would have had no difficulty, if I could have held, as Lord Murray did in the case of Pretty, that the renunciation of the liferent was equivalent to the death of the liferentrix. On that general question I was of a different opinion in that case, holding, along with the majority of the Court, that renunciation of the liferent had no effect on the vesting. I have seen no cause to depart from that view. This case cannot therefore be resolved on that ground. Its solution depends entirely on the question argued by the defenders, whether the fee of this trust-estate vested in Sir David's sons at the date of his death?

On that point there is considerable difficulty, but I think this deed peculiarly constructed. At the date of the deed, and on Sir David's death, all his sons were grown up, and two of them were in India. This appears from their designation in the deed itself. Now, in considering the father's intention, it is not immaterial to keep this fact in view. For unless the estate should have vested in them, they had no power, in the event of marriage, to make it available in order to secure a provision for their wives or children during their mother's lifetime. Then there is no provision over in favour of other parties, and the subjects conveyed to the sons severally are distinct specific properties. Farther, the fourth purpose of the trust is very peculiar. It provides, that "on the termination of the liferent," the whole estate is to be transferred to the sons of the truster. A special estate is transferred to each of the three sons *nominatim*; and there are provisions for disposing of the estate of each on his death prior to that of his father and mother, "on predeceasing me and my said spouse." The share of a deceaser is to go to his children; but if he leaves no children, it is destined in a particular way. The provision, therefore, may be considered as a provision in favour of each son who should survive the granters, which vested in each of the sons at the father's decease.

On these grounds, although not without hesitation, I think the interlocutor may with safety affirmed.

The Court pronounced the following interlocutor:—"Recall the interlocutor of the Lord Ordinary; but of new, find that Lady Foulis is entitled to renounce and bring to an end the liferent of the trust-funds provided in her favour by the trust-settlement of her deceased husband; and that the liferent being so terminated, the pursuer, in the admitted circumstances of the case, is entitled to claim the whole of the trust-property and funds held by the reclaimers as trust-disponees of the deceased: Therefore, declare and decern in terms of the conclusions of the summons: Of new, find the trustees entitled to retain their expenses out of the trust-funds, and decern."

Melville & Lindsay, W.S.—John Gillespie, W.S.—Agents.

No. 88. **Robert Blair Maconochie**, Petitioner.—*Penney*—*J. T. Anderson.*

Feb. 3, 1857.
Maconochie.

Judicial Factor — Curator Bonis — Lunatic — Special powers — Expenses.—The Court has power to authorise a *curator bonis* of a lunatic to sell or burden the lunatic's heritable estate, when a case of necessity for so doing has been established.

Circumstances in which the Court refused to grant such power, but allowed the expense of the application to be charged against the estate.

2d Division.
I.

Mr Maconochie was in 1851 appointed *curator bonis* to Mr Graham of Airth, and had since then managed the estate. He now presented a note to the Lord Ordinary on the Bills for special powers to burden the estate, producing along with it the following opinion by the Accountant of Court, to whom he had reported the matter, under section 7 of the "Pupils Protection Act:"—

"The estate of Airth, belonging to the ward Mr William Graham, was burdened by his father, the late Thomas Graham Stirling of Airth, with a provision in favour of his youngest son, Mr C. J. H. Graham, the ward's youngest brother, to the extent of L.4999. Under the management of the curator, there has been a considerable surplus revenue from the estate, and the curator intimated to Mr C. J. H. Graham his desire to pay off a part of that claim, but Mr C. Graham objecting to receive a partial payment, has called up the whole amount.

"In these circumstances, the curator proposes to meet the demand by applying the sum of L.1000 which he is able to spare from his bank account towards the extinction of the debt, and under the sanction of the Court to borrow from another party, and burden the estate with the sum of L.4000, and in doing which he proposes to reserve power to pay off hereafter by instalments.

"The Accountant is of opinion that powers may be granted to the curator in the terms craved by him."

The Lord Ordinary reported the matter to the Second Division of the Court, when the following interlocutor was pronounced:—"Having heard counsel in support of the application by Mr Blair Maconochie, *curator bonis* to Mr Graham of Airth, now confined in a lunatic asylum by order of the Sheriff, and having regard to the origin, nature, and character of such appointments of *curator bonis*, and the grounds on which its competency has been sustained, and to the fact that such appointment does not necessarily supersede the individual's capacity in point of law, if he chose to act and his sanity should afterwards be proved, and to the objection stated by some of the Judges of this Division to the competency of the Court to authorise and empower such an officer to grant heritable securities over the fee of the estate, vested by habile titles in the person of an individual no cognosced, or divested, or found incapable to act by any appropriate or competent judicial proceeding; and further, considering that it appears that the Divisions of the Court have been gradually led on, step by step, to grant powers which it may be found were not contemplated or in use to be given in former times, and that if such powers as those here prayed for are to be hereafter granted on the ground of expediency; and if creditors are not to be left to resort to their proper remedies, if their debts are not paid, it is proper that the competency of the Court to grant the power to burden or convey the fee of the heritable estate of the person under curatory, should be deliberately considered, and decided by the whole Court, the Lords direct this application to be argued before the whole Court."

In the argument it was submitted for the curator, that if the debt were not paid in the manner suggested, the creditor would be left to take his own remedy—the debt might be assigned, and the estate finally carried off by adjudication; or the debtor might enter by a process of maills and duties

and arrest the entire rents for the debt, interest, and expenses. To permit which, when there was a free income from the estate which would make it possible gradually to clear it, would, to say the least, be highly inexpedient. There could thus be no question to consider, but the one of the competency of the Court to grant the powers craved. Under the former practice of suing out a brief of lunacy, the difficulty did not arise; but the relatives could not be compelled to adopt that course of procedure, and so the Court came to interfere by the appointment of a special officer. The competency of so proceeding without cognition was very anxiously discussed and settled in the case of Bryce v. Graham.[1]

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Feb. 4, 1857.
Maconochie.

The case was parallel to that of a tutor being appointed, where the tutor-at-law has declined. The position and duties of these officers were nearly identical—the office was temporary, and the powers limited to the preservation and ordinary administration of the estate; but whenever extraordinary circumstances arose, it had always been the practice for them to apply to the Court for powers to enable them to meet them;[2] and there was a long series of decisions in which every variety of power had been granted, where necessary, for the estate. Thus Somerville's factor (6th February 1836, Sh. vol. xiv. p. 451) was authorised to do what is here sought—viz. to borrow money, and grant heritable security over his pupil's estate; and so high are the powers of a *curator bonis* held to be, that without any feudal title being made up in his own person, he can validly convey the estate under his charge, and, when necessary, will be authorised to do so.[3] There were many cases in the books showing what was considered to amount to a necessity, such as to justify granting of bonds or selling,[4] and to warrant the Court in granting authority to curators to exercise other extraordinary powers of management; and the Court were in the habit of interponing, not only in cases of necessity, but also in cases of expediency, and in aid even of a tutor-nominate.[5] It would be necessary to go back on the whole practice of the Court for the last century, to hold that there was any incompetency to grant the authority sought. Moreover, the usage which was thus unbroken had been imported into the Pupils Protection Act, 12 & 13 Vict. c. 51, sect. 7.*

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[1] 25th Jan. 1828, Sh. vol. vi. p. 425; and H. of L. 23d July 1828, W. & S. vol. iii. p. 323.

[2] Stair Inst. i. vi. 18.

[3] Scott, 21st Feb. 1856, ante, vol. xviii. p. 625.

[4] Coll v. Coll, 30th July 1801, M. *voce* Curator, App. No. 1; Borthwick, Sh. vol. x. p. 620; Wilson, 11th Dec. 1834, Sh. vol. xiii. p. 176; Finlayson v. Kidd, 4th June 1835, Sh. vol. xiii. p. 861; Crawford, 6th July 1839, ante, vol. i. p. 1183; M'Gregor, 7th June 1837, Sh. vol. xv. p. 1092; Tweedie, 16th Jan. 1841, ante, vol. iii. p. 369; Dunbar, 7th July 1847, ante, vol. ix. p. 1426; Thriepland, 7th June 1848, ante, vol. x. p. 1234; Mackenzie, 18th July 1848, ante, vol. x. p. 1493; Scott, 20th July 1848, ante, vol. x. p. 1495; Hood, 6th Feb. 1850, ante, vol. xii. 414; Campbell's Curator, 11th Dec. 1851, ante, vol. xiv. p. 312; Wood, 6th March 1856, ante, vol. xviii. p. 732.

[5] Bellamy, 30th Nov. 1854, ante, vol. xvii. p. 115.

* "And be it enacted, That if at any time it shall appear to the factor that there is a strong expediency for granting abatement of rent, either temporarily or permanently, or for renewing or granting a lease for a period of years, or for draining, or for erecting buildings or fences, or for otherwise improving the estate in a manner not coming within the ordinary course of factorial management, he shall report the same to the accountant, who may order any necessary inquiry, and shall state his opinion thereon in writing; and such report and opinion may be submitted by the factor to the Lord Ordinary, with a note praying for the sanction of the Court to the measure proposed; and the Lord Ordinary shall, with or without further inquiry, report the matter to the Court, who, if they consider it expedient and con-

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The consulted Judges returned the following opinions:—

Lord President.—The competency of the Court under any circumstances, however urgent, to grant to a *curator bonis* of a person in Mr Graham Stirling's condition, power to burden the fee of the heritable estate of the person under curatory, is the point on which our opinion is desired, and to which the argument from the bar was directed. If it be not competent for the Court to grant such power under any circumstances, however urgent, then it follows that the present application must be dismissed on that broad ground alone, irrespective of the particular circumstances of this case, and that any inquiry into the circumstances is not only unnecessary, but is legally excluded. If, on the other hand, it be competent for the Court to take into consideration the circumstances under which such an application is made, and to grant the power where the interests of the person under curatory, and of his estate, manifestly require the aid of such power to protect them against imminent loss or injury, then it will be necessary to consider whether the circumstances under which the present application is made are such as to bring it within the competency. That, however, is a point on which the opinion of the whole Court is not asked. It is an ulterior question that will not arise until the larger question of competency is disposed of, and will not arise at all if that larger question shall be decided in the negative.

Having given attention to the considerations suggested in the interlocutor of the Second Division, as well as to those urged from the bar, and having reviewed all the authorities and cases I know of bearing on the point, and having in view the provisions of the Pupils' Protection Act (1849), I am of opinion that it is competent for the Court to grant power to a *curator bonis* to borrow money on the real security of the heritable estate of the person under curatory, where it is made clear to the Court that the interests of the person under curatory, or of his estate, will be exposed to serious loss or injury which cannot otherwise be averted, but from which they may be protected by the intervention of such aid. But while I am of opinion that it is competent for the Court to protect these interests, and that it has been in use to do so by granting such power when necessary for that purpose I am not of opinion that it is competent for the Court to grant such power for the mere purpose of avoiding inconvenience or of facilitating operations from which

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sistent with due regard to the amount of the estate at the time, may sanction th measure, and the decision of the Court shall be final, and not subject to appeal and if the estate be held under entail, it shall be lawful to the Court to authoris the factor to take proceedings for constituting as a charge against the future heir of entail, or otherwise recovering, the money expended in making any improvemen upon the estate, under and in terms of an Act passed in the tenth year of the reig of his Majesty King George the Third, intituled 'An Act to encourage the improv ment of lands, tenements, and hereditaments in that part of Great Britain call Scotland held under settlements of strict entail,' and under and in terms of an A passed in the session of Parliament holden in the eleventh and twelfth years of t reign of her present Majesty, intituled 'An Act for the amendment of the law entail in Scotland;' but nothing herein contained shall be held as conferring pow on the Court to authorise the factor to build or enlarge a mansion-house upon t estate, or to charge the estate and future heirs of entail to a greater extent th one-half the amount with which the heir in possession, if under no incapacity to a could have charged the estate under the said Acts, or either of them; and if a factor having charge of the estate of any lunatic or other person incapable managing his own affairs shall deem it proper for the comfort or welfare of su person that the whole or a part of such estate should be sunk on annuity, he sh report the matter to the accountant, who shall state his opinion thereon in writi and such report and opinion shall be submitted by the factor, with a note as afo said, to the Lord Ordinary, who shall report the matter to the Court, and it sh be in the power of the Court to sanction the measure, and the decision of the Co shall be final, and not subject to appeal; and in all other matters in which spe powers are, according to the existing practice, in use to be granted by the Co the Court shall have power to grant the same in like manner and form as is ab provided."

gain or profit may be expected. There may be mixed cases in which protection from impending loss or injury, and promoting of positive gain or profit might be blended, and might both result from the one act of granting power to burden or convey. I need scarcely say that in such a case the presence of the latter element or expectation would not militate against the competency of the Court to grant the power shown to be necessary for the purpose of protection.

The grounds on which I rest the opinion I have thus expressed affirming the competency of the Court to grant the power under certain circumstances, are substantially the same as those set forth in the detailed opinions of Lord Curriehill and Lord Neaves. To restate grounds already so fully stated, would be superfluous. I therefore refer to these opinions as containing a sufficient exposition of my views on this general question of competency,—expressing no opinion,—none being asked on the effect of the application of them to the circumstances of this particular case.

LORD DEAS.—My views of the present question are substantially expressed in the opinion of the Lord President, to which, therefore, it is sufficient to refer.

The term *competency* is used in reference to such applications in a peculiar and, perhaps, not very logical sense;—embracing not the mere abstract nature of the application, but the circumstances in which it is presented. These circumstances may, and generally do require to be ascertained, by inquiry, before the competency can be decided. This has not been done in the present case; and, consequently, our opinion is asked, as I understand it, not upon the competency of this particular application, but upon the general question whether, in any case, a power to borrow, such as is here prayed for, can competently be granted to the *curator bonis* of a lunatic who has not been cognosced?

I am of opinion that, in certain circumstances, such a power may competently be granted. To a description of these circumstances I can approximate no nearer than by saying that they must amount to a legal necessity;—words which, I am very sensible, may, in themselves, require definition; but which it would not be easy, and is not here necessary to define more precisely than by giving instances both ways, as has been done in the opinion of the Lord President, to which I have already referred.

LORD CURRIEHILL returned the following opinion, which was concurred in by Lords Handyside, Benholme, and Mackenzie:—The question on which our opinion is sought is, Whether or not this Court can competently empower a *curator bonis* of a person in Mr Graham Stirling's state to borrow money on the real security of the ward's heritable estate, for the purpose of paying his personal debts?

This question is of great importance retrospectively. In many cases, this Court has granted such special powers, and the powers so granted have been acted upon to a great extent; and if it should now be found that such powers were not lawfully granted, and that the grants and the securities following upon them must be dealt with as nullities, many persons may be ruined by having trusted to the validity of the powers granted by this Court.

The question is of still greater importance prospectively. A *curator bonis*, in virtue merely of the usual powers implied in his office, cannot validly create a real burden on the heritable estate; and if it be not competent for this Court to authorise him to execute such power, the debts of the unfortunate wards, when, as in the present case, the estates consist only of heritage, could be satisfied only by the creditors resorting to adjudications, processes of maills and duties, and other steps of legal execution. And the consequences would be—1. That much of the estates would be wasted in defraying the expense of such proceedings. 2. That by the creditors entering into possession on decrees of maills and duties, or otherways, a very detrimental as well as expensive course of management would supersede that of the guardians; and during its continuance the unfortunate wards might be deprived of the means of subsistence. 4. That if the debts should not be paid during the currency of the legal, the estates might be evicted by means of decrees of declarator of its expiry; and, 5. That in cases where the debts owing to the creditors insisting for payment were incurred by an ancestor of the ward, from whom he has by succession derived his right to the estate (and the present case is an example of this), that estate might be sequestrated, and judicially sold.

If it be not within the jurisdiction of this Court to save such incapacitated per-

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sons from such disastrous proceedings, by empowering their guardians to borrow funds for payment of their debts on the security of their estates, it does not appear that any tribunal in Scotland has authority to do so. Although it is part of the Royal prerogative, with the advice of the Judges of Exchequer, to appoint tutors in such cases by gifts of tutory, proceeding upon services, when the next agnates apply for the office, and upon signatures, when the tutors are selected by the Crown itself, yet such gifts confer only the usual powers; and neither the Crown, through any of its functionaries, nor the Court of Exchequer, nor any tribunal other than the Court of Session, has ever since the Union, when the Scottish Privy Council became extinct, exercised such authority.

But this Court has been in use to exercise its jurisdiction in such cases from time immemorial, and at all events during the century and a half which has elapsed since the Union. And such inveterate usage, being the best exponent of the constitution of the Court, is sufficient to establish that the jurisdiction which it has so exercised does truly belong to it. The very ground, indeed, upon which the jurisdiction of this Court to make appointments of *curators bonis* to insane persons, without a previous cognition, is held to rest, is inveterate usage, as appears from the report of the case of Bryce, dated 25th January 1828. In that case the House of Lords ultimately affirmed the judgment sustaining this jurisdiction. Inveterate usage is as effectual to establish the jurisdiction of the Court to grant special powers, when it appears to be proper to do so, as it is to establish the jurisdiction to confer the office with the usual powers. And accordingly it was found, in conformity with the unanimous opinion of all the consulted Judges, in the case of Somerville, 6th Feb. 1836, F. C., 1st, That, in point of fact, this Court has been in use, from time immemorial, to grant such special powers to *curators bonis* or judicial factors; and, 2dly, That this usage was sufficient to establish the competency of the Court to grant special powers to such a functionary to borrow money on the security of the ward's heritable estate for the payment of his personal debts. The report of that case states, that the Second Division of the Court directed the opinions of the other Judges to be obtained on this question, "with a view to settle more authoritatively the nature and extent of its powers." And the nature and extent of its powers having accordingly been thus settled in conformity with the unanimous opinion of all the consulted Judges, I hold that settlement of the question to have been conclusive. I could not assent to that question being now unsettled, after the country has been transacting for twenty years on the faith of that decision, even if I could see any grounds for doubting its soundness, which, however, is not the case.

But this is not all. It is certain that the usage upon which that judgment in 1836 proceeded, continued in observance until the passing of the Pupils Protec tion Act (12 & 13 Vic. c. 51) in 1849. In proof of this usage, reference may b made to four reported cases, which were decided during the two years immediatel preceding the passing of that Act. In the case of Dunbar, 7th July 1847, a *cura tor bonis* applied for special power, *inter alia*, to sell two pieces of ground wit houses thereon, belonging to his ward, and to apply the price in payment of hi debts and towards his maintenance. What took place is thus stated in the report Lord President: "This case deserves attention. The curator prays for authorit to do that which will sweep away the whole property of this lunatic. Let th creditors do what they please, can we agree to such a prayer as this?" Deas "Unless the authority is granted, the creditors will adjudge the property, an swallow up in expenses, that fund which might otherways be saved for the lunatic Lord President: "We must at least have a report from the Lord Ordinary on th matter." The case was remitted to the Lord Ordinary. On a future day, th Lord Ordinary reported that it was necessary that the sale should be authorise whereupon the Court authorised a sale by public roup as prayed for. Thus th Court exercised its jurisdiction by granting, not merely a power to burden th ward's estate, but even to dispose of it entirely, in order to save it from bei wasted by the expense of legal diligence. And in each of the cases of Thrieplan 7th June 1848, and Mackenzie, 18th July 1848, power was given to a *curator bo* of a lunatic, who was proprietor of an estate, to borrow money on the securi thereof, to pay off debts of the lunatic. And in the case of Stott, 20th July 18 a *curator bonis* petitioned alternatively for such a power to borrow on the securi of the estate, or to sell it; and the Court authorised him to borrow as prayed f but declined, as matters then stood, to grant power to sell. And thus the Co

continued in the practice of granting special powers of borrowing, in such cases, down till the 20th July 1849. And eight days afterwards, viz., on the 28th July 1849, the Pupils Protection Act was passed, the 7th section of which, besides authorising the Court to grant special powers in several cases therein enumerated, in a more simple and economical form than that formerly in use, proceeds thus: "And in all other matters in which special powers are, according to the existing practice, in use to be granted by the Court, the Court shall have power to grant the same, in like manner and form as is above provided for.

I am of opinion, that this enactment had the effect of a statutory confirmation of the jurisdiction which this Court had previously been in the practice of exercising in this class of cases; and of an authority to exercise it thereafter, in the new form which was thereby introduced, being the form in which the present application is made.

That enactment mentions only the case of factors; but the interpretation clause, section 1, explains, that the expression "judicial factor" or "factor," shall mean "factor *loco tutoris*, factor *loco absentis*, and *curator bonis*."

I am therefore of opinion, that the competency of the Court to grant such a power as that under consideration is established by inveterate usage,—and by clear precedent,—and confirmed by statute. This being the case, I do not think it is necessary to inquire, whether or not, if the question had not been already so settled, there would have been sufficient grounds, on abstract principle, for sustaining the competency of the Court to grant such a power. I shall only say on that subject that, in my opinion, it is necessary for the welfare of persons, in the helpless state in which the petitioner's ward is stated to be, that some tribunal should have authority to grant such powers to their guardians, where this is shewn to be requisite for the protection of the estate; that the supreme civil court of the country is the fitting tribunal to be intrusted with such authority; and that this is in harmony with the nature and the extent of the jurisdiction which it exercises in other respects for the protection of persons, who, from nonage or mental disease, are incapable of taking due care of their persons or their property. Thus, when the welfare of parties in that helpless state requires it, this Court can competently afford them the requisite protection by even removing their tutors, however appointed, from their office, and appointing judicial factors or *curators bonis* to manage their property; or by requiring such tutors to find caution for their intromissions and management; or by authorising to be done voluntarily by guardians what would be done only at great expense and loss to the wards, by judicial proceedings; or even by the Court taking the persons of the wards under its own care,—that is to say, by placing their persons under the charge of parties selected by itself. It has exercised its jurisdiction, in this respect, by removing the custody of children in pupillarity from their tutors, and even from their fathers and their mothers, when circumstances rendered such steps proper. And in the case of Miss Mercer Elphingstone, 31st May 1814, this Court, while it held that a factor *loco tutoris* had not, *virtute officii*, the charge of the ward's person, also held it to be within its own competency and duty to see that her person was properly cared for, and accordingly took that matter into its own hands. On the same principle on which it is competent for this Supreme Court to interfere for the protection of such helpless parties in these different matters, I think it is also competent for it to interfere to authorise the guardians of such parties to pay their debts without the estates being wasted by legal executions. At all events, the usage, which has long existed (and the continuance of which has now been expressly authorised by statute), of this Court in certain circumstances authorising loans to be obtained on the security of the heritable estates of such persons, appears to me to have been,—not inconsistent with principle,—but in full accordance with the jurisdiction which belongs to this Court, for protecting from impending loss or detriment the interests of persons in such a helpless state.

The interlocutor of the Second Division suggests several points, to which we should have regard in forming our opinions on this question; and as the discussion at the bar has been *ex parte* in this case, it is very satisfactory to us to have the points of difficulty thus brought under notice, and I shall state my views regarding them.

1. "[illegible] nature, and character of such appointment of *curator bonis*, and the [illegible] its competency has been sustained." I find these explained

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in the proceedings in this Court, and in the House of Lords, in the reports of the case of Bryce, already referred to. I there find that it was inveterate usage which was held to be sufficient to shew that the Court has jurisdiction to appoint *curators bonis*, with the usual powers, to persons incapacitated by mental disease from managing their own affairs, and that too without any previous cognition. And I think that inveterate usage was also, in the case of Somerville, properly held to be sufficient to shew that the Court has jurisdiction to confer upon these functionaries such special powers as are now under consideration, and that all question as to the Court having such jurisdiction is now excluded by the recent statute.

2. "The fact that such appointment does not necessarily supersede the individual's capacity in point of law, if he chose to act, and his sanity should afterwards be proved." In any case where the incapacity of the individual to be a party to such a transaction admits of doubt, the special power should not be granted without either his concurrence being obtained to the transaction, or his incapacity to concur being satisfactorily ascertained. But such a consideration, however it may be held to influence the Court in the exercise of the jurisdiction in particular cases, does not appear to me to affect the general question of competency. This consideration, as it does not affect the competency of this Court to make the appointment with all the usual powers, some of which are of great importance, should not affect its competency to grant such special power in cases where the interests of the ward require it. Even tutors-dative are appointed by gifts from the Crown to persons affected with mental disease without any previous cognition (vide, Stair i. 6, 25, and the cases there referred to of Colquhoun, 22d Feb. 1628, Mor. p. 6276; and Stewart, 21st Jan. 1663, p. 6279); and yet I cannot doubt that at all times it was as competent for this Court to grant such special powers to tutors of that class as well as to tutors-at-law, the gifts of tutory to whom are preceded by cognition. And, at all events, here again the inveterate usage of grants of special power of borrowing on the security of the estates, in cases such as the present, is sufficient, according to precedent and to statute, to sustain the jurisdiction of the Court.

3. "The competency of the Court to authorise and empower such an officer to grant heritable securities over the fee of the estate, vested by habile titles in the person of an individual not cognosced or divested, or found incapable to act by any appropriate or competent judicial proceeding." Here two things are set forth for consideration as affecting the question of competency. Having already stated my views as to the latter of these, viz. the want of a cognition or other judicial proceeding establishing the ward's incapacity, I need not say more on that subject. And with regard to the other consideration, viz. that the fee of the estate remains vested in the ward himself, this does not render it incompetent to grant to the *curator bonis* the special power of borrowing on the security of the estate. A guardian of any kind, whether or not his appointment be preceded by a cognition, is not as such vested with the *dominium* of the ward's estate, and he does not act *qua* owner thereof. He acts for the owner, and as his representative. The maxim, *qui facit per alium facit per se*, applies to such cases. Although the authority of a guardian is derived from a different source from that of a mandatory, yet, as a mandatory, although not vested with the real right or ownership of the subject of his mandate, exercises, on behalf of his principal, the powers of ownership belonging to the latter, so far as these are within his delegated authority; so such a guardian, although not vested with the real right or ownership of his ward's estate, exercises on behalf of the ward the powers of ownership belonging to him, so far as these are within the authority delegated to him either by law or by special grant. This is the case as to his actings in matters falling under his usual powers; and it is also the case in matters falling under any additional or special power which may be conferred upon him. And accordingly, in such cases, where the title of the ward is not made up, the practice is that the guardians pray for and obtain special powers, first to make up titles in the person of the ward, and then to sell or burden the property so to be vested in the ward's person, in order to raise funds for paying his debts. The case is different as to a judicial factor, appointed on a trust-estate in consequence of the non-acceptance or death of testamentary trustees, because in such a case there is no existing *dominus* of the estate, and the judicial factor, *qua* such merely, is not in the position of being either a fiduciary owner, or representative of an existing owner, of the subjects. And hence, if in the performance of his

factorial duties as to the trust-estate which is in abeyance, it becomes necessary to exercise such powers of ownership as selling, burdening, or entailing the estate, or disponing it to the beneficiaries, the factor must obtain the fiduciary fee of the estate vested *habili modo* in his person; and in such cases the Court is in use to authorise him to do so. But this is not necessary or proper in a case like the present, where the fee is not in abeyance, but is vested in its proper owner; and where his guardian, in the due exercise of his powers, whether they be the usual powers of his office, or additional powers specially conferred upon him, acts merely in place of that owner. And accordingly, in the long practice which has established the jurisdiction of the Court in this matter, the guardian has never, in such a case, been required or empowered to obtain the fee of the estate transferred from his ward to himself, and vested in his own person.

4. "The Divisions of the Court have been gradually led on step by step to grant powers, which it may be found were not contemplated or in use to be given in former times." I am not aware that such a special power as that under consideration was ever of this character. But even if it had been so at some former period in the history of our jurisprudence, this would now be of no consequence; as the usage has now been so inveterate as, according both to express decision and statute, to establish the competency of a special grant of such power.

5. "If such powers as those here prayed for are to be hereafter granted on the ground of expediency, and if creditors are not to be left to resort to their proper remedies if their debts are not paid," it is proper that the competency of the Court to grant such powers should be decided by the whole Court. Views of expediency are not always sufficient grounds for the Court granting the power. The distinction is now always taken between cases where the power is sought to enable the guardian to enter into a speculation, however tempting it may be, with the view of making profit for the ward; and a proceeding which appears to be necessary to avoid or prevent serious impending loss or detriment to him. In the present case, the power is sought for the latter purpose; and the competency of granting it for such a purpose is established. The case of Dale, in which a feuing speculation, entered into in virtue of a grant of such a power, was afterwards reduced, is a strong authority against granting such a power for a purpose of the former kind; and accordingly the practice of the Court has been to refuse special powers to sell or to borrow for such a purpose. And although in the Pupils' Protection Act the Court is authorised to grant powers even of this kind in certain cases therein specified, yet, excepting in these specified cases, the former practice will probably be continued.

With reference to the last quoted passage of the interlocutor of the Second Division, it is proper to explain that, in my opinion, the creditors of a person in Mr Graham Stirling's state, while they are left at full liberty to resort to their legal remedies in order to obtain payment of debts owing to them, if the guardians do not otherways provide funds for that purpose, are not entitled to have any additional special powers conferred upon themselves. Such special powers are granted, —not as a privilege to the creditors of the ward,—but only in order to save the ward himself from the loss which is impending over him, by these creditors resorting to their legal remedies. And I am of opinion that it is competent to the Court to grant this power; reserving to it, of course, to determine whether or not, in the actual circumstances of each case, they should exercise this discretionary jurisdiction.

LORD NEAVES. — The interlocutor of the Second Division, which directs the application by Mr Graham's *curator bonis* to be argued before the whole Court, seems to indicate that the opinion of the Court is not required on that individual application, but rather on the nature and extent generally of the special powers which ought to be granted to judicial managers for alienating or burdening the heritable property of parties under their care.

Upon this subject, I can only answer the question raised by taking a distinction. I think it competent for the Court to authorise the alienation of such property, or the [illegible] a burden upon it, only when and in so far as it is necessary to do so. I [illegible] incompetent for the Court to deal with the property in that way, when [illegible] a necessity for such a course.

By [illegible] referred to, I mean the necessity of preserving the life, health,

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or welfare of the party under curatory, or of preserving from destruction or serious injury, the property which is under management.

I have no doubt that the limits between what is necessary and what is not, may often be difficult to define; and in drawing the line, the Court must use its discretion. But I am of opinion that the Court ought not to grant the powers asked except where they are prepared to say that the necessity exists.

It is quite fixed that the Supreme Court can interfere by the appointment of a factor or curator to manage the property of incapable persons who are otherwise unprotected. But confessedly, the foundation of that interference is necessity, and it appears to me that necessity should also be the measure of the interference. If it were necessary to sell the whole property of a person so situated for his subsistence, or for the preservation or recovery of his health, I think it would be competent to do so. In like manner, if it were necessary to sell or burden the property to any partial extent in order to avert the forfeiture or eviction of the property, as where an action of tinsel of feu was brought *ob non solutum canonem*, or where an expiry of the legal was sought to be declared under an adjudication subsisting for a small balance of debt, I think it would be competent to protect and preserve the property by raising the necessary funds in the way suggested. These are clear cases of necessity. There may be other cases more doubtful in their character; but wherever the Court thinks there is a necessity, I think there is jurisdiction. It is a known principle in the law that necessity creates powers of administration which do not otherwise exist. Thus a shipmaster who is only an institor as to the ship, and who has no administration at all as to the cargo, may sell or hypothecate both, where the owners are absent, and where a case of necessity arises, though without such necessity he could not do so.

On the principles now indicated, it seems clear that no case of mere eligibility or expediency, no desire to make profit, and even, I think, no wish to avoid inconsiderable loss, will justify or give jurisdiction to the Court in such a matter. For illustration, I would refer here to the case of Colt (Mor. Tutor, Curator, and Pupil; Appendix 1), where, in an analogous question as to the powers of a tutor at law, "the Lords, in respect that the contract libelled is an act, not of necessary administration, but of discretionary power exercised on the part of the tutor, in the view of ultimately promoting the benefit of his pupil, found the action incompetent, and dismissed the same." And again to the recent case of Muller v. Dixon, 11th Feb. 1854, 16 Dunlop, p. 536, where the Court at first had authorised the sale of a pupil's property, in certain special circumstances, upon a report that it was an eligible transaction; but upon objection by the purchaser as to the sufficiency of this authority as a title, a further inquiry was ordered, and the transaction was confirmed upon its appearing that it was not merely eligible but necessary.

With regard to the payment of personal debt, I think it may be competent for that purpose to authorise a sale or security affecting the heritage in certain circumstances. There may be such a pressure of diligence, such a prospect of accumulated expense and probable loss, as may threaten ruin to the party interested, and may make it necessary to interfere. But, on the other hand, if there is no urgency —if there is no serious risk of great detriment, there will not be a case of necessity, and it will not, therefore, in my opinion, be competent to give the powers. If, for instance, it may be merely wished to pay a personal debt, or convert it into an heritable one, in order to obtain an abatement in the rate of interest, where the estate can well afford the difference, I think there would be no competency in such an interference; and generally, I may say, that I think a very special case needs to be made out before sanctioning the conversion of personal into heritable debt, under which there is still a personal creditor entitled to demand payment, and to adopt all legal diligence, with the advantage of having a real security over the estate in addition. An heritable security may be more easily transferable than a personal debt. But this will depend on circumstances, and particularly upon the power which the heritable security confers on the creditor, as to which I shall afterwards make some observations.

It may be that, in the present case, there is no possibility of effecting an assignation to the personal debt in favour of a more accommodating creditor, and that it is necessary to pay this debt in order to avert serious loss and confusion in the party's affairs, which might for a time interfere with the due support of himself and

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family, or involve other impending disasters. Of this, the Court before whom the application depends will judge, and a case of necessity of that nature may be made out, which, in my opinion, would justify them in granting the application. I give no opinion whether the statement at present before the Court shows the existence of such a *nodus* as will give competency to the interference.

I do not believe that the principles now stated are substantially different from those to which the Court have generally looked in their past decisions. They may sometimes have stretched or misapplied them, and it was natural, when the cases were *ex parte*, that there should sometimes be a want of precision or strict attention to distinctions in the judgments pronounced. The case of Muller, already referred to, is an example of such an oversight. But when the question is deliberately raised, I cannot help thinking it in perfect accordance with past decisions, as well as with correct principles, that the essential difference between necessity and expediency, in respect of the power of interference, should be explicitly put forward in the Court's deliverances.

I shall conclude by adverting to a point suggested by a remark in the opinion of Lord Curriehill. Even in cases where I consider it competent to authorise an heritable security, I doubt the competency, and I have no doubt of the inexpediency, of granting to the heritable creditor a power of sale, especially if that power is to extend over a much larger portion of property than will be sufficient to pay the debt. I think it would be better for the Court themselves to sell in such a case, when they would have an opportunity of determining how much, and what part of the estate should be sold. To delegate this power to a heritable creditor seems extremely questionable, and more than questionable, if the security and power of sale are to embrace the whole or a large part of the estate. Possibly the want of such a power of sale may make the security less marketable, and not much more eligible in some circumstances, than a personal ground of debt. But I regard this consideration as one of very inferior importance.

Lord Ivory.—On the question of abstract competency, I concur in the opinion of Lord Curriehill; as illustrated in those of the Lord President and Lord Neaves.

As to another question, viz.—What is the form, in which the Court should be approached, in an application for their judicial interposition—whether, as here, by way of summary petition,—or in the shape of an ordinary action of cognition or the like, formally calling as defenders all parties interested,—I might have entertained doubts, how far the more recent practice, of proceeding in the former course, has yet acquired such a degree of consistency and strength, as to overcome the older authorities, which are wholly in favour of the latter. But this is a matter which does not seem to have been in the view either of the parties, or of the consulting Judges,—and therefore I do not enter into it.

Lord Ardmillan.—The only question on which our opinions are desired is the question of the competency of granting the special powers for which Mr Maconochie has applied as a *curator bonis*. In considering this question, I think that it must be disposed of, on the assumption, on the one hand, that Mr Maconochie was properly appointed *curator bonis* to a lunatic, and, on the other hand, that the circumstances of the case are such as to justify the application for special powers to borrow money on the security of the estate, if it be competent for the Court to grant such powers. The abstract point of competency can only be fairly raised on the assumption of this state of the facts. The ultimate disposal of the merits of this particular application remains with the Second Division of the Court, if the competency is ascertained.

I am of opinion that, looking to the long established practice of the Court in a great variety of cases, which it is unnecessary to mention, but many of which are similar to the present, the competency of granting the special powers here craved to a *curator bonis* is so settled that it would be highly inexpedient to disturb it; and I am by no means satisfied that, even if the question were open, there is any sufficient ground for arriving at the conclusion that the granting of such powers is absolutely incompetent. It may be, that the incapacity of parties to whom *curators bonis* are appointed has been occasionally acknowledged on slight inquiry or inconclusive evidence, and it may also be, that special powers have been occasionally granted where a case of necessity has not been adequately established. But in a case of undoubted lunacy on the one hand, and of clear necessity on the other

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hand, I am unable to perceive any solid ground of objection to the competency of the Court's conferring on the *curator bonis* judicially appointed, a power necessary for the right management of the lunatic's estate. I rather think that the right to grant such power to meet a case of necessity is reasonably implied in the jurisdiction exercised in the appointment of the *curator bonis*. It is part of the duty of the curator so to manage the estate as to protect it from loss; and if the borrowing of money on the security of that estate is really necessary as an act of management in the discharge of the office of curator, but is not within his ordinary powers, then the conferring of special power to borrow in such a case flows naturally and equitably from the jurisdiction in the exercise of which the appointment was made. In the abstract question of competency, there are no degrees of necessity. These may enter into the merits of each separate application; but the clearest possible necessity must be assumed to raise the pure question of competency. If it is incompetent to grant such powers in a case of necessity, then the urgency of that necessity cannot create a competency; and it must be incompetent even to save the lunatic from starvation, or to protect the estate from utter ruin. To this conclusion I cannot come. I should be very unwilling to arrive at it, if there had been no practice and no authority on the subject; but having regard to the numerous decisions, and to the settled practice for many years, I am of opinion that the granting of the special powers craved in this case is within the competency of the Court, if the necessity shall be satisfactorily instructed.

In so far as the Pupils Protection Act has any bearing upon this question, it appears to me to confirm the view now taken. It is plain, from the 7th section of that statute, that the practice prior to its date of granting special powers to *curators bonis*, and other judicial factors, was in the view of the legislature, and was left as it then stood, without disturbance or restriction. Now, there can be no doubt, that for many years prior to the date of the Pupils Protection Act, the Court had been in the practice of granting such special powers, or of refusing them on the merits of the particular case,—a procedure as conclusive of the competency as the granting of the power would have been; for if it was incompetent to grant it, all discretion was excluded, and it was unnecessary to inquire into the merits.

On the whole matter, I am therefore of opinion that such power as is here craved may be competently granted, if a clear case of necessity is made out.

When the case came to be advised,—

Lord Justice-Clerk.—I have considered the opinions of the consulted Judges with great anxiety, and with the utmost deference. They have failed to bring conviction to my mind that it is competent for the Court to do what is asked in this case—that of a *curator bonis* to a person confined in an asylum on certificates. I do not think adequate attention has been bestowed on the state of the facts. There has been no procedure of any sort which declares Mr Graham's incapacity, or puts him under any disability to act as proprietor of his estate.

A petition was presented to the Court by Mr Graham's wife, setting forth that he was afflicted with insanity, and had been placed in the asylum at Dumfries, on the opinions of medical men, and praying, in these circumstances, for the appointment of a *curator bonis*—that is, to manage and take charge of his affairs. In the view that the Court took, and ultimately the House of Lords, this course of procedure for a *curator bonis* was sustained as competent, and rested, not on much practice, but still on some practice. Precedents were much wanted in that case. I believe a case, in 1730, which I found had more weight with the House of Lords than any other fact.

But still, while such procedure is clearly competent, it is to be kept in view that it falls altogether short of any kind of cognition or judicial declaration of insanity. The Court proceed entirely on the certificates of the medical men on which the individual has been received into the asylum by the Sheriff, for safety and proper treatment. When a factor *loco tutoris* is appointed, law has declared a pupil incapable of acting. The pupil has no capacity by law to act, and the Court then are to supply that defect—that is, of legal incapacity, and the factor *loco tutoris* may competently receive from the Court all the powers of a regular tutor; for, in the condition of the pupil, there is nothing to object against such powers being granted, while that very condition requires such powers, if necessary to be granted

(if there is no regular tutor), in order to fulfil and carry out the object of that guardianship which the Court is bound to undertake and execute.

But in such a case as the present no man of full age is superseded in his position and rights, and laid aside as incapable, except by certain legal procedure, ending in the trial of his insanity, and cognoscing that fact by judicial determination. That while shown *prima facie* to be insane, he should be protected, if no one comes forward with a cognition, and to constitute the proper legal guardian, is quite true, especially if he himself does not oppose that interposition of the Court—and a *curator bonis* is a very proper proceeding. But still that procedure in no respect whatever approaches to the character or object of a cognition. The Court actually ...d and declare nothing as to the condition and state of the individual. They simply appoint (there being no opposition, and the person having been previously put into confinement by the Sheriff), a curator to manage his affairs—an appointment solely for protection. The individual remains unaffected in point of legal capacity to act by any declaration or cognition; and no one can doubt that any ...t or disposition granted by him, in reference to his heritable property, would be perfectly habile and competent, although it might be challengeable; and if a lucid interval or recovery was made out to the satisfaction of the Court such act would be ...ectual. There is no bar or impediment to it. The individual is still vested in the ... of the lands, and his capacity to act is unaffected by any legal procedure.

I am not able to comprehend how the Court, in such circumstances, can *de plano* authorise the *curator bonis* to grant heritable securities in such a state of things ...r such a party's lands. Curator *bonis*, observe—that is, an officer appointed ...ply to protect his property. To this view of the question I do not think that sufficient attention has been paid.

I am not moved by the previous practice. What was done under special authority of the Court is safe from challenge, unless at the instance of the person himself, ...e recovers, and his right of challenge cannot be excluded. No previous proceedings then would be disturbed. The cases, so far as they are in point, are, in ...h, not numerous. And so far has the point been held not to be settled, that, in ...ase of Watt in 1855, the other Division ordered a minute of debate to be given ...n the question now under consideration, and again, in the subsequent year, ...ered a minute of debate on the very same point in the case of Nesbitt, showing ... little the matter was understood to be settled.

...do not feel myself, then, constrained, by course of authorities, to hold this as ...ed point. And while it is very satisfactory to find that, generally speaking, ...ther Judges desire to put great restraint on the propriety of granting such ...ial powers as are here asked, yet the considerations they urge on that matter ... only to strengthen the objections to the competency of the Court authorising ...rator *bonis* to burden the fee of the property of the individual whose affairs he ...pointed to manage.

... the view I take of the case, I proceed entirely on the broad distinction between ...ase of a *curator bonis* appointed to take charge of the affairs of a person in ...ement on the ground of insanity, but not cognosced, and the cases of factors *...oris* to pupils. If I had entertained any doubt upon this important point, ...terms of the 7th section of the Pupils Protection Act would have satisfied ...at no such powers as those now held to be within the competency of the Court ... sanctioned by the Legislature.

...ill be observed, that in this section there is introduced one provision as to en...ment on the capital of the property of an insane person under the management ...ctor, and in very special terms. And then by special enactment it is provided ...e Court shall have the power to sanction such a measure. But that power had previously exercised in some cases by the Court. Yet, nevertheless, obviously ...ing the matter to be beyond the competency of the Court, power is specially ...ed on the Court to authorise this the most necessary authority, which could ...e asked for, viz., the actual maintenance of the lunatic. Now, for what pur...was this most limited and special power bestowed on the Court?—for such is ...haracter of the provision, if the Court had of itself authority not to sanction this ...ular act, but, in truth, powers extending far beyond any such limited procedure. ...r, as the legitimate and only warrantable conclusion from this provision, that ...ourt had no such powers as those now ascribed to it, and that the Legislature,

No. 88. having the care of insane persons under the curatory *de bonis*, thought it necessary for their maintenance to bestow on the Court this special power, and no other, which could affect fee or capital of such insane person's means and estate.

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I own I was not prepared for the view taken of the concluding paragraph of this section, in which it is said, that "in all other matters in which special powers are, according to the existing practice, in use to be granted by the Court, the Court shall have power to grant the same *in like manner and form as is above provided.*"

This clause is plainly a mere general declaration, added as a sort of afterthought, to direct that in all cases where special powers are given, the same form of procedure for due inquiry shall be followed. But it would be a most strained construction to hold, that in this indirect manner it was intended to sanction everything that ever was done by the Court, or that, in particular, it was intended, in regard to persons under a curatory *de bonis*, to give authority to the Court to a different and greater extent than the power specially bestowed in the preceding and separate part of the section. It is contrary to a very general and salutary rule of construction, to hold that any such general clause can be held, on any view of its meaning, to extend to larger and greater powers than that which was previously bestowed. But, in truth, the object of this concluding addition to the section is not intended to make any general declaration as to the powers of the Court, and much less in regard to insane persons under curatory, but simply to provide that, where special powers are to be given, the course of procedure introduced in the opening part of the section is to be followed.

Having, then, expressed my opinion on the general question, the propriety of considering this special application is now for this Division. I do not like this rule about necessity; but still we must now take it a wise and safe rule to be applied, and what is the case here? There is an ample estate here, and a large saving every year. By the direction of the deed there is a provision of L.5000 to the younger son. I do not see anything said that he is about to set agoing legal proceedings against the estate; and even though he did, why it is his father's will that he should have this interest in the estate, and an adjudication might be a very good security with which this curator might deal.

Lord Murray.—The opinion of the majority of the Judges goes no further than this, that the powers craved can be granted in cases of necessity. Now, I do not see that a very strong case of necessity occurs here. One of this family has right to and demands payment of L.5000: it is said the curator cannot borrow this at any legal rate. Now, an adjudication would be a very good security, and I cannot see the necessity of this application. Why should there be a power granted by this Court? The report of the Accountant here is perfectly general. He just says that he has no objection to the granting of this heritable security. I dare-say he has not; but the question is, is there no other way of raising the money than this? I see there are able men of business employed here, and I think they could devise a way of doing it without coming to the Court. I think there are various ways of doing it; and all the Judges being united upon this, that there must be a necessity, I hold that this application is unnecessary.

Lord Cowan.—On the general question of competency it is certainly expedient that no doubt should be entertained; and it is satisfactory to find that it is the unanimous opinion of the consulted Judges that it is within the power of the Court in certain cases, to give such powers in relation to the heritable estate as are here sought by this *curator bonis*. The form of the application is immaterial. Whether by action or petition or application under the Pupils Protection Act, the exercise of the powers sought must be shown to be a proper and necessary act of administration, calculated to avert serious loss from the estate.

The case of Muller v. Dixon, 11th February 1854, referred to in Lord Neave's opinion, is exceedingly instructive, as explanatory of the general grounds on which the Court have been in use to proceed in granting powers to interfere, either by loan or sale, with a pupil's or ward's heritage. On a review of the previous cases the views ultimately sanctioned by the Court were in perfect consistency with the rule explained in the second paragraph of the opinion of the Lord President. The principle, which will serve as a rule in future in all similar cases, is there clearly and succinctly stated. In that opinion I quite acquiesce. It appears to me to express, in guarded language, the principles which ought hereafter to guide us

and the consulted Judges have given it their entire acquiescence. There is, no doubt, a difference between a *curator bonis* and a factor *loco tutoris*; but, as regards this matter of granting extraordinary powers to affect heritage, no distinction has been taken in the practice of the Court. This has been fully explained by Lord Curriehill in his opinion. In addition to the case of Somerville and other cases to which his Lordship refers, I may mention that of Eaton v. Murdoch, 4th July 1825. In that case the curator of a lunatic got power to sell his ward's heritage, and became bankrupt with the price in his hands. This led to a claim against his cautioners, who had been no parties to the application; and they resisted the action on the precise ground of its having been incompetent for the Court to grant the powers they did. This plea was overruled both by this Court and by the House of Lords. The case affords a strong illustration of the practice that has prevailed of granting these powers to such officers.

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There remains the question, whether, taking the principle to be as stated, it permits us to grant the powers here sought by the curator. Do the facts brought before the Court in this case make out one of mere convenience, from which gain or profit may arise; or is it a case of necessary administration and urgency to avoid serious loss? Owing to the difficulties expressed by your Lordship in the chair, the general question alone was argued before us prior to the remit to the consulted Judges. We expressed no opinion at the time, on the point whether this was a case in which the powers sought should be granted. I have now looked into the whole circumstances of the case, and I do not think there is any such necessity made as ought to induce the Court to grant the application. There is no evidence laid before us but the opinion of the Accountant of Court; and according to that, the whole matter originated with the curator himself. The creditor was contented to let matters alone. As I read the report, the accountant states that the curator wished to pay up a part of the money, but that Mr Graham, the creditor, refused to take partial payment, and called up the whole. The application thus appears to have arisen from a desire on the curator's part to save paying interest, which was very praiseworthy in him. I therefore think, in the first place, it does not appear there is any necessity which would make it competent for us to interfere; for there is nothing to show, that if the curator had let matters alone, Mr Graham would not have done so too. But, secondly, it has not been shewn that there may not be an assignation of this security to some party willing to advance so much of the L.5000 as it is proposed to leave a burden on the lands. There is no evidence that this is not a marketable security. A very different case would present itself were the estate of the pupil or ward exposed to diligence of creditors. A case of necessity to justify the interference of the Court might be made out, were the estate exposed to be seriously injured and burdened with expenses by creditors leading adjudications. Then the Court might interfere. Suppose Mr Graham here were to adjudge, and bring a ranking and sale, I will not say there might not be an application to the Court to save serious loss and injury; but we have no case of that kind to entitle us to grant the powers sought by this curator.

Lord Wood absent.

The Court pronounced the following interlocutor:—"The Lords, having considered the opinions of the consulted Judges, Find and declare, in terms of the opinions of the majority of the whole Judges, that it is competent for the Court to grant the power to burden the fee of the heritable estate of the person under curatory, when that shall be thought proper; and the Lords of this Division, having considered the application before them for the special powers therein asked, Find that no case has been made out to the satisfaction of the Court for granting the prayer of the note, and refuse the same, and decern; but allow the expenses to be charged against the estate."

G. R. Maitland, W.S.—Agent.

IN THE COURT OF EXCHEQUER.

No. 89.

Feb. 4, 1857.†

Watson v. Simpson and Others.

JOHN WATSON, Plaintiff.—*Sol.-Gen. Maitland—Fraser.*
JAMES SIMPSON AND OTHERS, Defendants.

Proof.—Held (ex parte), that in a prosecution before the Justices of the Peace for contravention of an excise statute, where the offence was punishable by a penalty or forfeiture, the offender was not a competent witness in his own favour, under the Act 16 Vict. cap. 20, sect. 3.

EXCHEQUER. Lords Benholme and Mackenzie.

THE plaintiff, an officer of excise, prosecuted the defendants, James Simpson, David Saunders, and James Stewart, brewers in Perth, for having in their brewery a quantity of raw and unmalted corn and grain ground and bruised, the same being corn or grain not gronnd or bruised in premises entered for the purpose of making malt, and not being oats or beans *bona fide* intended to be used for the purpose of feeding horses, and kept in premises entered as a place for the deposit of horse corn, in contravention of the statute 18 & 19 Vict. c. 94, sect. 36.* The case was tried before two Justices of the Peace for the county of Perth. The defendants "denied the complaint." Evidence was led; and after the plaintiff's proof was concluded, the defendants tendered themselves as witnesses for their defence. The Justices, "in respect the offence charged was punishable on summary conviction, and of the decision in the case Attorney-General v. Otto Radliff, 14th June 1854 (English Court of Exchequer, 23 L. I. Ex. 240), sustained the objection to their reception, and refused to receive them as witnesses." Other witnesses were examined for the defendants. The Justices pronounced this judgment:—"Find the complaint proved; and therefore find that the defendants have incurred the penalty under the Act, which the Justices modify to one-fourth, being L.50 sterling, with the recommendation to the Board to farther mitigate to the sum of L 20 sterling."

The defendants appealed to the Quarter Sessions against this judgment, and pleaded that it should be reversed, on the ground that their testimony was competent, and had been erroneously excluded. After hearing parties the Court of Quarter Sessions thought it expedient to state the facts of the case for the opinion and direction of the Court of Exchequer, in virtue of the powers conferred by the Act 7 & 8 Geo. IV. c. 53, sect. 84; and, on receiving such direction, they would hear and dispose of the appeal.

The case now came on for discussion in the Court of Exchequer. It wa

* It is in the following terms:—"And for preventing fraud and evasion of th duty of excise on malt, by the use of raw or unmalted corn or grain in the brewin of beer for sale, be it enacted, That it shall not be lawful for any brewer of bee for sale to have in his brewery, or in any premises belonging or adjacent thereto whether the same shall be entered by him or not, any raw or unmalted corn or grai whatsoever, either whole or unground, or ground or bruised, except corn o grain not ground or bruised being in premises entered by such brewer for the pu pose of making malt; and all raw or unmalted corn or grain which shall be found i such brewery or other premises (except as aforesaid), and also all malted corn or grai whether whole or unground, or ground or bruised, with which such raw or unmalte corn or grain may be mixed, shall be forfeited, and may be seized by any officer excise, together with all sacks, casks, vessels, or packages in which such raw unmalted corn or grain may be contained, and the brewer for every such offen shall forfeit the sum of L.200: Provided always that no such penalty or forfeitu shall be incurred in respect of any oats or beans *bona fide* intended to be used a consumed as food for horses, and oats or beans being in premises of which su brewer shall specially make entry as places for the deposit of horse corn, and whi shall be so far distant from his entered brewery premises as not to have any intern communication to or with the same."

† Decided 19th June 1856.

intimated that the defendants did not intend to appear, and left the case in the hands of the Court. No. 89.

Pleaded for the plaintiff;—The defendants can only be competent witnesses in their own favour, in virtue of the provision in the 3d section of 16 Vict. cap. 20, which allows a party to any action to be a witness therein; but this provision is qualified with the enactment, "that nothing herein contained shall render any person, or the husband or wife of any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence." The present case falls within this qualification, and the evidence of the defendants is incompetent. The defendants were prosecuted under the statute 18 & 19 Vict. c. 94, sect. 36, which provides, that "for preventing fraud and evasion of the duty of excise on malt by the use of raw or unmalted corn in brewing beer for sale," brewers are not to keep raw or unmalted corn, unless in premises entered for the purpose; and any such raw grain, and the bags or vessels containing it, may be seized by any officer of excise, &c.; "and the brewer for every such offence shall forfeit the sum of two hundred pounds." Such language was never used but in reference to criminal proceedings. The matter was clearly out of the category of civil proceedings; for the prosecution might be either at the instance of the Advocate-General, or of a common informer.

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The thing complained of is called an "offence." The object of the statute was "to prevent fraud." The thing prohibited is declared not "to be lawful." The offence is punished by a "penalty," or "forfeiture;" and the mode of prosecution is by "summary conviction," under the general management and regulation Act, 7 & 8 Geo. IV. cap. 53. It is no doubt merely a *malum prohibitum;* but still there is in it such criminality as takes it out of the class of civil proceedings. The Justices exercise their jurisdiction as magistrates. The proof to be taken is proof by witnesses, or by confession—that is proof other than by the party; and confession is to be voluntary, and is a different kind of evidence from that got from the party on oath. A reference to oath would be incompetent in such a prosecution, just as the defendant could not competently defer to the oath of the prosecutor. In circumstances similar to the present, the Court have held cases like this to be criminal proceedings.[1] The case can no longer arise in England, as all doubt has been removed by a subsequent statute, with reference to prosecutions at the instance of the Board of Inland Revenue, 18 & 19 Vict. cap. 96, sect. 36.

The Court made avizandum with the case, and afterwards signed and delivered the following opinion:—

"*Exchequer Chambers, Edinburgh,* 19*th June* 1856.—We are of opinion that the judgment of the Justices sustaining the objection to the reception of the parties complained of, and refusing to receive them as witnesses, is right. * (Signed) "H. J. Robertson.
"T. Mackenzie."

[1] Stevenson v. Scott, 1 Irving's Just. Reports, p. 603; Lawson v. Jopp, 16th Feb. 1853, ante, vol. xv. p. 392.

* Note.—This case was not reported of the date it bears, because it was thought that the Court of Exchequer Act, which was at that time passing through Parliament, would have settled the question raised. By the 43d section of that Act, 19 & 20 Vict., cap. 56, it is provided, that "the 3d section of the Act of the 16th year of Her present Majesty, cap. 20, shall not be deemed to apply to any cause to be instituted under *this Act*, relating to the Customs or Inland Revenue." As prosecutions before justices are not instituted under the Court of Exchequer Act, it is obvious that the question is not set at rest by that statute; and, therefore, it has been considered expedient to report the above opinion of the Court of Exchequer, though delivered upon an *ex parte* discussion. C. J. S.

No. 90. **John Keegan, Petitioner.**—*Mackenzie.*

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Keegan.
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1st Division.
Ld. Mackenzie
L.

Judicial factor—Special powers refused to a factor to carry out an agreement by the beneficiaries under a trust-deed, the terms of the agreement not being strictly in accordance with the directions in the trust-deed.—A trust-deed provided for the investment of capital for an annuity to the truster's sister, the capital, after her death, to be divided amongst certain legatees; and it directed the whole residue to be apportioned at once amongst certain legatees. It contained no power to sell. On the failure of trustees, a factor was appointed. Disputes arose under the settlement, and these were adjusted by a minute of agreement. Application was then made by the factor for special powers to sell various shares of Joint-Stock Companies, and, *inter alia*, retain L.150 to meet contingencies till the invested capital should be relieved from the liferent—*Refused*, and *observed* that the application was partly unnecessary and partly *ultra vires* of the Court.

The petitioner was appointed judicial factor on the estate of Mrs Elizabeth Bisset or Miller, in consequence of the only trustee nominated by her having died two days after the truster. The purposes of the trust were, after payment of debts, &c., 1. To invest a sum sufficient to provide an annuity of L.15, to Mrs Fleet, the sister of the truster, stated in the petition to be the heir-at-law and next of kin of the deceased. 2. To deliver certain specific legacies of plate, furniture, &c. 3. For payment to a certain legatee of the sum of L. sterling. 4. To apportion the residue into four shares, and divide it among five persons named in the deed; and, 5. To divide at Mrs Fleet's death the capital sum invested to provide her annuity amongst four persons named in the deed.

The testamentary paper left by the truster had not been prepared in the usual style; and although purporting to be a "trust-disposition and settlement," it contained no proper dispositive clause. It contained (at the close of the testing clause) however, a nomination of an executor, and was deemed sufficient as a paper of bequests. It contained no power to sell.

Disputes arose between Mrs Fleet and the beneficiaries under the testamentary paper as to its validity; and there were likewise disputes amongst the legatees as to its meaning. All these disputes, however, were arranged; and a minute of agreement was now produced, by which all the beneficiaries under the settlement of Mrs Miller homologated her settlement with two unimportant alterations, the one relating to the division of the silver plate, and the other to the division of certain articles of furniture.

The value of the truster's estate was estimated at L.1165, of which abou[t] L.830 consisted of shares in three Edinburgh Cemetery Companies, and i[n] the Dundee Water Company. The rest of the estate consisted mainly o[f] about L.250, being the value of the household furniture and silver plate.

The object of the present application was to obtain authority,

1. To make up a title to the Cemetery and Water Company shares. [2.] To sell these shares by public roup or private bargain, to convey them, an[d] to receive the proceeds. 3. To empower the factor to invest L.450, to yiel[d] an annuity of L.15 a-year to Mrs Fleet. 4. To retain L.150 to meet conti[n]gencies, until the capital of L.450 should be relieved from Mrs Fleet's lif[e]rent. 5. To empower the factor to implement the special legacies, as alter[ed] by the minute of agreement; and, 6. To divide the residue among the re[-]siduary legatees.

The Lord Ordinary remitted to Mr Duncan, W.S., who reported that [in] his opinion there was no absolute necessity for the special authority of th[e] Court being granted to enable the judicial factor to exercise any of th[e] powers for which he prayed. The first power to complete a title to th[e] Cemetery and Water Company's shares, was within the ordinary powers [of] administration of a judicial factor, and in practice commissaries were accu[-]

tomed to decern judicial factors as executors-dative, on production simply of the Act and warrant of their appointment, without any special power authorising them to confirm as executor being first granted by the Court. "Indeed, the Act of Sederunt of 1730[1] not only authorises, but requires a judicial factor to make up a title 'in his own name as executor-dative,' where this is necessary. At the sametime it is believed that the Court does not yet in practice refuse to authorise specially a factor to confirm as executor, where this is asked."[2] No. 90. — Feb. 6, 1857. Keegan.

The second power to sell the shares, he likewise believed to be within the ordinary powers of administration of a judicial factor.[3]

With regard to the other special powers prayed for, the reporter had not been able to find any precedent where such powers were granted; and it did not appear to him to be necessary that the factor should obtain special powers for these purposes.

"There is a single circumstance which of itself seems to make it inexpedient for the factor to ask the Court to interpone their authority to the proposed mode of division of the trust-funds;—it is, that the conclusive nature of the minute of agreement in question depends entirely upon the fact, whether Mrs Fleet be, as is stated in the petition, the only next of kin of the deceased. Although the reporter believes that there is no reason to doubt that this is the fact, still the Court have no legal evidence before them that such is the case. It may further be mentioned that two of the parties to the minute of agreement are minors, namely,—Archibald Glen and David Russell Glen, and their curators (if they any have), are not called in the present application. One of the residuary legatees also, Mr David Russell, has declined to subscribe the minute of agreement, although he has granted a letter, giving a *quasi* consent to the arrangement being carried out."

The Lord Ordinary reported the case.

Lord Curriehill.—The direction of the trust-deed is, that these subjects shall be divided specifically. We are now asked to alter that direction, and appoint these subjects to be sold. There is great difficulty in doing that. This is asking us to authorise the curator to do what the trustee could not have done.

Lord President.—I see no reason for doing this.

Lord Ivory.—We are in a position to refuse this petition, partly as unnecessary and partly as *ultra vires* of the Court. Parties have arranged their differences by this deed of agreement, and it is in order to enable the factor not to follow out the settlement in its own sense, but according to the terms of the agreement, that these powers now prayed for are necessary. But, in the first place, one of the residuary legatees is not a party to the agreement; and, in the next place, two of the parties to the agreement are minors, and are not in a condition to agree to it. But, even if there was a proper consent by all parties, I do not think that, in a judicial factory for the execution of a trust, we ought to give powers to the factor to carry out the agreement, which is not carrying out the purposes of the trust. If the factor wishes to carry out the agreement, he must take the whole responsibility on himself, so far as it is extrajudicial.

Lord Deas.—I am also quite satisfied that there is no case for the interference of the Court.

The Court pronounced the following interlocutor:—"In respect that no case is presented *hoc statu* for the interference of the Court, Refuse the petition, and decern."

James Wallace, S.S.C.—Agent.

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[1] Act of Sederunt, 13th February 1730, sec. 7.

[2] Wood, 1855, ante, vol. xvii. p. 580.

[3] A. of S., 13th February 1730, sec. 6; Hamilton, 16th February 1839, ante, vol. i. p. [illegible]; [illegible], 28th February 1856, ante, vol. xviii. p. 676; Fraser, 10th January [illegible], ante, vol. xii. p. 904; Corson, 10th July 1835, 13 S. & D. p. 1093; [illegible], I. 7. 17; Fraser, II. p. 120.

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Carron Co. v. Ritchie, Watson, & Co.
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Smith v. Frier.

THE CARRON COMPANY, Pursuers.—*Mackenzie.*
RITCHIE, WATSON, AND COMPANY, Defenders.—*Millar.*

Process — Jury trial—13 & 14 Vict., cap. 46, sect. 40—Right of pursuer to fix time and place of trial.—Issues were adjusted for a jury trial on 17th January. The defender gave notice on 2d February for the March sittings. The pursuer moved the Lord Ordinary on 3d February to fix a day for trial before himself during session. The defender was willing to waive his right of countermand. *Held* that the defender's notice did not render the pursuer's motion incompetent; and, there being no sound reason given why the trial should not proceed before the Lord Ordinary, a day was fixed for so proceeding with it.

1st DIVISION.
Ld. Benholme.
C.

SEE supra, p. 281.

In this case issues were adjusted on 17th January. Notice of trial had been given on 2d February by the defenders for the March sittings. On 3d February the pursuers enrolled the case, and moved the Lord Ordinary, under section 40 of the Court of Session Act, to appoint a day for the trial before himself before the rising of the Court.

His Lordship now reported the point.

Mackenzie, for the pursuers.—Notice having been given by the defenders, it is open for them to countermand. The pursuers wish to prevent that, being anxious to get on with the case.

Millar, for the defenders. — We do not wish to countermand, and are willing that the time for which we have given notice shall now be fixed so as to prevent any possibility of doubt as to a countermand. But, if that is not agreed to, cause must be shewn why our notice should be disturbed.[1]

Mackenzie.—It is not necessary to shew any further cause than that the party is pursuer of the action, and wishes to have it proceeded with.[2]

After consultation,—

LORD PRESIDENT.—We are very clearly of opinion that the circumstance of the defenders having given notice for the sittings does not make it incompetent for the pursuers to move before the Lord Ordinary, and for him to consider the objection to the trial being fixed for the sittings. We are of opinion that there is no sound reason why the cause should not be proceeded with before the Lord Ordinary, which is the most expeditous way of trying it, and especially when desired by the pursuers, whose interest it is to proceed with it, and who say that there has been a piracy of their rights. Even if witnesses must be brought from England, that is of no consequence, for the trial will not take place for several weeks.

THE COURT pronounced the following interlocutor:—"The Lords, on the report of Lord Benholme, Ordinary, and having heard the counsel for the parties, Appoint the trial of the issues in the cause to proceed before the said Lord Ordinary at Edinburgh, within the Parliament House, on Tuesday, the twenty-fourth day of February current, at ten o'clock forenoon."

GIBSON-CRAIGS, DALZIEL, & BRODIE, W.S.—J. & J. MACANDREW, W.S.—Agents.

No. 92.

DONALD SMITH AND JOHN BUCHANAN (Trustees for the Western Bank of Scotland), Pursuers.—*D. F. Inglis—Mure.*
THOMAS FRIER (Scoon's Trustee), Defender.—*Macfarlane—Fraser.*

Bankruptcy—Right in security—Heritable and moveable—Transaction—Adjudication—What falls under the jus mariti.—By assignation *ex facie* absolute, and bearing to be for an onerous consideration, a wife, with consent of her husband,

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[1] Faulks v. Park, 17th June 1854, ante, vol. xvi. p, 961; Shiells v. Edinburgh and Glasgow Railway Company, 17th July 1856, ante, vol xviii. p. 1301.
[2] Boyd v. Law, 20th February 1856, ante, vol. xviii. p. 618.

conveyed (in security) to a bank a heritable bond to which she had right in her own person, and from which the *jus mariti* and right of administration of her husband were not excluded. Some time thereafter the husband was sequestrated, and two days after his sequestration the bank completed their title by registration. In a competition between the bank and the bankrupt's trustee for the interest on the bond—*Held* (affirming judgment of Lord Handyside) (1.) That the *jus mariti* of a husband may be attached by adjudication, and that a sequestration of his estates operates as such an adjudication. (2.) (*diss.* Lord Deas) That the interests on the bond accrued to the bank as the holders of the assignation, and not to their cedent, the wife of the bankrupt: Therefore, that the interests did not fall under the *jus mariti* of her husband, which could not extend to anything that was not personal property belonging or accruing to the wife, and forming part of her personal estate: Therefore the claim of the bank preferred.

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Mrs Helen Herdman or Scoon, before her marriage with William Scoon, acquired right by assignation to a bond and disposition in security for L.1500. The assignation was dated 28th December 1849. It was registered 31st January 1850. The destination which it contained of the bond was simply in favour of "Miss Helen Herdman." It contained no exclusion of her husband's *jus mariti* or right of administration.

In July 1850, Miss Helen Herdman married William Scoon. On 2d October 1850, she and her husband, "for his own right and interest," assigned the bond to the pursuer Smith for behoof of the Western Bank. The assignation was *ex facie* absolute as for a price paid of L.1500. It was recorded upon 15th March 1851. On 13th March 1851, being two days before the date of registration, Scoon was sequestrated: The pursuer Frier was appointed his trustee. Prior and subsequent to the date of the assignation, the Western Bank had advanced large sums to the bankrupt Scoon, and at the date of the bankruptcy, they alleged that he was indebted to them L.1538, 17s. 8d. They averred, that the assignation was granted in security of all these advances. The trustee, on the other hand, alleged that the assignation was intended to be in security only of advances subsequent to its date. But both parties were agreed that the assignation was not absolute, but only in security of the husband's debt, whatever that might be.

In May 1851, the debtor in the bond having intimated that he wished to pay up the same, the Western Bank and Scoon's trustee concurred in granting the requisite discharge, and they at the same time entered into an agreement by which the amount of the bond was deposited in the Western Bank in their joint names, till their competing claims should be decided.

The Bank then raised the present action of multiplepoinding, in which the Bank and the bankrupt's trustee were the sole claimants. The Bank claimed the fund *in medio* in virtue of their security. The trustee claimed to the extent of the right and interest in the bankrupt *jure mariti*, being the whole annualrents or interests arising during the marriage. He also objected to many of the vouchers for the Bank, as not falling within the exemption of the Acts 55 Geo. III. cap. 184, and 9 Geo. IV. cap. 49, but these objections did not now form the subject of discussion, which was limited entirely to the preference claimed by the trustee in virtue of his alleged adjudication of the *jus mariti*. He pleaded;—" I. The right acquired by the bankrupt Scoon, *jure mariti*, to the annualrent or interest accruing on the said bond and disposition in security, being separable from, and independent of, that pertaining to his wife, *quoad* the principal sum, was adjudgeable, and has been by force of the sequestration adjudged from Scoon for behoof of his creditors. II. In this view, and in respect that the assignation or conveyance by the bankrupt Scoon, in favour of the Western Bank of Scotland, had not been completed by being duly recorded, or by other valid intimation or registration prior to the sequestration, this bond was, to the extent of the bankrupt's interest as

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comprehended by his *jus mariti*, vested in, and has now accrued to the present claimant, as Scoon's trustee, for the creditors under his sequestration. III. The claim of the said Western Bank of Scotland is ill-founded, and cannot be maintained in competition with that of the present claimant, in respect,—(1.) That the drafts, orders, or cheques before referred to in Articles 11 & 12 of the present revised condescendence and claim, are liable to the objections therein stated; and, therefore, in terms of the statutes 55 Geo. III. cap. 184, particularly section 13 thereof; and 9 Geo. IV. cap. 49, particularly section 15 thereof, the sums of money alleged to have been advanced or paid in virtue of these drafts, orders, or cheques, cannot be allowed in account between the said Bank and the bankrupt Scoon, or his creditors, or the present claimant, as representing them; and, (2.) That the said drafts, orders, or cheques are also liable to the objections before stated, in Articles 13 & 14 of this revised condescendence and claim; and, therefore, that the sums represented by such drafts, orders, or cheques, cannot form articles of debit against Scoon in the Bank's accounts in question."

Smith and *Buchanan*, representing the Western Bank, pleaded;—1. That in respect of the writs condescended on, they were entitled to be preferred on the fund *in medio*, in terms of their claim. 2. As the assignation in question related to a security which was the property of Mrs Helen Herdman or Scoon, and not that of the bankrupt, and was now duly vested in the claimants in virtue of the assignation, the claimant, Scoon's trustee, had no title to challenge the assignation as regards either the principal sum, or interest thereon.

The Lord Ordinary, on 14th March 1855, pronounced the following interlocutor:—"Finds that the bankrupt *jure mariti* had, during the subsistence of the marriage, right to the annualrents or interest due and payable under the bond and disposition in security vested in the person of his wife, and that his right thereto was an adjudgeable subject; and therefore sustains the title and interest of the claimant, trustee on his sequestrated estate, to challenge in this process the validity of the assignation founded on by the Western Bank, and also to dispute the fact of any debt being due by the bankrupt to the Western Bank, in security or for payment of which they obtained and hold said assignation, in so far as said assignation conveys or affects the right to said annualrents belonging *jure mariti* to the bankrupt; and to this extent repels the second plea in law for the claimants Smith and Buchanan: Finds that the said assignation was sufficiently registered in the Register of Sasines on the 15th day of March 1851, and repels the objections to the formality of the registration: Finds that the assignation, so registered of that date, constituted a valid security to the Western Bank for monies advanced to the bankrupt previous to the date of his sequestration, and which shall be legally vouched or proved in terms of law, notwithstanding the sequestration was awarded on the 13th day of March 1851, previous to the date of the aforesaid registration; and to that extent repels the second plea in law for the claimant, the trustee; and with these findings orders the cause to the roll, that the third plea in law for the claimant, the trustee, may be disposed of." *

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* "NOTE.—Three points raised at the debate before the Lord Ordinary are disposed of by the preceding interlocutor. A fourth point is reserved, not having been fully argued, and which it seems expedient to waive deciding until the findings on the other points shall become final.

"The prejudicial question is, whether the right of the husband *jure mariti* in the rents of the wife's heritable estate during the subsistence of the marriage, is an adjudgeable subject so to be attached by his creditors. In the present case, the wife of the bankrupt was assignee of a bond and disposition in security over certain heritable property acquired by her previous to her marriage, without any exclu

The trustee reclaimed, and pleaded;—That his second plea in law ought to be sustained. In a question of succession the *jus mariti* was a right that No. 92.

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of the *jus mariti* of her future husband. Some time after their marriage, the wife, with consent of her husband, and he for himself, and as taking burden upon him for his spouse, and for his own right and interest, executed an *ex facie* absolute assignation of the bond and disposition in security to the manager and secretary of the Western Bank of Scotland, in trust for the bank; the consideration for which is stated in the assignation to have been the sum of L.1500 sterling, paid to the cedents, and which was the precise amount of the sum in the bond and disposition itself. The assignation, however, was truly in security of advances made and to be made by the bank. The bankrupt, at the period of sequestration, was indebted to the Western Bank in the full sum for which the assignation bore to be granted. The trustees for the Bank claim the benefit of the security so obtained to meet the balance due, and the fund *in medio* consists of the principal sum in the bond and disposition in security, which the debtor insisted on paying off, and which, under an arrangement between the parties to this process, was discharged, and the money consigned. The other claimant, the trustee on the sequestrated estate, has disputed the validity of the assignation obtained by the bank; and while admitting that the creditors under the sequestration can claim no right to the principal sum in the security, as being heritable estate belonging to the wife, the trustee maintains the right of the creditors to claim the life-interest of the bankrupt, during the subsistence of the marriage, in the annualrents of the security, and the interest of the principal sum now paid, contending the same to be an adjudgeable subject, and carried to the trustee by the sequestration. The title of the trustee to appear as a claimant in this process to object to the validity of the assignation to the Bank, or, if unsuccessful in that, to cut down or extinguish the balance due to the Bank, so as to relieve the bankrupt's life-interest in the sum in the bond from the burden of the security held by the Bank, is thus dependent on the determination of the point, whether that life-interest belonged to the bankrupt *jure mariti*, so as to be adjudgeable by his creditors. The opposing claimants maintain the contrary, which is involved in their second plea in law, but, as humbly appears to the Lord Ordinary, on insufficient grounds. Whatever may be the precise legal character or definition of the right in the husband in the wife's heritable estate, and the rents or produce of it, it appears at least to be settled by adjudged cases, that his interest, while the marriage subsists, in the future rents and profits, is so vested in him as to be attachable by creditors under the diligence of adjudication. It is thought sufficient to refer to the cases of Calder v. Steel, Nov. 19, 1818, and Borthwick v. Macfarlane, July 16, 1844, 6 D. 1290, confirming the earlier case of Menzies v. Gillespie, Dec. 8, 1761, Mor. 5974. Proceeding on these authorities, the Lord Ordinary has had no difficulty in holding that the trustee on the bankrupt's estate has a sufficient title and interest to challenge the validity of the Bank's security, so far as affecting the interest of the sum in the bond assigned.

"The first of the objections to the Bank's assignation is, that it has not been recorded in the Register of Sasines in the formal manner which is said to be required. The usual certificate of registration did not bear the signature of the registering officer or clerk, when the assignation was first produced and founded on by the Bank, subsequent to the sequestration. The registration of the assignation had been made under the Heritable Securities Act, 8 & 9 Victoria, cap. 31, sect. 5, which, after enacting that the writs shall forthwith be shortly registered in the minute-books of the Registers of Sasines in common form, and with all due despatch be fully registered in the Register Books, goes on to direct that they shall thereafter be redelivered to the parties with certificates of due registration thereon, which shall be probative of such registration; such certificates specifying the date of presentation, and the book and folio in which the engrossment has been made, and being subscribed by the keeper of the Register. This subscription was not attached when the assignation was redelivered; and upon this omission at the time, although since supplied, the objection is rested. But the section goes on to enact, that the date of entry in the minute-book shall be held to be the date of registration. As the fact of the entry in the minute-book, of date the 15th of March, is not contested, and the assignation was thereafter duly engrossed in the Register, it is conceived

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was neither heritable nor moveable. It was a right of an anomalous description, and must be dealt with as a right by itself, and not as a pure heritable or moveable right. It was a right which belonged to the husband as a separate estate so long as the marriage endured, but no longer. It was rather of the nature of a limited liferent, but still not of such a nature as re-

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that the deed was thereby sufficiently registered, and that the certificate, which is to be held probative of the registration, is no part of the act of registration, but merely evidence of it, and may be attached *ex intervallo*.

"The second of the objections is of a more serious character. The assignation was delivered for registration two days after the sequestration was awarded. The trustee, referring to the 7th section of the Heritable Securities Act, which, reciting the Act 1696 and the two sequestration statutes, enacts, that in all questions under these Acts, the date of the registration of all assignations, &c., granted or taken in pursuance of this Act, shall be held to be the date of such assignations, &c., without prejudice to their validity or invalidity in other respects—contends that the security of the Bank under the assignation is invalid and ineffectual in competition with the adjudication in favour of the trustee under the sequestration. The view taken by the trustee is, that this enactment makes the execution of the assignation identical with the date of its registration, so as to give it a postponed date, bringing it down to a period subsequent to the sequestration. On the other hand, the Bank contend that this section of the Heritable Securities Act neither was intended to make, nor has made, any change on the position of creditors holders of uncompleted securities, not otherwise challengeable, granted before sequestration, though not rendered by the creditor complete until after the bankruptcy. The Lord Ordinary is of that opinion. The object of the Heritable Securities Act was to simplify and render less expensive the transmission of securities, by dispensing with the instrument of sasine and its registration, and substituting the registration of the assignation itself as an equivalent. By the Bankrupt Statutes, 54 Geo. III. cap. 137, sect. 12, and 2d and 3d Vict., cap. 41, sect. 25, it was enacted, that dispositions, heritable bonds, or other heritable rights whereupon infeftment may follow, shall be reckoned to be of the date of the registration of the sasine taken thereon in all questions under the Bankrupt Acts, but without prejudice to the validity or invalidity of the said heritable rights in all other respects. But it has been held, under these statutes, that a party holding a security of a prior date, validly granted at the time, but remaining uncompleted till within the sixty days of bankruptcy, or even subsequent to the awarding of sequestration, may, notwithstanding, proceed to complete it by taking and registering infeftment, and the security becomes unchallengeable and preferable to the trustee under the adjudication in the sequestration.—Cormack v. Anderson and Others, July 8, 1829, 7 S. 868. The question in the present case appears, therefore, to be brought to this narrow point, whether the Heritable Securities Act has effected an alteration upon the law according to the construction which has been put upon the Bankrupt Acts. It is humbly thought that it has not. The terms of the enactment in section 7 are precisely the same with those in the sections above referred to of the two Bankrupt Statutes, with the difference of applying the enactment to the assignations of securities under the new form, as was necessary for the working of the Act. It was a conveyancing statute, and nothing else. It would be unwarrantable so to construe it as to infer that it contained an incapacitating enactment directed against the holders of securities completing them, from which they have been held not to be prohibited by the Bankrupt Statutes, which are specially referred to in the section itself.

"On these grounds the Lord Ordinary has, on the one hand, sustained the title of the trustee, and, on the other, has overruled the objections taken to the assignation. There remains, however, for future consideration the objection of the trustee to the debt on which the Bank claims, founded on the alleged advances made to the bankrupt being vouched by cheques, which are pleaded to be null under the Stamp Acts."[1]

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[1] The objections to the Bank's title on account of insufficient recording, and because the recording took place after registration, were not repeated in the Inner House.—J. S. M.

quired to be feudalised. It was established that this right might be carried by adjudication. It could not be carried by arrestment. The fruits of the wife's estate might be arrested, but the right itself could not be so taken from the husband. It might, however, be voluntarily transferred by him. But if this right could be adjudged, there was a good vested right in the adjudger so long as the fee of the estate remained in the wife. Here the disposition to the Bank by the wife did not altogether divest her of her estate. A radical right still remained in her. The fee was hers. The right to the estate was hers. It was only disponed in security. She could at any time redeem it; and, therefore, her husband's sequestration operated an adjudication for behoof of his creditors of his *jus mariti*. Now adjudication of the *jus mariti* at once completed the trustee's title; sasine was unnecessary on an adjudication of *jus mariti;* the interlocutor awarding the sequestration operated at once as a valid transference; while the title of the Bank (which did require sasine) was not completed till two days after the sequestration, and so could not compete with the trustee's title. No doubt *that* sasine carried the fee of the wife's estate; but it could give no right to the *jus mariti* of the husband, which was at that moment vested by the sequestration in the trustee.[1]

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Pleaded for the Western Bank;— Admittedly the *jus mariti* might be carried by adjudication; but, of course, that could not create a higher right than it attached, and could not confer on the adjudger a right which was not in the husband. Possession of the heritable estate by the wife was indispensable to the *jus mariti*. The continuance of the marriage was also indispensable to it, and the continuance of the right in the wife to her estate. But the existence of the *jus mariti* and its application to the rents of the real estate of the wife, gave the husband no right to require that that estate should always remain in her. No doubt, his concurrence in a sale was necessary, but the *jus mariti* gave him no right to insist that the estate should remain in his wife, and, therefore, the right resulted from a state of things which the husband could not, of his own power, bring about or force a continuance of. It depended on something else, on the interest and will of the wife, and the moment she, in the exercise of an independent right of property and the *jus disponendi*, did, with the curatorial concurrence of her husband, sell her estate, the husband's right *eo ipso* came to an end. Therefore, the right which existed in the husband to uplift the rents of his wife's real estate was defeasible by the act of another, and, if so, the adjudger could make no better of it. He could only take and exercise the right subject to that defeasibility, and the adjudger had no control over the wife. He had no claim over her. There was no contract or relation between her and him whatever. She remained as free and uncontrolled as owner of her real estate after adjudication as before. She could sell the estate, and notwithstanding the adjudication of the *jus mariti*, at any time, and the moment it was sold, it was followed by the necessary legal consequence that the husband's right to the rents came to an end.

A difficulty arose from the combination in the husband of his right to exercise the *jus mariti*, and also of his rights and duties as curator of his wife. But he would not be allowed to abuse his curatorial right for the purpose of keeping up and maintaining his right to the rents of his wife's estate, if it were for the interest of the wife that he should not do so. If so, how could adjudication impose on the husband any obligation inconsistent with his curatorial office? The bankruptcy of the husband and the confirmation of the trustee could not interfere with the *jus disponendi* of the wife, and all its legitimate consequences; and, therefore, if she should sell the estate with the consent of the husband, as her legal guardian,

[1] Bell's Pr. sec. 1561; Bell's Com. on Sequestration Statute, p. 51; and cases referred to by the Lord Ordinary.

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the infeftment of the purchaser would oust the husband, the trustee, and every other person having interest. Applying this principle to the present case—the wife had already, with consent of her husband, conveyed away her estate—there was nothing, therefore, in the bankrupt at the date of the sequestration that could be carried, and therefore nothing that could avail the trustee.

Lord President.—The fund *in medio* in this competition is a sum of L.1500 contained in an heritable bond and disposition in security, to which Mrs Scoon is stated to have acquired right prior to her marriage. It is not stated that there was a marriage-contract which could in any way affect her right on the occasion of her marriage. This bond was afterwards conveyed by her and her husband to the Western Bank. The conveyance, although absolute, was truly intended as a conveyance in security for money advanced and to be advanced by the Bank, and the Bank now say that a large balance is due to them. That is a question for future accounting between the parties.

On 15th March 1851, two days before the conveyance to the Bank was recorded, Scoon, the lady's husband, was sequestrated, and the trustee on his estate claims the interest on the bond, in respect of his *jus mariti*. The trustee contends, that as sequestration had been awarded on 13th March, and the assignation had not been completed or published till 15th March, the assignation could not have the effect of establishing a preferable right to his own right as trustee in the sequestration. In the meantime, it appears that the debtor in the bond has paid up the principal sum. By arrangement the amount has been consigned, and that sum, with interest, forms the fund *in medio* in this competition. The trustee does not claim any part of the principal sum. He limits his claim to the interest that has accrued and that may accrue on that principal sum during the marriage. The Western Bank contend, that the trustee has no such right as he claims; that the interest belongs to them, and that the debt due to them exhausts the whole bond. This last is matter for subsequent inquiry. The competition, therefore, is truly in reference to the interest on the L.1500 that has accrued or may accrue during the bankrupt's marriage.

It appears to me, in the first place—and that is not the subject-matter of any question—that the principal sum in this bond and disposition in security was an heritable subject which belonged to the wife herself, and which of course was liable for her proper debts and obligations as at the date of her marriage. In the second place, it is not disputed that the interest of that sum accruing to the wife did fal under the *jus mariti*. The *jus mariti*, though it gives the husband a right only t the personal estate of the wife, is a species of right or interest over that estat which is attachable by adjudication. It is a peculiar kind of right. It is sometime called a right of administration. But it is perhaps more substantial than a mer right of administration. It is a current right—I may so call it—during the sub sistence of the marriage, and it applies to that which becomes or has already becom the moveable property of the wife. It may be abridged or extended, according a the funds accrue during the subsistence of the marriage, and in proportion as th value of the subjects falling under it may vary during that period. But it attache only to that which accrues to the wife in the form of moveable estate; and althoug the right of the husband is a right which in itself may be adjudged, yet its valu —the things which fall under it either before or after being so attached—may b affected by circumstances. I have said that the right continues only during th subsistence of the marriage, and that it continues only in reference to the subject which have accrued to the wife as moveable estate. After the dissolution of th marriage it is extinguished, but during the subsistence of the marriage it may al be extinguished, as regards the fruits or profits of the wife's heritable estate, by suc heritable estate ceasing to belong to the wife. In such an event, there is no long any interest or rent that accrues to the wife, and therefore there is nothing that fal under the *jus mariti*.

There is no contention here, on the part of the Western Bank, that sequestrati has not carried the *jus mariti* of the husband, whatever it is. I do not think the is any competition here as to that which confessedly falls under the *jus mari* The question here, as it appears to me, is whether, in the circumstances, the inte est of this heritable bond does or does not fall under the *jus mariti*.

Upon that question, the view that presents itself to me is that the bond, being the estate of the wife, was validly conveyed by that assignation, and that although infeftment, or its equivalent, registration, was not effected till two days after the sequestration of the husband, still that the conveyance of the estate by the wife, with the concurrence of her husband, was a good conveyance, and that the proceedings being otherwise unobjectionable, that right has now been completed by the Bank. Now, in that view, I do not think that the interest of the bond belonged to the wife. The fruits and profits accrued to the assignee in the bond, and therefore did not fall under the *jus mariti*. It may be that at some future time they may again fall under it, if there is a reconveyance by the Bank, or extinction of the debt in respect of which this bond was originally conveyed. But in the meantime the question is whether, standing that assignation, the interest that has accrued after the date of infeftment accrues to the wife, or to the party who is in right of the bond? It appears to me that the interest accrues to the assignee, and not to the wife, and therefore does not fall under the *jus mariti*; that, until an accounting with the Bank, the fruits and profits, so far as they have accrued and may yet accrue, belong to the Bank, and not to the wife. It must be so held at present, and therefore, in that short view of the matter, I think that the Lord Ordinary has done right in preferring the claim of the Bank to that of the trustee. It is not necessary, to go through all the grounds of his Lordship's judgment, nor the various views of the law on which he rests it, which are not precisely what I have now stated as those that press more strongly on my mind; nor is it necessary to analyse the cases. The case that has been most discussed is that of Borthwick, which appears to me not to touch this case. There is a great deal of discussion in the opinions in that case that tends to a principle that may affect this case; and I confess that the principles that are stated by some of the Judges in the minority appear to me to be sound as to the operation of the *jus mariti*. But these discussions were not necessary to the decision, for the whole question related to the valuation of the right under the Bankrupt Act. Looking to the discussion that took place on the bench, I think that even those of the Judges in favour of the judgment—some of them at least—did not say anything hostile to the principle which I think would regulate this case, and therefore I propose to sustain the preference of the Bank here, being of opinion that substantially the Lord Ordinary has arrived at a right conclusion in the competition as to the bond.

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Lord Ivory.—I am of the same opinion, and though it may not be necessary to concur in all the grounds of the Lord Ordinary's judgment, yet substantially his result is perfectly correct. There is no competition here between two transmissions of the *jus mariti*. The competition arises, and it is necessary to keep that in view, between the transmission of the *jus mariti* competing with a conveyance of the wife's estate. The trustee, by force of the adjudication in the sequestration, says he has carried the *jus mariti*. The Bank say that they have a right *ex facie* absolute to the real estate of the bankrupt's wife under their assignation and sasine. I shall in the first place deal with it as an *ex facie* absolute conveyance to the real estate of the bankrupt's wife.

I have no doubt at all as to the right of the trustee to the *jus mariti*. Nor have I any doubt that the *jus mariti* is an adjudgeable interest. Originally there has been a question as to the principle of that, for it is an interest of so peculiar a character, attaching to the moveable estate as it arises in the person of the wife, that ..., in his Commentaries, p. 61, has some remarks as to whether adjudication of it ...t to be considered a proper diligence; but in practice and in the books that is ...ttled question, and it cannot be doubted now, therefore, that the trustee has ... adjudged the *jus mariti*. This, however, goes a small way to solve the real question between the parties. It follows that the right of the trustee, such as it is, was legally completed to the *jus mariti* by adjudication as a *jus incorporale*. It follows, farther, that no subsequent acquisition of right to the *jus mariti* ... such could compete with him. In so far, therefore, as there are *termini habiles* ... the operation of the *jus mariti*, the right of the trustee would have been available; for example, if the estate had remained in the wife. It would also be available, if the estate, once conveyed, were to return to the wife: for example, if the Bank's right were found to be bad, or if the debt were extinguished *aliunde*: ...n the conveyance by the wife of the bond, which was a satisfactory security for

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the debt would be superseded, the title would be changed, the estate would again return to her, the rents would be hers, and fall under the *jus mariti*, and the legal title to the *jus mariti* being in the trustee, he would supplant the husband in regard to the rents of the estate. But in all such cases the question still remains,—How is it that the *jus mariti* operates, and what is the nature and character of the right as regards any particular term's rents? The *jus mariti* is a legal assignation of the wife's moveable estate. It does not touch directly or indirectly her real estate. In reaching the rents of the real estate, it is only as they fall into and become part of the wife's moveable estate that the *jus mariti* attaches them; and thus it is necessary towards vesting of any actual right of property, that the rents, *as* the wife's rents, have first fallen due. So far as regards future rents, the right of the husband carries nothing but the right to levy them should they ever come into the condition of rents belonging to the wife.

Such being the case as to the *jus mariti*, I observe, next, the nature of the Bank's right. It is not a competing right over the *jus mariti*. If it were, it might raise a question,—which of the two rights, the trustee's or the Bank's, had been first completed? and in such a question, if the right of the Bank had depended on their infeftment, the trustee must have been preferred, his right having been completed as at the date of the sequestration, by the mere force of his adjudication as trustee. It required no infeftment. It was of itself a legal assignation of the right. But the right of the Bank does not arise in this way, but as purchasers of the estate belonging to the wife; and here there is no such question as in the case of Cormack, which regarded sasine in the bankrupt's estate. The Bank here acquired the estate by disposition and assignation from the wife, *ex facie* absolute. Perhaps the terms of the right may in some points of view be material to be attended to. But it was necessary that it should be more or less in the character of an absolute right, because, in a transaction with the wife, if it had been in the shape of a personal obligation or security, it would be null, that being a form of obligation which sh[e] is not entitled to grant. But if the husband's right of administration and the *ju[s] mariti* had both been excluded, the wife's conveyance might have been good, withou[t] the actual consent of the husband. But if this were not so, the husband's curatori[al] concurrence became necessary; but why? not as an act of conveyance by himsel[f] but as completing and validating the act of conveyance by the wife of the estat[e] belonging exclusively to her, and not to him. It was a curatorial act, and nothin[g] more. The conveyance to the Bank, therefore, was essentially a conveyance of th[e] wife's estate, and, as such, it was good and perfectly complete, as a personal con[-] veyance, from the moment of its execution. Nothing farther was required or pos[-] sible on the part of the husband. Nothing was competent to him against it. S[o] long as by the infeftment of the disponee the estate was not taken out of the wif[e] there might be situations in which questions with third parties might in certai[n] views arise as to the *jus mariti*. But to exclude these, not even infeftment was he[re] necessary. If the Bank had entered to possession, or had intimated their right [to] the debtor's tenants at or before sasine, at least assignation to maills and duties,—[in] other words, if they had done anything that took the rents out of the person of th[e] wife, that would have been sufficient to exclude, with all and sundry, the operatio[n] of the *jus mariti*. Their right was completed by sasine: It is objected that th[is] was two days after the husband's sequestration. But that was of no cons[e-] quence in the present question. The wife was thereby divested of her esta[te] by sasine in favour of the Bank, and consequently of all right to its rents. so, the *jus mariti* had thenceforth nothing to which it could attach, and ther[e-] fore, although the trustee's right under his adjudication still remained to all oth[er] effects, and as regards all the other estates which continued to be in the wife, was, as regarded the subject here in competition, for the time excluded from practical operation. Should circumstances vary so as to reinstate the wife, th[e] state of things may vary in a corresponding manner. But until the Bank be pa[id] such must continue to be the result. There are various illustrations which mig[ht] be given. The case is the same as if the wife, having been indebted in her o[wn] right, her estate, whether before or after the husband's sequestration, had been a[d-] judged by her creditor. The trustee's adjudication of the *jus mariti* wou[ld] be complete, as it now is. But he could not by force of that right have stood [in] the way of the wife's proper creditor carrying off her estate by adjudication,—a

once carried off, there would have remained nothing to which the *jus mariti* carried by the trustee had the possibility of attaching. No. 92.

All this, it is said, rests on the absolute divestiture of the wife, and a distinction was attempted to be made in this case from the right conveyed, although *ex facie* absolute, not being in substance an absolute divestiture of the wife, but in reality a security, being so qualified by the nature of the transaction. But it seems to me very little to the purpose whether you consider the wife's interest in the one case or the other. The conveyance was absolute to the extent of paying the Bank's debt, and the Bank could not have been ousted till that debt was paid. But though a mere security, it would still, if complete, have operated as a complete conveyance of the rents of the estate to the Bank, the right to which is the matter now in question. That it is a reversionary right may be of importance even in a question between these parties, for if it can be shewn that there is no debt to the Bank, or if there be a balance over, then such reversionary right will be available. But in no other way can it operate. I entirely concur in the judgment proposed by your Lordship. Feb. 7, 1857. Smith v. Frier.

Lord Curriehill.—I concur in the findings in the Lord Ordinary's interlocutor as to the sufficiency of the registration of the assignation, and as to the validity of the security to the Western Bank for such monies as shall be legally vouched or proved to have been advanced by it to the bankrupt prior to the date of the sequestration. But I think that the objection to the competing claim of the trustee on the sequestrated estate goes deeper than is contemplated in the note to the interlocutor.

There is no doubt that the *jus mariti* of a husband may be attached by adjudication, and that a sequestration of his estate operates as such an adjudication. But to what does the trustee acquire right in virtue of such an adjudication? He acquires right to those moveable funds which either belong to the wife at the date of the sequestration, or which shall afterwards belong to her, during the subsistence of the marriage, and the currency of the sequestration. But, on the other hand, he does not thereby acquire right to any funds which have never belonged to the wife herself at the date of the sequestration. The *jus mariti*, as it is equivalent to a general assignation from a wife to her husband of all her moveable funds, can transmit to the latter nothing but what first of all belongs to hereself. Nothing, which does not belong to the wife, can thus be transmitted by or from her to her husband. And hence, although when the wife is the absolute owner of an heritable subject, her right to each instalment of its accruing annual produce, whether it consists of rents or of interests, is from the legal term when it becomes due to her, a moveable fund belonging to her, and instantly passes from her to the husband *jure mariti*; yet from the time, when the heritable subject itself ceases to belong to her, the annual produce of it never thenceforth becomes hers, and, consequently, is never transmitted by or from her to her husband *jure mariti*. In this case there is wanting an essential condition, which is necessary to bring the right to such annual produce under the operation of the *jus mariti*, or any adjudication thereof.

The question here in dispute is, whether the interest falling due subsequent to 13th March 1851, the date of Mr Scoon's sequestration, on an heritable bond to which Mrs Scoon had acquired right on 28th December 1849, fell under the operation of the bankrupt's *jus mariti*, and of the adjudication thereof implied in the sequestration of his estate? The answer is, that this could not be the case, because prior to that date, viz. on 2d October 1850, she, with the requisite concurrence of her husband, had divested herself of the bond itself to the Western Bank of Scotland. That bond not having been hers at, or after, the date of the sequestration, the annual interest which became due thereon subsequent to that date never was hers, and never could pass from or through her to her husband *jure mariti*, or from or through him to the trustee upon his estate.

It is true that that conveyance, although in the form of an absolute disposition, was in effect only a right in security, and that Mrs Scoon still retained a reversionary right to the bond. And if, in virtue of that reversionary right, any of the yearly instalments of the interest shall be shewn, in the accounting, to have become hers by the extinction of the debt, in security of which the conveyance to the Bank was granted, such instalments may have fallen under the *jus mariti*, and the husband's sequestrated estate, under the Lord Ordinary's interlocutor, it remains open to the

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trustee to shew that such is truly the state of the case. But, if there be no such reversion, and the whole amount of the bond be required to pay the debt owing to the Bank, then, of course, none of the future interest upon that bond, or of the money which was thereby secured, can ever belong to Mrs Scoon in virtue of her reversionary right, or be transmitted from or through her to her husband, or to the trustee on his estate.

The trustee deals with the question as if it were only whether Mr Scoon had, before his bankruptcy, conveyed away an existing right in the future income of his wife's heritage; whereas the first question is, whether Mrs Scoon had not previously, with her husband's authority, divested herself of the right to that heritage, and thereby precluded the future income thereof from becoming hers? I think that this is the true state of this case: that the deed in question was a conveyance by Mrs Scoon of her own property, to which her husband merely interponed his curatorial authority: and that for this reason, as well as for the separate reason stated in the note to the Lord Ordinary's interlocutor, the enactment in the Heritable Securities Act is inapplicable to this case.

This view of the case is quite consistent with the authorities founded upon by the trustee. In the case of Menzies v. Gillespie, 8th December 1761, the wife had not divested herself of her heritable property, and, consequently, the annual income arising therefrom fell under the *jus mariti* of her husband, and was attachable by the diligence of his creditors. In like manner, in the case of Calder v. Steel, 19th November 1818, the wife remained vested with her heritable estate, and there was no doubt that the yearly produce of the estate fell under her husband's *jus mariti*, and the only question was, whether one of his creditors who had adjudged the estate, or another of them who had by arrestment attached a certain term's rent thereof, had the preferable right to that rent; and the Court found that, owing to defects in the adjudication, the arrestment was preferable.

In the case of Borthwick, 16th July 1844, the question was merely whether or not, in a ranking upon the sequestrated estate of the husband, a creditor who held a security over the wife's estate was bound to value and deduct the value of that security in so far as it might include the husband's *jus mariti*. But it appears from the report of that case that, according to the true construction of the peculiar terms of the deed of conveyance by which the security was granted, it imported, in the opinion of a majority of the Judges, a conveyance of that *jus mariti* as being part of the husband's estate; and that this being the case, it was indispensible, in conformity with the express requirements of the Bankrupt Statute, that the creditor who had taken such a security should in his oath value that security. It does not follow that the security was truly worth anything, or that the statute would not have been satisfied if the creditor in his oath had deponed that the security was worth only a nominal sum, or even nothing at all. But such having been the nature of the security, according to what was held to be the true construction thereof, the creditor could not be allowed to rank on the general estate without so satisfying the requirement of the Bankrupt Statute. In the present case, no such question occurs. In the assignation granted to the Bank, the bankrupt, although he granted his concurrence in the usual terms as his wife's administrator, never mentioned his *jus mariti*, nor made any such reference to it as in Borthwick's case was construed into a conveyance of it. On the contrary, the general words in which he expressed his concurrence in his wife's deed, viz. "I, the said William Scoon, for myself, and as taking burden upon me for my said spouse, and for my own right and interest," did not admit of that construction, according to the principle of the other case of Calder v. Steel above mentioned; for, in that case, an adjudication led against a husband of his wife's estate, "with all right, title, and interest he has or can claim thereto," was held not to admit of being construed as an adjudication of the *jus mariti*, in respect it was of a right of quite a different kind from the right of property.

I therefore think that in no view of the case has the trustee right to the interests in dispute.

Lord Deas.—This is a question of great subtlety. The facts are these:—Mrs Scoon, before her marriage to the bankrupt, had obtained an assignation to an heritable security for L.1500, duly feudalised in the persons of her cedents, which placed her precisely in the same situation as if she had been the original lender. The security constituted, of course, in her person, an heritable estate, subject to

the same rules, as respects the form of title, mode of divestiture and attachment, and likewise as regards the beneficial interests of herself and her heirs, and of any husband she might marry, as any landed estate belonging to her absolutely would have been. It was, in truth, the money which became heritable; the effect of the security being to give it that heritable character. The termly interests, payable by the debtor, were carried to the husband by the legal and completed assignation implied in the marriage (in the absence of any exclusion by marriage-contract or otherwise), precisely in the same way, and to the same effect, as the rents would have been of lands or houses of which she was absolute proprietrix. Had the L.1500 been uplifted pending the marriage, it would have fallen to be reinvested for behoof of the wife, subject to the husband's right as formerly while not renounced by him; and, while it remained uninvested, the sum would have formed a *surrogatum* for the heritable security, unless given over to the husband, or mingled with his funds, or otherwise dealt with in such a manner as to shew the wife's intention to convert it from heritable to moveable; and, while retained for reinvestment as a *surrogatum*, the fee would have been in the wife, and the interest would have gone to the husband precisely as before. All this, which is matter of trite law, is not immaterial to be kept in view in dealing with the question we have now to decide.

So standing the rights of parties, the wife with consent of the husband, and the husband as taking burden for the wife, and "for his own right and interest," granted an assignation of the L.1500 security in favour of the Western Bank. This assignation is absolute, upon the face of it, as for a price paid of L.1500. But in article 4 of the condescendence for the Bank, it is expressly stated that the assignation "was granted by Mrs Scoon in payment and security of advances made and to be made to her husband." The trustee under the husband's sequestration (which had been awarded between the date of granting and the date of registering the assignation to the Bank), denies this statement. But, in article 8 of his own condescendence, he states, "The foresaid assignation in favour of the Bank, though *ex facie* absolute, was, in reality, granted by the bankrupt, Scoon, to the Bank, in security of advances to be made to him after its date;" and he quotes a letter from the Bank agent to this effect. The parties thus differ as to whether the assignation was a security for past and future advances to the husband, or for future advances only;—a point on which they rather seem to me to take sides opposite to their own interests, if there were room for any question as to whether this was a *novum debitum*. But they are both agreed that the assignation was not absolute for a price paid, as its terms would import, but a security merely for the husband's debt, the amount of which requires to be *aliunde* instructed, precisely as if there had been a formal back bond to that effect.

The consequence of this is, that the reversionary right to the heritable estate (which consists here of an heritable security) remains in the wife, and will be less or more valuable to her, according to the greater or smaller amount which may be found legally due by the husband to the Bank. If there be no such debt, the whole will come back to her; and, if the debt be short of L.1500, her reversionary right will be of the value of the difference. If she, or anybody on her behalf, shall pay the debt, or if the husband's estate should prove sufficient to pay it, her right will remain entire, precisely as it stood before she granted the assignation, and subject to the *jus mariti* of her husband as before. The case which occurs is, in this respect, not the same as the case of an absolute sale and divestiture by the wife, with the husband's consent, of her heritable estate; although I am not prepared to say that, even in that case, the *jus mariti* could be said to be extinguished, so long as the price fell to be dealt with as a *surrogatum* for the debt, in which the husband and wife had each precisely the same rights and interests as before.

Nor, for the same reason, do I think that the fact of the debtor having consigned the L.1500, with a view to paying off the security, makes any substantial difference upon the rights of parties. The sum consigned is just a *surrogatum*, in which the husband and wife are, respectively, interested, precisely as they were in the heritable security. It depends entirely upon there being a debt due to the Bank, and on the amount of that debt, whether, and to what extent, the wife's right of fee in the [illegible] shall be of value to her, and whether, and to what extent, the *jus* [illegible] of value to the husband, if he comes to be in a situation to pay off his [illegible]

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But supposing it were ascertained—which it has not yet been—that the reversionary right of the wife will be of no value whatever, because the debt of the husband to the Bank exceeds the value of the L.1500 security,—I am not prepared to say that even this would solve the present question favourably for the Bank. Much ingenuity has frequently been shown in attempting to describe what the *jus mariti* is, and then drawing conclusions from self-made definitions. But it is only necessary to look into any one of our institutional writers, to see how entirely at a loss they all were to define, or even to describe, this somewhat anomalous right, otherwise than by saying that it is of the nature of one thing—such as a right of administration,—and yet that is more of the nature of another thing—such as a right of property. So far as it is a right of administration, it is obviously not a right to administer for the proper behoof of the wife, as is shown by the case of Robb (M. 9500), in which the wife was found not entitled, as in a question with the husband's creditors, to an aliment out of the rents of her own heritable estate. So far as it is a right of property, this, of course, is favourable to the supposition that it may be dealt with, to certain effects at least, as a separate estate belonging to the husband; and, accordingly, it has been held,—and it was admitted in the argument to have been rightly held,—that it is adjudgeable by the husband's creditors. Mr Bell doubted the principle of such adjudication when he wrote his Commentaries (i. 61.) But, when he came to write his Principles (*vide*, sec. 1561), he laid it down, unqualifiedly, that the right is adjudgeable. The fact that the right is adjudgeable, seems to me more important and safer to proceed upon than any attempted definition, which may be calculated to mislead by being imperfect, of a right so entirely *sui generis* as the *jus mariti*. The consequence of its being adjudgeable is, I think, that the right, so far as applicable to the annual proceeds of the heritable security then vested in the wife, has been carried to the trustee by his general adjudication implied in the sequestration, unless it can be shown to have been previously extinguished, or a completed title to it to have been conferred on the Bank. Now, at the date of the sequestration, I find no divestiture of the wife by which the *jus mariti*, as applicable to the particular heritable estate in dispute, can be said to have been extinguished, and no completed title to it in favour of the Bank, by which it can be said to have been transferred to them. That the rights of the husband and of the wife were, so far, of the nature of separate estates as to require a conveyance by both, and to admit of having been separately conveyed seems to me to be settled by the fact that the husband's right might have been adjudged while the wife's right remained precisely as before. Accordingly, if the husband had merely concurred in the assignation to the Bank, as administrator-in-law, or curator, for his wife, without conveying any right of his own, his right t[o] the interest or annual proceeds would not have passed; and, on the other hand, i[f] the assignation had been of his own rights only, such assignation, supposing it t[o] have been completed in an appropriate manner, would, of course, have carrie[d] nothing but his own rights, and would have left his wife's right of fee entire. Bu[t] it is not pretended that, prior to the sequestration, the right and title of the Ban[k] had been completed in any way. The Bank had not registered the assignatio[n] (now equivalent to infeftment), so as to divest the wife, and raise the plea, what[-] ever might have been its force, that the *jus mariti*, as respected this particul[ar] estate, had been extinguished. Nor had they done anything to complete the assig[-] nation, as an assignation to them of the *jus mariti* as a subsisting right. If the[y] are founding upon it to this last effect,—just as they might have done had nothin[g] been conveyed to them by the wife at all,—I am of opinion that no act necessa[ry] to complete the assignation of the *jus mariti* could be effectually done after th[e] sequestration, because, by that time, the trustee had a completed right and title i[n] virtue of his adjudication. And, if they are founding upon their assignation [as] *extinguishing* the *jus mariti*, *quoad* this estate, because the estate of the wife wa[s] thereby conveyed to them, I am equally of opinion that the act of registratio[n] coming in place of infeftment, could just as little have this effect, for precisely th[e] same reason, viz., that the right and title of the trustee, in virtue of his adjudica[-] tion, were, before this time, complete.

If the Lord Ordinary means, in the concluding part of his note, to state th[e] doctrine that rights, generally, although requiring no feudal investiture, may be availably completed, after sequestration, as rights which do require such investitu[re]

I cannot concur in that doctrine, because I do not hold the rule to be applicable to cases where the trustee's adjudication, as in the case of the *jus mariti*, completes both his right and title; but only to cases in which some farther step requires to be taken by him for this purpose, as where the question comes to be whether he or the competing party has obtained the first recorded infeftment.

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Here the trustee's right and title were complete by the adjudication implied in the very act of awarding sequestration; and, unless it can be held that, even after that adjudication, a conveyance, such as was granted here, would render the adjudication worthless, by extinguishing the *jus mariti* applicable to the estate in dispute, I do not see how it can, consistently, be held that the *jus mariti* has been extinguished here. Lord Fullerton, who alone dissented from the judgment in the case of Borthwick (6 D. 1290), did not hold this. His Lordship said,—"It has been held that the right of the husband may be adjudged and assigned. It may follow from this, that if the wife had remained proprietor of the estate, subject to no incumbrance, the husband's right would have been adjudged to the trustee in the sequestration, and that then the husband would not have been entitled, after that, by any act of his, to impair the right of the trustee. But it does not follow, from the circumstance of the right being adjudgeable, that, where the right of the wife has been alienated before the husband's bankruptcy, the husband's right remains part of his estate." Lord Fullerton was addressing himself to a case in which infeftment had passed and been recorded prior to the sequestration, upon a conveyance by the husband and wife, and where, consequently, before the sequestration, the wife's right, as he expressed it, had been "changed." I see nothing to shew that he would have taken the same view had there been no such infeftment before sequestration, in which case the wife's right would not have been changed till after the date of the trustee's adjudication. His opinion, clearly enough, indicates, at all events, that, if both conveyance and infeftment had been after sequestration, he would not have so held. Now, if a conveyance by the husband and wife, after the sequestration, would not have had the effect here contended for by the Bank, I do not see how registration (equivalent to infeftment) of the wife's conveyance can have that effect. True it perfects the conveyance of the fee, just as it would have done although the date of the wife's conveyance, as well as its registration, had been subsequent to the sequestration. But it does not follow that, either in the one case or the other, what is done after sequestration can cut down the completed adjudication of the trustee which carried the husband's right to the rents of this particular estate. In dissenting from the judgment in that case, it humbly appears to me that Lord Fullerton did not give sufficient weight to the fact, distinctly pointed out by Lord Jeffrey, that the wife was not there divested of her estate, as in a case of sale—the deed being a mere bond and disposition in security; and the judgment pronounced I cannot but regard as having a most important bearing on the present case,—a bearing which, as regards the opinions delivered, even Lord Fullerton's grounds of dissent, were they well-founded, would not go materially to diminish.

I am not at all moved by observations made, as to the nature of the *jus mariti*, in such cases as those of Stevenson (1 D. 181), and the Duchess of Buckingham (3 D. 1129), where there were conflicting interests between the husband and wife. The present case arises upon a joint deed of the spouses, where there are no conflicting interests, and where, in so far as the wife is concerned, her interest rather is to increase the sequestrated estate of her husband, against which she, probably, may have a claim of relief.

Upon the whole, therefore, I am for recalling that part of the interlocutor which is in favour of the Bank, and sustaining, in such qualified terms as may be deemed appropriate, the claim of the trustee.

The Court pronounced the following interlocutor:—"Adhere to the interlocutor of the Lord Ordinary, in so far as it sustains the title and interest of the trustee on Scoon's estate; and refuse the reclaiming note for the claimants Smith and Buchanan, for the Western Bank: *Quoad ultra* recall the interlocutor of the Lord Ordinary submitted to review: Find that the heritable bond referred to, which belonged to the wife of the bankrupt, William Scoon, was conveyed

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by her to the Western Bank by assignation *ex facie* absolute, and bearing to be for an onerous consideration, of date 2d October 1850, to which assignation her husband was a consenting party, as curator of his wife, and for his own right and interest in the premises, and which conveyance was of the same date duly ratified by her, and was on the 15th of March thereafter recorded in the Register of Sasines: Find that, on the 13th of the said month of March, the said William Scoon was sequestrated, and that the right and interest belonging to him in the estates of his wife, by virtue of his *jus mariti*, were carried to the trustee on his estate by the adjudication obtained in the sequestration: Find that the sum which forms the subject of the present competition between the Western Bank and the trustee on Scoon's estate, consists of interest on the said heritable bond accruing after Martinmas 1850: Find that the said interests accrued to the Western Bank as the holders by assignation of the said heritable bond, and not to Mrs Scoon, their cedent; and consequently did not fall under the *jus mariti* of her husband, which could not extend to anything that was not personal property belonging or accruing to the wife, and forming part of her personal estate: Therefore, and to that extent, and subject to the qualification after-mentioned, repel the second plea in law for the claimant Frier, trustee on Scoon's estate; but in respect it is admitted that the assignation to the Western Bank, though *ex facie* absolute, was truly intended for payment and security for advances made, and to be made, by the Bank to Scoon the bankrupt; and in respect the amount of these advances is disputed, and the extent to which the claim of the Bank should be sustained, as regards either the principal sum in the bond or the interest thereof cannot be known till the extent of the debts due to the Bank is ascertained: Remit to the said Lord Ordinary to proceed further in the cause as shall be just, reserving all questions of expenses; and granting power to the Lord Ordinary to dispose thereof."

Smith & Kinnear, W.S.—Morton, Whitehead, & Greig, W.S.—Agents

No. 93. Mrs Elizabeth Megget or Cook and Others, Pursuers.—*Pattison—Mair.*

Robert Bell, Defender.—*Macfarlane.*

Process—Issues.—An action of damages was brought against a coalmaster by t family of a miner who was killed by a portion of the roof of the coal-pit falling c him—Form of issues to try the question.

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Ld. Mackenzie.
L.

This case was reported by the Lord Ordinary on the adjustment issues. The late Adam Cook was a miner, and having been killed when the defender's employment, his widow and children brought this action damages against his employer. Their allegation was, that while Cook w engaged removing one of the stoops of a level, and he had put up the wo which had been supplied to him by the defender for the purpose of suppo ing the roof as the work proceeded, upwards of fifteen feet square of t roof fell upon him and killed him. Art. 11 of the pursuers' condescenden was as follows:—" The said occurrence, by which the life of the said Ada Cook was lost, took place by and through the fault or culpable negligence the defender, or of those in his employment, for whom he is responsible, consequence of the materials supplied by the defender, for supporting th part of the roof of the said pit in which the deceased wrought, being alt gether insufficient and unsuited for that purpose, and also in consequence the defender not having daily examined the said pit, and stoops or c

pillars, before the miners commenced their operations, and in not having taken the proper precautions before the deceased began to work at the stoops in question, by instructing him either to pass it altogether, or warning him of the 'hitch' at the top of it, or of the danger attending its removal." No. 93. — Feb. 7, 1857. Lynch v. Haggart.

The following issue was adjusted:—"It being admitted that the defender is proprietor or lessee of the pit situated at Wishaw, called or known by the name of the Meadowhead Pit: It being also admitted that the pursuer, Mrs Elizabeth Megget or Cook, is the widow of the said Adam Cook, and that the other pursuers are the lawful children of the said Adam Cook and Mrs Elizabeth Megget or Cook:—Whether, on or about the 9th day of May 1855, the said Adam Cook, while engaged in the service and employment of the defender in removing stoops in the said pit, was killed by a portion of the roof of the said pit falling upon him, through the fault of the defender, to the loss, injury, and damage of the pursuers? Damages to the widow laid at L.300. To each of the other pursuers, L.150."

David Manson, S.S.C.—John Leishman, W.S.—Agents.

Bartholomew Lynch, Pursuer.—*D. F. Inglis—F. W. Clark.* No. 94.
George Haggart, Defender.—*Pattison.*

Process—Relevancy—Action of damages—Liability of a master for injury to a workman caused by another workman.—An action of damages by a labourer against his employer for injury received by the falling of a scaffolding, was laid on the allegation that the scaffolding was insufficient, and that the insufficiency had been pointed out to the defender's manager, who neglected to remedy it. The defence was, that the accident was caused by the fault of a fellow-workman, for which the master was not responsible;—*Held* (affirming judgment of Lord Ardmillan), that the action was relevant.

The pursuer's averments in this case were to the following effect:—The pursuer, Lynch, was a labourer, and had been for sometime prior to 6th August 1855, in the employment of the defender Haggart, who was a master builder in Dundee. Upon that day he had been employed on a hanging scaffolding at the front of a new house, 35 feet high, the scaffolding being composed of one plank about a foot broad, and four inches in thickness. It was supported by three ropes attached, one at each end, and one in the middle. The pursuer, in his condescendence, explained how these ropes were fastened, and how the scaffolding was raised and lowered. He stated that there were two guy ropes attached to it, one at each end of the scaffold plank, intended to steady the scaffolding and bring it close to the wall, and as an additional security in case of accident to the supporting ropes. He detailed the mode of fastening these ropes. He then averred, that there was only one ground plank seven inches broad, and about two inches thick, in place of two, as ought to have been the case. The stones placed upon it were quite insufficient to sustain the weight of the scaffolding with the men working on it, and the ropes used, at least the guy ropes, were rotten. The scaffolding was further defective, in respect it wanted an outward railing,—that is, a rope breast high, passing along and attached to each of the supporting ropes, and which railing was supplied immediately after the accident libelled on took place. These deficiences were pointed out to David Mathew, the defender's manager, upon Saturday the 4th of August last, when the ropes were fastened to the ground plank, after the men had ceased working for the day, but he culpably and recklessly failed to take any steps to remedy the same. Previous to that day, the ropes supporting the scaffold were carried into the lower flat of the building by the windows, and securely fastened to the joists built in for supporting the floor. "On the morning of the day already mentioned, being Monday the 6th day of August 1855, Feb. 7, 1857. — 1st Division. Ld. Ardmillan C.

No. 94. or about that date, and between six and seven o'clock a.m., the pursuer and three others got upon the scaffold by means of an outside ladder. In addition to the weight of the three men, there were only two pails of water on the scaffold. Shortly after commencing work, the ground plank suddenly started up, the stones fell off, and it ascended to the first cornice, the guy ropes, being rotten, gave way, and the scaffold plank descended with great rapidity, till it had reached the first cornice, where it stuck. The descending scaffold plank was passed by the ascending ground plank, the latter of which struck the pursuer on the back of the head, knocked him off the scaffold against the wall, from which he rebounded and fell to the ground, sustaining thereby severe bodily injuries, both external and internal. David Matthew, who was on the scaffold with the pursuer, was killed on the spot. The falling of the scaffolding, and the consequent injuries received by the pursuer, took place in consequence of the fault and dereliction of duty on the part of the defender, or those for whom he is responsible.

Feb. 10, 1857. Wemyss v. Australian Co. of Edinburgh.

Upon these averments the pursuer concluded against his employer Haggart for damages for the injuries he had sustained.

The defender pleaded;—That the pursuer's allegations were irrelevant; that the only fault or negligence alleged was that of fellow-servants of the pursuer, engaged in a common employment with him, for whose negligence the defender was not responsible, and therefore for which he could not be liable in damages.

The Lord Ordinary, on 14th January 1857, pronounced the following interlocutor:—"Finds that the pursuer has stated relevant matter on record to entitle him to go to issue with the defender; and appoints parties' procurators to attend a first meeting, for the adjustment and settlement of the proposed issues," &c.*

The defender reclaimed. The pursuer's counsel were not called on.

Lord President.—There is issuable matter here. The record states that this man was on a scaffolding on the 6th of August 1855—that the scaffolding was insufficient—that the attention of the defender's manager was called to its insufficiency, but that he failed or neglected to remedy it. That averment is relevant. There is another question raised as to the liability of the master for a colaberateur, but this is not the time for considering it.

The Court adhered, with expenses

William Mackersy, W.S.—John Rogers, S.S.C.—Agents.

No. 95.

William Wemyss, Pursuer.—*D. F. Inglis—Gifford.*
The Australian Company of Edinburgh, Defenders.—*Sol.-Gen. Maitland—Monro.*

Process—Jury Trial—Proof on Commission.—In an action of accounting against a company having office-bearers in Scotland, and doing business in Australia, issues were adjusted, and a remit made to the Lord Ordinary to hear parties on the mode of investigation to be adopted in the cause, and to proceed as to his Lordship should seem just;—*Held* (on report by Lord Neaves), that there being no evidence abroad to be taken, the proper course was to proceed by jury trial—the pursuer desiring it, but the defenders, who had little parole evidence to lead, objecting.

Feb. 10, 1857. 1st Division. Lord Neaves. C.

Supra, p. 122.

This case was now reported by the Lord Ordinary, who stated that, under the remit of 4th December 1856, a question had arisen, whether the case

* "Note.—The record is not well framed, and criticism on its defects is obvious and easy; but, giving a fair and reasonable construction to the averments, the Lord Ordinary does not think that the action can be dismissed as irrelevant."

should go to a jury, or be the subject of a proof on commission. He himself was inclined to think that the latter was the proper course.

No. 95.

Feb. 10, 1857. Fraser v. Brebner.

D. F. Inglis, for the pursuer;—This is a mixed question of law and fact, being at same time a mercantile question, and that is a strong consideration for having a jury trial. Farther, the leading witness necessarily is the pursuer; and it is therefore of importance to have his examination taken before a jury, who shall have the opportunity of judging how far his evidence is to be credited. The evidence will consist chiefly of parole evidence of parties connected with the administration of the affairs of the Company; and a great deal will depend on the accuracy of their recollection and credibility. It is proper, therefore, that they too should be examined before a jury. There is no evidence to be taken abroad.

Sol.-General, for the defenders;—The only object is to arrive at the truth of this matter. The defenders will have little or no parole evidence at all; and a proof on commission will afford the pursuer himself a sufficient safeground for speaking the truth.

Lord President.—When the case was before us, nothing was said about the proof, whether it was to be by jury trial or commission. I rather think, that as the pursuer insists on a jury trial, there is not sufficient reason for preventing it. If there had been a necessity for taking a great deal of evidence abroad, thus rendering a commission necessary at any rate, that would have been a good ground for allowing the whole proof to be so taken; but as that is not the case, there must be a jury trial in the usual way.

Lords Ivory and Curriehill concurred.

Lord Deas.—I would rather have been guided by the suggestion of the Lord Ordinary in this case, but it is better not to raise questions in regard to it; and, as your Lordships think otherwise, I concur.

The Court then pronounced an interlocutor, appointing the issues to be tried before a jury in common form.

Miller & Craufurd, S.S.C.—William Alexander, W.S.—Agents.

No. 96.

James Fraser, Pursuer and Respondent.—*Monro—A. B. Shand.*
Alexander Brebner, Defender and Advocator.—*Sol.-Gen. Maitland—Hector*

Landlord and Tenant—Lease—Consensus in idem placitum—Rei interventus—Interdict—A party made offer in August for a farm, by letter addressed to the landlord, "on conditions explained by you." The landlord's agents sent a draft lease to the offerer, with a note stating that the rent in the lease was less than was agreed on, but the reason of this the landlord would explain when they met. The offerer's agents, in October, and sometime after a renewed application by the landlord's agents requesting the lease to be returned, did return it to be extended, but the landlord's agent then proposed to insert farther conditions, and reduce to writing certain matters which had been verbally agreed upon. In the meantime the offerer had made purchases at the displenishing sale, and ordered implements for the farm; and having taken possession of the farm, the landlord applied for interdict against him. In an advocation;—*Held* (affirming judgment of Sheriff of Kincardineshire), that there was no true consensus in *idem placitum*, and therefore no concluded, though informal contract between the parties, which could be validated by *rei interventus*. Therefore interdict granted.

Feb. 10, 1857.

1st Division.
Lord Neaves.
C.
Sheriff-court of Kincardine (Sheriffs Gordon Robertson, and Montgomerie Bell).

On 10th August 1855, Brebner made an offer to Fraser for a farm, "according to conditions explained by you, at the yearly rental of L.240 sterling." On 1st September, Fraser's agent sent the draft lease to Brebner for revisal, and he stated—"Mr Fraser has seen and is satisfied with it, and you will observe the rent is (at his desire), made L.10 less than was agreed on. The reason of this he will explain when you meet."

No. 96. — Feb. 10, 1857. Fraser v. Brebner.

On 5th October Fraser's agent wrote to Brebner as follows:—"I sometime ago sent you a draft of a lease between you and Mr Fraser of Heathcot for your revisal, along with a note calling your attention to the fact that I have stated the rent on the draft at L.10 less than your offer, for reasons and on conditions which would be explained to you by Mr Fraser personally.

"I have been expecting to hear from you every day since, but not having done so, I have to request that you will return the draft of the lease that it may be extended, after being revised by Mr Fraser."

On 17th October Brebner's agents returned the lease to be extended, stating that they were satisfied with it; but of same date Fraser's agent replied that he had omitted to mention a certain condition which must be inserted in the lease, and that a variety of matters verbally agreed on should form the subject of a written memorandum, to be signed by the parties at the time the lease was executed, and he concluded as follows:—"Although you do not mention it in your note, I have no doubt you are aware that Mr Fraser has found it necessary to apply to the Sheriff for a warrant to restrain Mr Brebner from taking possession of the farm or cropping the ground till the terms of agreement are adjusted, and unless these terms are adjusted to his (Mr F.'s) satisfaction, and the tenant agrees to drive the stone and other materials for building his offices, the rent must be L.240, as in Mr Brebner's offer."

The litigation which was then commenced before the Sheriff resulted in this advocation. In the proceedings before the Sheriff the landlord averred that "the draft lease had not been completed or adjusted between the parties, and possession under it had not been given to him by the respondent, but that the respondent nevertheless, without the sanction or authority of the petitioner, or of any one entitled to give such sanction or authority, on or about the 8th day of October last, illegally entered upon the said portion of said home farm of Heathcot, and commenced certain ploughing operations, and threatened to exercise all the usual powers of a tenant of the possession or subjects referred to in said draft lease."

The landlord therefore craved interdict against Brebner entering upon the farm, "until such time as a regular lease shall be concluded and executed between the petitioner and respondent, on the terms set forth in said draft lease (subject always to its revisal by the petitioner, and to adjustment between him and the respondent), or absolutely and in all time coming, in the event of such lease not being entered into and executed" within reasonable period.

The respondent pleaded *rei interventus*, in respect of purchases made by him of wheat and fodder, &c., at the displenish sale of the way-going tenant on 15th August, to the amount of L.87; and, on 16th August, ordering two carts to be made by a plough-wright, which cost L.25. The Sheriff-substitute (Gordon Robertson) granted the interdict as craved, holding that there had been no final mutual understanding as to the conditions of the proposed lease, nor a completed bargain between them,—and, on appeal, the Sheriff (J. Montgomerie Bell) adhered.*

* "NOTE.—Though this case is attended with some difficulty, it would appe that the parties never got the full length of a concluded contract, and therefo that the interlocutor of the Sheriff-substitute is well founded.

"In the present position of the case there is a specialty (which it is *pars judi* to notice), in consequence of there being no stamped agreement or missive on whi the appellant can found; but as this could still be obviated by getting the prop stamp affixed, the process would have been merely sisted for a sufficient ti to allow this to be done, if it had appeared that the appellant's defence would ha been thereby validated, but it would not have been so.

"It is a lease of nineteen years which is in question, and the appellant m

Brebner advocated, and pleaded ;—That the writings which passed betwixt the parties were sufficient to constitute a binding lease of the farm for the

No. 96.
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Feb. 10, 1857.
Fraser v. Brebner.

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either found on a formal and probative lease, or upon an informal lease, supported by *rei interventus*. There is no formal lease in the question, and as to the other alternative, it is apparent from the correspondence of parties that the letter of the landlord's agents of 5th September must have certiorated the appellant beyond any doubt that the landlord at least understood the contract of lease to be still entirely unfinished. The appellant must therefore shew that, prior to 5th September, there was an informal contract already validated by *rei interventus*. Any subsequent acts of alleged *rei interventus* after 5th September may be laid aside.

"Now, it is of the essence of the appellant's case that however informal the contract between the parties might have been, there was at least an actual contract or true *consensus in idem placitum*, a full mutual agreement on both sides, and not merely a close approximation to such agreement. But the appellant fails to do this. He had written to the landlord on 10th August an offer in very general terms of L.240 of yearly rental for Mains of Heathcot, 'according to conditions explained by you.' Next day the landlord's agents wrote the appellant with a draft lease for his revisal, stating, no doubt, that the landlord was satisfied with it, but also notifying that the rent was reduced by L.10 (viz., L.230), the reason of which the landlord was to explain when they met.

"It does not appear that the appellant was entitled to assume that he had got the land at a sum of rent spontaneously reduced by the landlord below his own offer, without something remaining to be still explained and adjusted between them in the course of the revisal of the draft lease, and the words of the letter draw his special attention to this subject. But the parties were living near each other, and the appellant could easily have cleared this matter up by inquiring what subject of explanation still remained to be adjusted between his landlord and himself, and what was the contemplated equivalent or other cause for the abatement of the rent. Though the point is narrow, it does appear that the appellant was not entitled to assume, without farther explanation or communication of any kind, that the agreement of parties was fully adjusted between them, and merely remained to be extended as a probative writ.

"In place, however, of asking for any explanation after having got the draft for revisal, the appellant proceeded at once to perform two acts, which are founded on as making a *rei interventus*, viz., buying wheat and fodder, &c., at the displenish sale of the way-going tenant on 15th August, to the amount of L.87, and on 16th August, ordering two carts to be made by a ploughwright, which cost L.25. The averments on these points are, *hoc statu*, assumed to be true.

"No other acts were done by the appellant prior to 5th October, on which day the landlord's agents wrote him to expedite the adjustment of the lease, and in [illegible] which expressly intimated that the landlord had all along understood the agreement to be still unfinished. To this the appellant makes no immediate answer. He does not instantly write that he holds the agreement to be concluded, and that he has been acting on the faith of this. On the contrary, he makes no answer at all till 17th October, when his agent sent back the draft lease, desiring it to be extended precisely as it stood. In these circumstances, it would appear that the only basis to which acts of *rei interventus* can effectually attach (viz., [illegible]ually completed bargain), is wanting.

"It is not *hujus loci* to determine what would have been the effect of the two acts [illegible] specified as making a proper case of *rei interventus*, if these acts had followed [illegible] actual but informal contract. It is enough, in the present instance, that such [illegible] seems to be wanting.

"There are various circumstances in the proceedings of the landlord which are [illegible]factory, and it is very difficult to make the language of the letter of [illegible] August cohere with the material variation which it was afterwards proposed [illegible] the lease. But this would seem only to go to the modification of [illegible] litigation which might probably at first have been altogether pre-[illegible] procedure on the part of the landlord. It is material, at [illegible] on this subject, the offer made by the landlord in his con-[illegible] 6, Art. 11."

No. 96. period, and at the rent therein specified, and the respondent was not entitled to adject conditions essentially different from, or additional to, those specified in the draft lease.

Feb. 11, 1857. Welsh v. Rose.

The respondent's counsel were not called on.

LORD PRESIDENT.—There never was a concluded bargain here. The case is quite clear.

The other Judges concurred.

THE COURT pronounced the following interlocutor:—"Remit the cause *simpliciter* to the Sheriff, and decern: Find the advocator liable in payment to the respondent in expenses of process," &c.

ALEXANDER MONRO, S.S.C.—JOHN ROBERTSON, S.S.C.—Agents.

No. 97. WILLIAM ALVES WELSH, Pursuer.—*Macfarlane—Fraser.*
DAVID ROSE AND ARTHUR JOHN ROBERTSON, Defenders.—*D. F. Inglis—Gordon.*

Process—Title to Sue—Infeftment cum processu.—In an action of declarator of right to a stream, and against encroachments, the defenders disputed the pursuer's right to ground adjoining the stream, and pleaded, that this being a real action the pursuer had no title to sue, in respect neither he nor his predecessors were infeft in these grounds. Subsequent to the date of the action, the pursuer completed his title by infeftment in the disputed ground under a title which had not been previously feudalised;—*Held* (affirming judgment of Lord Ardmillan), that the pursuer's infeftment *cum processu*, and the possession alleged by him, was sufficient to sustain his title, and it did not require a prescriptive title to enable him to sue.

Feb. 11, 1857. 1ST DIVISION. Ld. Ardmillan C.

THE pursuer was heritable proprietor of certain lands in Inverness-shire, part of which adjoined a stream called Mill-burn, and he brought this action against the defenders, who were *ex adverso* proprietors, containing declaratory conclusions of his right to the use of the stream, and of the illegality of certain operations by the defenders, and concluding to have the stream restored to its natural channel *ex adverso* of his lands. He averred that he and his predecessors and authors had for time immemorial the free uninterrupted and continuous use of the stream adjoining his lands. The pursuer's sasine was only taken after the action was in Court. None of his predecessors were validly infeft in the subjects. He had therefore no prescriptive title. The defenders produced no title at all, but merely stood on the defensive, and pleaded the invalidity of the pursuer's title.

The defenders averred that, in point of fact, the pursuer had no ground touching the stream—the property of the defender Robertson intervening; and they averred that the pursuer's titles were defective—his infeftment in part of his lands being subsequent to the raising of this action. They therefore pleaded, *in limine*,—"1. The pursuer had not, at the date of the summons, and does not even yet possess, a title valid and sufficient to support his right to insist in the present action. 2. The conclusions of the action are groundless, in respect that the pursuer has not relevantly set forth, and cannot instruct, any right or interest in the matters therein referred to sufficient to support said conclusions; more especially as the pursuer or his predecessors never had any title or right as proprietors to land bounded by the burn."

The Lord Ordinary, on 20th January 1857, pronounced the following interlocutor:—"Reserves the first and second pleas in law stated for the defenders to be discussed with the merits, when the state of the facts in dispute has been ascertained; and appoints the cause to be enrolled, in order

that the mode of procedure in investigating the facts may be adjusted; and reserves the question of expenses." * No. 97.

The defenders reclaimed. They only pressed the first plea, and only the first part of it. They pleaded, that the action was essentially of the nature of a real action; and, from the titles produced, it appeared that none of the pursuer's authors had been infeft in the lands. There was no case in which a party who could not connect himself with a previous infeftment could insist in a real action.[1] Feb. 11, 1857. Bain v. Burnet.

Counsel for the respondent were not called on.

Lord President.—None of the cases referred to touch this case. The title of the pursuer is merely sufficient to prevent the encroachments complained of.

Lord Ivory.—The defenders may at present be no better than squatters on this land, which they aver is not the pursuer's, but to which they themselves have produced no title.

Lord Curriehill concurred.

Lord Deas.—The only doubt I have is, whether the Lord Ordinary ought not at once to have repelled the plea. And I observe that his Lordship had the same doubt himself.

The Court adhered, with expenses.

Todd, Murray, & Jamieson, W.S.—Sang & Adam, S.S.C.—Agents.

John Bain, Pursuer.—*G. H. Pattison*—*F. W. Clark.* No. 98.
James O'Neil, John Burnet, and James Smart, Defenders.—*Macfarlane.*

Reparation—*Conjunct and several liability*—*Public officer*—8 & 9 *Vict. cap.* 289, sect. 22.—A police sentence having been suspended by the High Court of Justiciary, the party against whom it had been pronounced, and who had been imprisoned under it, brought an action of damages against the informer and an assistant superintendent of police, who acted as a joint procurator-fiscal for part of the burgh, and had presented the complaint in his own name, and he called also the principal procurator-fiscal and the superintendent of police. The action was (*aff.* judgment of Lord Neaves, *abs.* Lord Wood), dismissed as irrelevant against the two latter.

John Bain, shoemaker in Glasgow, brought an action of damages against John Burnet, procurator-fiscal of the burgh and city of Glasgow, James Smart, superintendent of police, James O'Neil, assistant superintendent of police, and joint procurator-fiscal of court, and George Stephenson, ironmonger, alleging that, on false information given by Stephenson, O'Neil had presented, in his own name, a complaint to the police-court of Glasgow, on which a sentence of imprisonment had followed, which had been in part carried into execution. But upon a note of suspension and liberation, he had been set at liberty by the Court of Justiciary. Feb. 11, 1857. 2d Division. Lord Neaves. C.

In the original condescendence, the statement from which liability on the

* "Note.—Although the Lord Ordinary has reserved the first and second pleas, instead of repelling them so far as preliminary, he has not done so from doubt in regard to them, if the pursuer's statements are assumed, for he is of opinion,—1st, that the pursuer's infeftment *cum processu* in support of his previous titles, and of the possession alleged by him, is sufficient to sustain his title to sue this action; and, 2d, That the pursuer, whether he possesses or can instruct his right and interest or not, has relevantly alleged it. But the facts in regard to possession, and in regard to the connection of the piece of ground in question with the titles being disputed, he thinks it safer and better to reserve these pleas, which are so expressed as to be mixed up with the merits, till the facts have been ascertained."

[1] Lady [illegible], 20th March 1623, Dict. p. 6618; Ramsay, 1st Dec. 1630, Dict. p. 6634; [illegible], 7th Feb. 1749, Dict. p. 16,121; Grant, 22d Jan. 1702, Dict. p. 13,286.

No. 98. — Feb. 11, 1857. Bain v. Burnet.

part of Burnet and Smart was deduced, was as follows:—" The said apprehension, proceedings, pretended conviction, and sentence and imprisonment, took place and proceeded by directions, and at the instance of the defender James O'Neil, and were obtained and insisted in, and carried into force by him, he being joint procurator-fiscal of court, along with the defender John Burnet, and assistant-superintendent of police to and under the said James Smart."

In defence to the action, it was pleaded for Burnet and Smart;—" It not having been alleged in the summons as libelled, or made ground of action in due and legal form, that the acts complained of were done by the defenders, Mr Burnet and Mr Smart, or by their instructions, or under their authority, or even with their knowledge, and no relevant or sufficient statement of any kind having been made against them in the summons, and no amendment thereof allowed, the action, *quoad* Mr Burnet and Mr Smart, ought to be at once dismissed."

To meet this plea the pursuer, in his revised paper, amplified the statement quoted above as follows:—" The defender James O'Neil is joint procurator-fiscal along with the defender John Burnet, and the defender John Burnet is joint procurator-fiscal with the said defender O'Neil, and participates in the profits, emoluments, and benefits of that office so far as exercised by O'Neil, and of the proceedings conducted by the said defender O'Neil, as joint procurator-fiscal foresaid. The defender James Smart i principal superintendent of police of the city of Glasgow, and has the appointment of, and did appoint, the said James O'Neil as assistant-superintender to and under him, and is, under and by virtue of the statute 9 & 10 Vic cap. 289 (27th July 1846), responsible for him and his actings as suc The said apprehension, proceedings, pretended conviction, and sentence an imprisonment of the pursuer, originated, took place, and proceeded, und authority of, and by instructions derived or emanating from the defende Burnet, Smart, and O'Neil. The apprehension, complaint, conviction, se tence, imprisonment, and others proceeded and were obtained, insisted and carried into force, in name, and at the instance of, and by, the defend James O'Neil, as joint procurator-fiscal of court, along with the defend John Burnet, and as assistant-superintendent of police to and under the sa James Smart."

It was contended that, even as thus altered, the allegations were n relevant.

The Lord Ordinary pronounced the following interlocutor:—" Finds, regards the defenders Burnet and Smart, that the pursuer's averments a not sufficient to import a case of personal fault or wrong on the part of t said defenders in the matters libelled: Finds that the pursuer's avermen are not relevant to infer a liability on the part of the said defenders for t acts of the other defenders, or any of them: Therefore sustains the defen for the said defenders Burnet and Smart, dismisses the action as against the and decerns: Finds them entitled to expenses, and allows an account to given in, and remits the same, when lodged, to the Auditor to tax and repo Finds that the pursuer has averred relevant grounds of action against t other defenders, and repels the defences stated by them respectively, so as directed against the relevancy of the action, but reserving all their ot pleas, and all questions as to the extent of their liability for the seve matters complained of; and appoints parties respectively, within eight da to prepare and lodge draft of such issues and counter issues, as they prop for the trial of the cause." *

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* " NOTE.—The nature of this action must be determined by the original st ments in the summons; but, indeed, these do not appear to be materially exten in the revised condescendence.

An attempt was made on the part of the pursuer to have the matter thus refused as a revisal added to the record by way of an amendment to the summons, but this the Lord Ordinary refused to allow. No. 98. — Feb. 11, 1857. Bain v. Burnet.

When the case came before the Inner-House, after hearing parties, the following interlocutor was pronounced:—

"Having considered the amendment of the summons proposed before closing the record, and the final interlocutor of the Lord Ordinary refusing to allow the same, and his Lordship's note to that interlocutor, and heard counsel, find that the grounds of action now stated in the revised condescendence against the defenders Burnet and Smart

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"The Lord Ordinary thinks that, neither in the summons nor record is there any clear, consistent, or sufficient statement that Burnet and Smart were actual parties to the proceedings complained of, so as to make them liable on the ground of personal fault or delinquency. He understood that this was not the ground of action meant to be relied on as against them.

"The pursuer, however, maintains that Burnet, who is procurator-fiscal of the burgh and city of Glasgow, is liable for the fault or wrong of the defender O'Neil, in his character of joint fiscal with Burnet, for a certain district of the town; and that Smart, who is superintendent of police, is liable for O'Neil's acts, in his character of assistant-superintendent, to which office he was appointed by Smart. There is no attempt to separate in their results the acts of O'Neil as assistant-superintendents from his acts as joint procurator-fiscal, but perhaps this was not necessary at this stage of the cause.

"The Lord Ordinary does not think that the pursuer's pleas now referred to are well-founded, either on general grounds, or on any special circumstances that are set forth.

"As regards Burnet, it will be observed that the complaint, the only part of the proceedings with which the procurator-fiscal can be held connected, is presented in name of O'Neil alone, as joint procurator-fiscal. The Lord Ordinary cannot hold that another joint fiscal, not a party to the proceedings, can be answerable for their regularity. Even supposing, as the pursuer alleges in his revised condescendence, that Burnet participates in the emoluments of the office as exercised by O'Neil, it does not appear that this affords a legal ground for holding him liable to a third party, not his employer, for the misconduct of the prosecution here in question, in which O'Neil was the only prosecutor.

"As regards Smart, the case is somewhat different. O'Neil, the assistant-superintendent, is appointed by Smart, and the statute (9 & 10 Vict. c. 289, sect. 22), declares that the superintendent 'shall have full power to appoint and dismiss, and shall also be responsible for the whole of the assistant-superintendents, lieutenants, patrol, and watchmen, in the several departments of the preventive and criminal police acting under him.' But the Lord Ordinary cannot view this enactment as creating a pecuniary responsibility to third parties for the acts of the subordinate officers in the exercise of their official functions, nor does this mere power of appointment constitute the relation of master and servant, or even of employer and employed, between Smart and O'Neil. O'Neil is not Smart's servant. They are fellow-servants of the magistrates, and of the community or public, and the Lord Ordinary cannot hold that a public officer or public servant is responsible in the way suggested for the inferior servants or officers whose assistance is necessary for the public service, even though the patronage or appointment may be left to him. He may be liable for making a bad appointment, but he does not seem to be liable for the personal faults of such inferior officers.

"The Lord Ordinary is aware that in the case of Melvin, 22d May 1847, 9 D. 1129, an opposite opinion is expressed by Lord Jeffrey. But his Lordship's observations were obiter dicta, not entering into the proper or immediate question under consideration, and not given effect to, or adopted, by the rest of the Court. With every sense of the weight due to the opinion of that eminent judge, the Lord Ordinary [illegible] that his views on this point are supported either by legal principle or by [illegible], and he thinks that the adoption of them would be both unjust and injurious [illegible] public interest."

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are exactly the same with the averments and grounds of action proposed in said amendment to be added to the summons, and having been rejected in that form, ought not to be allowed to enter the record: Find that the same are not within the original summons, and cannot competently be insisted in against these defenders: Therefore, assoilzie the said defenders from the conclusions of the libel, and decern: Find them entitled to expenses."

James Bell, S.S.C.—Campbell & Smith, S.S.C.—Agents.

No. 99.

William Myles, Pursuer.—*D. F. Inglis—Macfarlane.*
John Calman and Others, Defenders.—*Penney—Moir.*

Fee or Liferent—Husband and Wife—Bankruptcy.—Two sisters, both married women, were *pro indiviso* proprietors of certain heritable subjects derived from their mother. A division was effected by two conveyances executed by them, with consent of their husbands. The destination in the conveyance to the eldest sister was "to and in favour of her and her husband, and longest liver of them two, in conjunct fee and liferent, and to the child or children procreate or to be procreate betwixt them, which failing, to the said longest liver of them two, and the said longest liver her or his heirs and assignees whomsoever, in fee heritably and irredeemably." There were children of the marriage. The husband survived the wife, and was sequestrated. After his death, in a competition between the trustee on his estate and the surviving children,—*Held* (affirming judgment of Lord Benholme), that the fee of the wife's estate did not vest in him, but in the wife herself, and therefore was not carried in the sequestration.

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C.

The facts of this case were thus stated by the Lord Ordinary in his note:—"In 1804 two sisters, both married women, were proprietors of certain heritable subjects derived from their mother, who had conveyed these subjects to them *pro indiviso*. It was found convenient to divide these heritages into two portions, so that each of the two sisters might become exclusive proprietor of one of these portions. The share that fell to the lot of Mrs Calman (the eldest sister, whose maiden name was Ann Ritchie) consisted of house property in the burgh of Kilrenny.

"The division was effected by two conveyances executed by the *pro indiviso* proprietrixes, with consent of their respective husbands.

"The conveyance in favour of Mrs Calman proceeds upon a narrative which contains these expressions, and this conveyance,—'And Mary Black, our mother, having granted to us a disposition *pro indiviso* of her heritable property, we with one consent have agreed to make a division of the heritable property in communion betwixt us, and to allocate to each of us our particular share thereof. Therefore wit ye us to have made over, assigned and disponed, likeas we hereby make over, assign, and dispone, to and in favour of the said Ann Ritchie and John Calman, and longest liver of them two, in conjunct fee and liferent, and to the child or children procreate or to be procreate betwixt them, which failing, to the said longest liver of them two, and the said longest liver, her or his heirs and assignees whomsoever in fee, heritably and irredeemably, all and whole, &c.'

"The deed specially assigns the mother's conveyance, in so far as regards the subjects thus allocated, to Mrs Calman, 'that in virtue thereof, and of the procuratory of resignation or precept of sasine therein contained, and hitherto unexecuted, the said Ann Ritchie and John Calman may be infeft and seized in the whole subjects above disponed.'

"The marriage between John Calman and Ann Ritchie was dissolved about the year 1813 by the death of the latter, leaving several children of the marriage, of whom the survivors are the defenders in the present action

In 1843 John Calman became bankrupt, and his estate was sequestrated. He himself died in 1848. No. 99.

"The pursuer is the present trustee upon John Calman's sequestrated estate, and he has raised the present action of declarator in order to have it found that the foresaid subjects now form part of the sequestrated estate under his charge, as having been vested in fee in John Calman by the conveyance of 1804. This conclusion is resisted by the defenders." Feb. 12, 1857. Myles v. Calman.

They pleaded;—That according to the sound construction of the disposition by their mother, viewed as carrying out and implementing a family settlement of property belonging to her, the right of fee in the heritable subjects in question remained in her, and was not carried to her husband; and even if the effect of the disposition was to reduce the mother's right to a liferent, yet the fee was given to the children of the marriage, and now belonged to the defenders, as the surviving children, in equal proportions.

The Lord Ordinary, on 20th March 1855, pronounced the following interlocutor:—"Finds that the fee of the subjects in dispute was not vested in the late John Calman: Therefore assoilzies the defenders from the first or declaratory conclusion of the summons, and decerns. *Quoad ultra*, appoints the case to be enrolled, with a view of disposing of the other conclusions." *

* "NOTE.—(After the above narrative)—At the debate, the main consideration urged by the pursuer in reference to the terms of the conveyance, was the survivance of the husband; whilst the defenders founded upon the fact that the property belonged to the wife.

"The conveyance upon which the question turns is somewhat peculiar, inasmuch as the children of the marriage are called to the succession by a clause which is interjected between the first part of the conveyance, which is in favour of the spouses and the survivor of them two, and the last part, which calls the said survivor and her or his heirs and assignees.

"This peculiarity of style has occasioned considerable embarrassment in the construction of the deed, and has, on the whole, induced the Lord Ordinary to prefer the defender's pleas.

"His views are these:—

"1. The only serious doubt in this case appears to be, whether the fee was in the husband or in the wife. It can hardly be maintained that by the conveyance the fee was in the children. For the spouses take not only a conjunct liferent, without the addition, 'for liferent use allenarly,' but they also take a conjunct fee. The real question is, Which of the spouses was the fiar, and which the liferenter?

"2. The husband survived; and his sex, as well as survivance, are founded on in support of the pursuer's case.

"As to the survivance, this, in reference to some styles in conveyance, has been held very important, if not decisive.

"3. The survivor has been held to be the fiar in the following several instances:—

"(1.) Where the spouses only take a conjunct liferent, and the fee is specially destined to the survivors, and their heirs and assignees.—Forrester v. Trustees of M'Gregor, 13th April 1835, House of Lords, Shaw and M'Lean, I. 441.

"(2.) Where the right is taken to the spouses and the survivor in conjunct fee and liferent, and their heirs.

"In such cases, their heirs are held by settled construction to mean the heirs of the survivor.—Ferguson v. M'Grigor, 22d June 1739 (4202); Elchies Fiar 5, Brown's Supp. v. 777; Lord Boyd v. King's Advocate, 22d November 1749 (4205); Burrowes v. M'Farquhar's Trustees, 6th July 1842, ante, vol. iv. p. 1484.

"4. But where the right is taken to the spouses, and the survivor, and to the heirs, not of the survivor, but of the marriage, the construction of law is very different. Such a style of conveyance is not decisive in favour of the survivor, so as certainly to vest the fee in him or her. Far less is it decisive in favour of the husband in respect of his sex, and without reference to his survivance. On the con-

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The pursuer reclaimed, and pleaded;—That the question was, What was the intention of the granter of the deed? Much light was thrown on that

trary, other circumstances will be looked to to cast the balance; and in particular, the side of the house from which the property flowed will have a great, if not decisive, influence in determining whether the fee is in the husband or in the wife.

"It is no doubt true, that under such a clause, the husband, *cæteris paribus*, will be held the fiar, from regard to his sex, even where he is not the survivor, especially if the property come from him, or if he gets it from his wife, *nomine dotis*. There are a variety of cases which demonstrate this bias of our practice.

"But if the subject belongs to the wife, or comes from her relations, and has not the character of tocher, or *dos*, she will be held to be the fiar. And it is proper here to notice that Mr Bell, in the well known passage of his Commentaries, in which he lays down the rules of construction applicable to joint rights between husband and wife, has a little understated the effect of this circumstance in favour of the wife. He observes:—'2. If the subject come from the wife, or her relations, and the expression is not such as clearly to intimate a preference in favour of the husband, the wife is fiar, the husband liferenter; the husband's creditors cannot attach the fee, while the wife can grant no conveyance, nor her creditors attach her right, otherwise than with a full reservation of the husband's liferent. But it is a sufficient destination to give a fee to the husband, if the subject is taken in conjunct fee and liferent, and the heirs of the marriage in fee.' The learned author here refers in a foot-note to the case of Watson against Johnstone, 22d July 1766. But that case does not warrant the doctrine contained in the last sentence of this quotation.

"The report of that case, as given in the Faculty Collection, is imperfect, and calculated to mislead, leaving it to be inferred that the estate was entirely the wife's.

"But on consulting the reports by Monboddo (Brown's Suppl. v. p. 927), and Hailes (i. 82), it will be found that the Court proceeded expressly on the footing that the subject belonged to the husband, *nomine dotis*. This case of Watson against Johnstone truly affords an illustration, not of the doctrine contained in this passage of Mr Bell, but of the rule which he lays down shortly afterwards, to the effect that 'the wife will be held as fiar, *cæteris paribus*, where the subject flows from her; yet if it has come into the communion as tocher, it will require the strongest expressions of preference in her favour, to vest her with the fee.'

"5. It seems to be law, therefore, that where the heirs of the survivor are not immediately called to the fee, after mention of the spouses and the survivor, it remains to be determined by other circumstances, whether the survivor is to take a fee, or only a liferent. When the subject belonged to the wife, the presumption is that the husband, on survivance, takes merely a liferent. Such is the doctrine to be derived from the case of Blair v. Henderson, 16th June 1757, reported in Brown's Supplement, v. p. 335. 'In this process the defender appeared, and pleaded that the subject sought to be adjudged was not *in hereditate jacente* of his father, but belonged to himself as heir of his mother, to whom his mother's father had disponed the same in the following terms:—"For the love, favour, and affection he had and bore to Anna Young, his eldest lawful daughter, and to George Henderson, merchant in Cupar, her husband," and for certain other onerous causes and considerations giving, granting, and disponing, to and in favour of the said Anna Young and George Henderson, and longest liver of them two, and the heirs to be procreated betwixt them and their assignees whatsoever, all and haill,' &c.

"'The defender therefore maintained that this subject could not be attached for his father's debts.

"'It appeared that George Henderson had survived his wife.

"'*March* 5, 1757.—The Lord Ordinary found, "That the subject disponed being from the wife's father, and his name mentioned first, and being for love and favour, and not for tocher with the wife, which is previously secured by the contract of marriage, the wife was fiar, and that therefore the subject cannot be adjudged by the pursuer, a creditor of the husband, on the decree of cognition against the defender, the heir of the marriage."

"'In a petition against this interlocutor, the pursuer referred to the followin

principle of construction by the decision in the House of Lords in the important case of Glendonwing v. Maxwell, 22d June 1854.[1] The destination itself contained a clear meaning, and any presumption of law was therefore superseded by it.[2] No. 99. Feb. 12, 1857. Myles v. Calman.

The respondents pleaded;—That the circumstance of the property flowing from the wife was a specialty in this case which was of importance. She was the original fiar, and had not denuded herself.[3]

Lord President.—The view which I have taken of this case is in accordance with the conclusion at which the Lord Ordinary has arrived. In my view of the case, it is of great importance,—indeed, decisive,—that this property not only belonged to the wife herself at the time the deed in question was executed, but that the deed itself was executed, not for the purpose of divesting her of the property, but for the very purpose of giving to her her own separate share of it, instead of

decisions in support of his argument, that the husband must be held to have been fiar:—Bartilmo v. Hasinting, 2d February 1632; Graham v. Park, 29th January 1739; Gardin v. Sandilands, 12th July 1671; Edgar v. Sinclair, 23d July 1713. The Court, however, adhered. Lord Kilkerran has the following note of the grounds of the judgment,—'June 16, 1757.—The President Kilkerran, &c. declared for the interlocutor, only Kaimes stated a doubt upon the clause, "and the longest liver of them," to which the answer made was, that the fee was originally settled in somebody, and in respect of the circumstances in the interlocutor mentioned, particularly that it was a mere gratuity, not a contract of marriage, that could be no other than the wife. And on the question stated, see or refuse, the Lords refused the petition.'

"6. The Lord Ordinary cannot help considering this case of Blair v. Henderson as an important decision in reference to the present case.

"For here, as in the case of Blair v. Henderson, the clause to be interpreted occurs not in a marriage-contract, but in a deed of conveyance in favour of the wife—a conveyance, the declared object of which was, to divide between two sisters property held by them *pro indiviso*.

"It would be very strange, in these circumstances, to hold that Mrs Calman did not take a fee by the deed which was intended to allocate her share to her; or that the fee was vested in her husband, so as to cut out both herself and the children of the marriage altogether. The more reasonable construction is, that the surviving husband was to take merely a liferent.

"7. Nor does it appear that this conclusion drawn from the circumstances of the case, viewed in connection with the first part of the clause of conveyance, can be excluded by the latter part of the clause, in which, after calling the children of the marriage, there is a substitution as follows:—'Which failing, to the said longest liver of them two, and the said longest liver, her or his heirs or assignees whomsoever in fee heritably and irredeemably.'

"For, upon this clause it is obvious to remark, that the survivor is here called to the fee only upon the failure of children, which is inconsistent with the notion that the fee was vested in the survivor by the earlier part of the clause. According to the pursuer's argument, the surviving husband takes the fee both as institute and afterwards as substituted to the children. Whereas, the sounder view seems to be, that in the earlier part of the clause, the survivor, *qua* survivor, takes merely a liferent; whilst in the latter part, where he is called along with his heirs and assignees, he takes a fee as substitute to the children. The children being thus in the destination preferred to the survivor (*qua* survivor), the primary fee must be held to remain with the mother, the true proprietrix, to whom the children are heirs of provision.

"Had the mother survived, the effect of this last clause must have been to bring in her heirs and assignees, failing children of the marriage."

[1] Macqueen's House of Lords Reports.

[2] Burrowes v. M'Farquhar's Trustees (see Lord Ordinary's note); Ersk. B. 3, T. 8, sect. 35; Bisset, Dict. voce Deathbed, Ap. No. 1.

[3] Madden v. Currie's Trustees, 22d Feb. 1842, ante, vol. iv. p. 749; Bell's Com. 56, Menzies' Lectures, p. 649.

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holding it, as formerly, *pro indiviso*: "And Mary Black, our mother, having granted to us a disposition *pro indiviso* of her heritable property, we, with one consent, have agreed to make a division of the heritable property in communion betwixt us, and to allocate to each of us our particular share." The object and purpose of the deed was to allocate to each sister her peculiar share of this property. That being so, it would certainly require something very clear and explicit to convince me that the true object of the destination, the nature of the provisions and structure of the whole deed, was such as to deprive that sister of the fee which originally belonged to her. There is nothing in the deed to lead to that conclusion. The destination is "to and in favour of the said Anne Ritchie and John Calman, and longest liver of them two in conjunct fee and liferent." That does not necessarily, and in all cases, vest the fee in the husband. If the property belonged to the wife in her own right—still more, if it appears that the object of the deed was only to make an arrangement between this lady and her sister—the effect of these words is not necessarily to vest the fee of the wife's property in the husband. These words are intended to give the fee and a co-existing liferent, but they leave the right of fee in the wife, and only confer a liferent in the surviving husband. If the wife survives, she is to have both liferent and fee. That is the fair construction of these words where the property belongs to the wife herself, and still more, where the object of the deed is such as, I think, is clearly pointed out in the whole tenor of this deed.

The destination proceeds:—"To the child or children procreate or to be procreate betwixt them, which failing—to the said longest liver of them two, and the said longest liver, her, or his heirs and assignees whomsoever in fee, heritably and irredeemably." These words do not destroy the construction I have explained. They do not indicate any favour for the children as the children of the husband any more than of the wife. When it is the husband who is settling the estate that is a different thing. But here the words of this destination do not afford ground for supposing that it was intended to vest the fee in the husband. The words were appealed to by both parties as indicating a purpose to vest the fee in the party for whose benefit each construed the words, and, certainly, the words admit of being construed both ways. There appeared also to the Lord Ordinary some confusion and inconsistency in them, and in one view they might be read as making a substitution to the husband after his heirs,—he thus getting the fee after his own death. It is difficult to conceive that the deed could be made with any such purpose. But there really is not much confusion in the words after all. The fee is given, in the first place, to the wife. There is a liferent to the husband if he survives her. The fee then goes to the children, and what follows is intended to provide for the event of there being no children born or having been born—failing them, then the previous condition of matters arises, and which, it is provided, is to take effect on the dissolution of the marriage. Reading the deed in that light, the fee goes to the longest liver of them two, her, or his heirs and assignees whomsoever. In may be contended, in that case, that if the husband had survived, and there had been no children of the marriage, the fee would have gone to him as the longest liver, and to his heirs and assignees whomsoever. In the same way, if the dissolution of the marriage had taken place by the predecease of the husband, the fee would have gone to the wife, and her heirs and assignees. But this part of the deed is only intended to apply to the failure of children before the dissolution of the marriage—which did not happen. Reading the destination by the light of the source of the property and the evident purpose of the deed itself, I am satisfied that the fee is given to the wife, and not to the husband, although, under the last branch of this destination, it might have been maintained that if there had been no children of the marriage, the husband surviving might have got the fee. But that contingency is not such an indication of purpose and preference of the husband as to control the previous part of the deed, and, upon that ground, I am for adhering.

Lord Ivory.—I agree; and, being satisfied with the grounds of the Lord Ordinary's note as supplemented by your Lordship, I have nothing to add.

Lord Curriehill.—I have come to the same conclusion. The case is not without some difficulty, and is different, I think, from almost any former one; but, on applying to it the established principles of construction, the destination admits of no other reading than your Lordship has put on it. The only question before

us is, whether or not the right of fee vested in John Calman? Now, one thing is quite clear, that if he was fiar, he acquired the fee only under the disposition of 1804. The original right of fee belonged not to him but to his wife. So far, therefore, as regards the destination, I look upon the granter of it as being Mrs Calman, and I deal with her as a party making a settlement of her own property.

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Now, where two parties are not related to each other as spouses or as parent and child, a conveyance to them of property in conjunct fee makes each of them proprietor of one-half; but when there is introduced into such a conveyance a liferent as well as fee, that alters the effect of the destination so far, that each is fiar of one-half; and the survivor, besides being fiar of one-half, is also liferenter of the other half. When the parties are related to each other, as husband and wife, such a destination is construed differently. The one is exclusive fiar, and the other exclusive liferenter, and the question has always been, which is in the one position and which in the other? The solution of that question has always been according to the circumstances of each case. At same time, there are certain canons of interpretation which have been well established, and which are sufficient for the solution of this case.

The contention here is, that the husband was fiar under the first branch of this destination, which is in favour of the husband and wife, and longest liver of them two, in conjunct fee and liferent. If the husband was fiar, he was so from the date of this deed in 1804, and the wife only liferenter. But could this deed have been so read at that date consistently with these established rules of construction? It could not; for, in the first place, this property proceeds from the wife, and she is dealing with it as her own property. She is the granter of the deed, and testatrix of the destination; and the presumption of law is very strong, that the owner of the property does not intend, by a destination of this kind, to divest himself, in his own lifetime, of his right of ownership, unless the words of the destination will not admit of any other reading. There is an exception to this rule in the case where the husband's right is onerous, for example, in a marriage-contract, where he gets the property *in nomine dotis*. Here his right is absolutely gratuitous, so much so, that there is nothing to have prevented the wife at any time retracting that right, whatever it was—liferent or fee; and consequently the case does not fall under that exception.

There is another decisive view of the construction of this destination. The purpose of the deed was not to divest the wife of the fee, but to invest her with it. The narrative of the deed says that in so many words; so that there are here very strong rules of construction adverse to the plea that the fee was intended to be vested in the husband.

That plea is also at variance with the subsequent branch of the destination; because, if the husband was fiar under this conveyance, he was the owner as institute, from 1804 when this deed was executed and delivered. Now, undoubtedly, whatever may be the reading of this deed in other respects, you have him in the subsequent branch of the destination made a substitute heir of provision in the contingency of the failure of his wife and their children. Now that is totally irreconcileable with the fee having been in him from the date of the disposition. All these difficulties you have to contend with, in supposing that the husband was fiar.

But taking the wife to be fiar, there is no difficulty. She is dealing with her own property. She is disponer, and she begins by disponing to her husband and herself in conjunct fee and liferent. It is consistent with all the authorities, that that conveys a liferent of a peculiar kind—equivalent to a liferent by reservation, which carries more than a mere liferent does. Consistently with that construction, the wife retains the right of property which previously belonged to her, subject to the burden of such a liferent; and granting such a gratuitous deed, she makes a destination—a simple entail so far as it goes—in favour of her children; and failing them, to her husband and his heirs, in case he should be the survivor. It is said that, on the same principle, she herself could not be the institute or fiar under the first branch of the destination, because she makes herself, in the event of her being the survivor of the spouses, substitute under the second branch of the destination. It might be a sufficient answer, that even if the first branch of the

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destination displaced both husband and wife as fiars, the deed would still be a good deed; for in that case they would both be liferenters, and the children fiars—and still the fee would not be in the father. But I do not think that is the meaning of it. The fee, under the first branch of the destination, remains with the wife. She is executing a destination of her property, and concludes the destination in effect by saying, that failing all the other parties favoured by it, in her own lifetime, the right should remain with herself and her heirs and assignees.

Lord Deas.—I also am for adhering to the interlocutor. I adopt so entirely the observations in the well considered note of the Lord Ordinary, that I deem it superfluous to add anything. The fact of the survivor being substituted as fiar to the children of the marriage, strikes at least equally against the supposition that the husband was fiar *ab initio*, as that the wife was so. This is the true remark to make upon the concluding part of the dispositive clause; and I do not think the Lord Ordinary, in the seventh head of his note, meant to go farther than this. He rests his conclusion upon the other grounds stated by him, and then observes that the concluding words of the clause are not sufficient to overturn it. I take quite the same view of the matter. The fee of one or other of the parties depended upon survivorship, and the question is, of which of them? I think that of the husband. The notion of a joint fee—one-half in each—as in the case of strangers, will not do. The creditors of the husband could no more have carried off one-half the subject in the wife's lifetime, than the whole of it. The Dean of Faculty's argument was that, the words being plain, all presumptions ought to be excluded. Yet he founded upon the presumption arising from the heirs of the survivor (in this case the husband) being most favoured. Now the moment this is founded on, must not other presumptions equally come in? True, it was said, this is a presumption drawn from what appears on the face of the deed. But so it is with many others. The fact that the parties are husband and wife,—or parent and child,—the object of the conveyance, whether it be a marriage provision, and, if so, whether it be antenuptial or postnuptial,—or whether (as here) it be a mere division of *pro indiviso* property,—who is the disponer,—who is narrated as having paid the price,—and so on. These things, and such as these, may and generally do all equally appear on the face of the deed as the fact whose heirs are most favoured. And it is settled law that the presumptions applicable to the construction of the destinations vary in these different cases. Proceeding upon this principle, I think the Lord Ordinary has rightly applied the legal rules and presumptions when he found that the fee was not in the husband, and consequently did not pass to his creditors to the prejudice of the children of the marriage.

The Court pronounced the following interlocutor:—"Adhere to the interlocutor reclaimed against: Find the pursuer liable to the defenders in expenses incurred by them since the date of the interlocutor reclaimed against," &c.

Wright & Finlay, S.S.C.—T. Ranken, S.S.C.—Agents.

No. 100. The Church of England Life and Fire Assurance Trust and Annuity Company, Pursuers.—*Penney*—*Gordon.*

George Wink (James Lang's Trustee), and Others, Defenders.—*D. F. Inglis*—*Horn*—*Hector.*

Writ—*Act* 1681, *c.* 5—*Cautioner*—*Rei interventus*—*Proof.*—An advance having been made by an English company to a Scotchman on a cautionary obligation, executed in Scotland by the debtor, and the cautioners also Scotch, in the English form;—*Opinion* (*abs.* Lord Wood), that the cautioners' acknowledgment of their subscription did not obviate the objection to the deed as improbative under the Act 1681; but (affirming judgment of Lord Handyside) proof allowed before answer of facts averred in order to establish *rei interventus.* What constitutes sufficient *rei interventus?*

Proof.—*Held* (altering interlocutor of Lord Handyside), that an inquiry as to whether an improbative deed was validated *rei interventu*, should be made by proof on commission, and not by proof before the Lord Ordinary on adjusted questions, in which latter case his judgment is final.

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Ld. Handyside
I.

This was an action for the balance of an advance of L.800 made to James Leitch Laing, on the security of a policy of assurance on his life for L.1500, effected with the pursuers in 1849. This advance the pursuers alleged they had only agreed to make upon Hodges, Lang junior, and Macadam becoming sureties for it. An indenture or bond in the English form was accordingly drawn up, which narrated the policy, the agreement on the one hand to make the advance, and on the other that the parties should repay the L.800, and keep up the policy, and that nothing should be done whereby the policy should be forfeited or the premiums increased, and that interest should be paid regularly, as well as the capital repaid by stated instalments.

The pursuers' allegations as to the execution and adoption of this indenture were as follows :—" The deed of indenture was transmitted by the secretary of the pursuers to Robert Baird, writer in Glasgow, the agent for the pursuers; and the same was subscribed, sealed, and delivered by the said James Leitch Lang, George Hodges, John Lang, junior, and John Robert Bruce Macadam, respectively, in presence of witnesses who attest the said execution; and after the same had been so subscribed, sealed, and delivered, the said James Leitch Lang subscribed a receipt, appended to the said deed of indenture or bond, for the said sum of L.800."

The deed bore the signatures and seals of the two Langs, Hodges, and Macadam, with the following attestations and receipt by J. L. Lang :—

" Signed, sealed, and delivered, by the above named James Leitch Lang, in the presence of (Signed) Robert Baird, of the city of Glasgow, solicitor. (Signed) Gregor M'Gregor, of the city of Glasgow, accountant."

" Signed, sealed, and delivered, by the above named George Hodges, in the presence of (Signed) M. Mackay, of 44 George Square, Glasgow, clerk, witness. (Signed) John Morton, of 90 South Portland Street, Glasgow, surveyor and collector, *witness*."

" Signed, sealed, and delivered, by the said John Lang, junior, in the presence of (Signed) Robert Baird, of the city of Glasgow, solicitor. (Signed) Gregor M'Gregor, of the city of Glasgow, accountant."

" Signed, sealed, and delivered, by the said John Robert Bruce Macadam, in the presence of (Signed) M. Mackay, 44 George Square, Glasgow, clerk, witness. (Signed) John Macadam of Blairoer, farmer, *witness*."

" Received, the day and year first above written, of and from the trustees of the above mentioned institution, the sum of L.800, being the consideration money mentioned in the above written indenture to be paid by such institution to me. } L.800.

(Signed) J. L. Lang.

(Signed) " M. Mackay, of 44 George Square, Glasgow, clerk, *witness*.

(Signed) " Gregor M'Gregor, of the city of Glasgow, accountant, *witness*."

On the bond and receipt reaching their secretary, the pursuers alleged that they transmitted and Lang received L.800, and that this was done " on the faith of, and in reliance upon, the agreement of the defenders to become sureties for repayment of the said sum of L.800 by the said James Leitch Lang, and of the cautionary obligation come under by them by subscribing the bond or indenture as parties thereto. It was known by the other defenders that the sum contained in the bond was paid to and received by the said James Leitch Lang on the faith and in respect of the deed of indenture or bond above narrated, and the obligation of repayment therein contained, undertaken by the defenders respectively. The defender Hodges

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signed the said bond for the defender Lang, in consideration of Lang becoming security for him in another obligation."

For some time Lang paid duly the interest and instalments, but the pursuers received no payment after April 1855, when L.480 remained due; and Lang having become bankrupt, they now raised this action for the balance and interest, calling Lang, the trustee on his sequestrated estate, and the cautioners, and concluding for payment of L.480, "being the balance resting due, at and since the 27th of April 1855, of the principal sum of L.800 sterling advanced by the pursuers to the said James Leitch Lang, and that under and by virtue of a deed of indenture or bond, dated the 27th day of October 1852, made, granted, and executed by the said," &c. "in favour of the pursuers, and which deed of indenture or bond is herewith produced, and held as repeated *brevitatis causa: Item*, Of the legal interest," &c.

Neither of the Langs gave in defences.

Both Hodges and Macadam denied all knowledge of what had taken place under the deed, but admitted having subscribed it. They maintained, however, that as it bore to be executed by a Scotch debtor and Scotch sureties, all resident in and domiciled in Scotland, it was improbative according to the law of Scotland—the name and designation of the writer and of the witnesses not being mentioned, nor the date or place of execution. They also objected to the deed, as vitiated *in essentialibus*, several words being written on erasures.

The pursuers pleaded;—That the advance having been made with the knowledge of all the defenders, on reliance upon the deed of indenture, their subscription of which was admitted, they were jointly and severally liable.

The Lord Ordinary pronounced the following interlocutor:—"In respect that the defenders James Leitch Lang and John Lang, junior, have made no appearance in the action—Decerns against them in terms of the conclusions of the summons: And having heard parties' procurators on the closed record between the pursuers and the other defenders George Hodges and John Robert Bruce Macadam, who have appeared, and having made avizandum, finds that the last named defenders have admitted on record their signatures subscribed to the bond or indenture libelled on; and in respect of material averments made on record by the pursuers, and which are either denied or not admitted by these defenders, and which it falls on the pursuers to establish by competent proof; and that it appears to the Lord Ordinary it is not advisable, before the facts shall be ascertained, to proceed to give judgment on the pleas in law for the parties—Therefore, before answer, and reserving specially the pleas of the defenders, allows a proof to the pursuers on the following points:—1st, Whether, after the defenders had subscribed the bond or indenture, James Leitch Lang subscribed the receipt appended thereto? 2d, Whether the sum of L.796, being in full, after deducting charges, of the sum of L.800 mentioned in said bond or indenture, was advanced and paid to James Leitch Lang by the pursuers, after they had received delivery of the said bond or indenture, with the subscriptions of the whole defenders thereto, and on the faith of the same? 3d, Of what date and how said advance and payment was made and received? and, 4th, Whether the advance and payment was known to the defenders George Hodges and John Robert Bruce Macadam, or either or which of them: And appoints these questions to be tried by the Lord Ordinary, without a jury," &c.*

* "NOTE.—The defenders peremptorily refused to make any admission whatever beyond what was made on the record, and that amounted only to an admission of their signatures being genuine. Nor would they acquiesce in a proof being allowed before answer. Had the defenders, on the one hand, admitted that the sum in the bond had been paid over to Lang after their signatures had been placed upon it

The defenders reclaimed, praying the Court to sustain the defences, and pronounce decree of absolvitor. From the conclusions of the summons, this action was clearly laid exclusively on a written instrument, and one of the most peculiar character, and not entitled to be regarded with any favour, for it concluded by renouncing all the usual equities recognised in favour of cautioners. A cautionary obligation was *literarum obligatio*, and could be constituted only by a writing probative in terms of law, or holograph. Subscription of an improbative document would not suffice to bind the party unless *rei interventus* followed. There had been some variation in the earlier decisions, but subsequent discussions had settled the law,[1]—the only doubt which remained resting upon a dictum of Mr Bell (Pr. 249, 3), that acknowledgment of subscription was good evidence of cautionary. This dictum was founded on the cases of Brown v. Campbell,* 28th November 1794, Bell's Fo. Cases, p. 115; and Sinclair v. Sinclair, 3d February 1795, Bell's Fo. Cases, p. 140, but reference to the Faculty Report and to the Session Papers, showed that they did not warrant this position; neither the latter cases on the same subject.[2]

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...d the pursuers, on the other hand, had abandoned their averment that the payment so made was known to the defenders, the Lord Ordinary would have felt ...nd to have given judgment on the point of law which would then be raised for ...rmination. But with the facts of the case unascertained, it appeared to him ...xpedient to pronounce judgment, and therefore he has sought, by the prefixed ...rlocutor, to fix the points to be proved or settled in order to prepare the case ...decision. As a reclaiming note will follow, he may further explain, that had ...been quite clear that the mere payment to Lang of the sum in the bond subse...nt to the subscription of it by the defenders, amounted to a sufficient *rei inter...tu* to remove the objection of the bond being improbative under the Act 1681, ...ould have pronounced a finding to that effect, and so have remitted the case ...roof. He has given full consideration to the cases of Hamilton v. Wright, 22d ...ary 1836, affirmed in the House of Lords 12th February 1838, and of John... v. Grant, 28th February 1844, the authorities relied on by the pursuers. The ... of these cases went on the fact of Hamilton having been the hand through ...n the money was paid to the primary obligant in the bond, and there was no ...sion to consider the position of Mr Buchan, the other co-cautioner who joined ...e bond, for he being dead and unrepresented, was not sued. In the second ...ese cases, which related to a letter of guarantee, the decision was given by two ...e Judges under confessed difficulty, and resting greatly on the particular cir...tances of the case. The pure question, whether a bond with co-obligants, ...h is improbative, but the signatures admitted, became operative against the ... simply by the loan being made to the borrower, though undoubtedly the ...ple is touched by the latter of these cases, seems to require consideration; ...may be that the pursuers shall establish, under the proof allowed, knowledge ... part of the defenders of the bond being acted on by payment made to Lang, ...us a question of a different kind would be presented for decision. The Lord ...ary is not prepared to hold, with the defenders, that the averment of know...is, as they argued, irrelevant, though it may be a disputable ground on which ...case to sustain the exception of *rei interventus*, as a reply to the Statute 1681."

[1] ...ll's Pr. sec. 248-9; Foggo v. Milliken, 20th December 1746, M. p. 16,976; ... v. M'Lintock, 24th July 1764, Br. Sup. vol. v. p. 899; Wallace v. Wallace, ...ov. 1780, M. p. 17,056, and Hailes, p. 912; Walker v. Duncan, 9th Dec. 1785; ...stone v. Lang, 23d June 1786, M. 17,057; Bell's Illustr. vol. i. p. 174. ...lyle, 26th May 1790, see Note; Dunmore Coal Company v. Younge, 1st Feb. ... F. C., and quoted in a note to this case; Bill's Creditors v. Dunbar, 14th June ... M'Ewan v. Crawford, 13th February 1816, F. C.; Chaplin v. Sir W. Allan, ...ruary 1842, ante, vol. iv. p. 616.

...s by Lord President Campbell on Petition G. Brown against Lord Aber...y's interlocutor.—April 24, 1794.—(*Session Papers, Vol.* 75, *No.* 38).— ...May 1794.

...stion about an informal cautionary obligation.

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But although *rei interventus* might make the defenders liable, there was no averment here which in law would amount to that. Anything done by

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"It does not stand upon the same footing with transactions concerning land. See notes in case of Carlyle, 26th May 1790.*

"If matters stood in *nudis finibus contractus*, and the action was laid upon the writing alone, such action could not be maintained, that writing being improbative. But here the action is laid upon the fact, which fact admits of being proved *prout de jure*, or at least (if not by witnesses), certainly by oath of party, viz., that in consequence of the defender's interference, and granting his letter of relief, the pursuer became cautioner in the suspension, and was obliged to pay the debt. The letter was of the nature of a mandate or an obligation of relief. The fact is admitted, and matters not entire.

"Case of Sir Archibald Edmonstone wrong decided.

"28*th November* 1794.—Alter, and find him liable, with expenses."

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* NOTES by Lord President Campbell, on Petition for Francis Carlyle, &c., against Lord Braxfield's interlocutor, and Answers for James Ballantyne, &c.—January 22, 1788.—(*Session Papers, Vol.* 57, *No.* 74.)

"'Informal letter of cautionary—Interlocutor right—Literarum obligatio—Se 25th Nov. 1782, Wallace.

"'23d June 1785, Sir A. Edmonstoune.

"'See also Walker v. Gronons, in 1778, Sess. P., V. 37, N. 87; Tassie v M'Lintock, V. 5, No. 59.'

"With reference to the case of Crichton and Dow v. Syme, 21st July 177 quoted in the petition for Carlyle;—'see also case of Campbell v. M'Lachlan, 4t June 1742, Miller, p. 449. Court seems there to have understood that a cautio ary obligation was not strictly a *literarum obligatio*, insomuch that even proof b witnesses sometimes thought inadmissible. Contrary, however, was found in th case of Tassie v. M'Lintock in 1764. See vol. 5 of Sess. Pap., No. 57.'

"Decision, Walker v. Gronons, in 1778, is in point—Subscription acknowledge —But cautionary considered as *liter-obligatio*—*Rei interventus* was also strong pleaded

"Case of Wallace equally clear, and case of Sir A. Edmonstone. Case of Walk and Duncan, quoted in Sir A. Edmonstone's case, was similar; decided in De 1785, upon the principle that *liter-obligatio* must be compleat in all its parts.

"Late President Dundas was of this opinion—See pet. for Lang, p. 6.

"Suppose two cautioners, and one of them dead, is the living person, ackno ledging his subscription, to be liable for whole?

"26th May 1790,—find the missive improbative, and remit to Ordinary, t Court in general being of opinion, that although it is not competent to prove t subscription, it may be competent to prove the fact by oath.

"'Eskgrove.—Why may not the fact itself be referred to oath, matters n being entire?

"'Monb.—Same; it is the case of a mandate.

"'The Court found the missive improbative, but, in general, thought, th although the subscription would not be supported by oath, it might be compe to prove the fact by oath.'

"The following notes occur on the margin of the answers for Ballantyne—

"'In consensual contracts a principle of common law that consent any interposed is sufficient.

"'Ordinary modes of probation, writ, witnesses, and oath of party.

"'Oath may be qualified by intrinsic exceptions.

"'Besides consensual contracts, many other matters and transactions admit proof *prout de jure*. In some, however, witnesses are rejected, on account of jealousy which the law has of credibility and accuracy of witnesses, or bec writing is usually adhibited, *e. g.*, loan of money and payment. When we writing is necessary in these, we only mean witnesses are rejected. They can proved by oath of party, but w[t] the intrinsic exceptions.

"'If a writing be produced, and if it be not probative, *i.e.*, neither holog nor clothed w[t] the formalities of the statutes, the defect may admit of being

party under a deed to which he was obliged by the deed was homologation, No. 100.
t rei interventus, and it bound only himself. So, when a bond was for a

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d by other evidence, according to the nature of the transaction. If it be a loan money, or a payment, oath of party will be admitted upon reference not to make writing formal; for the law says it is null and not suppliable, but to prove transaction, and therefore extrinsic exceptions may be added. Party may say—'I nowledge the subscription, but I paid the debt,' or it is not resting-owing. See s observed by Durie as far back as 1633 and 1634, Dict. ii. 551. This was re the irregular practice of allowing writer and witnesses to be condescended and proved, which practice had only taken place in a few instances recently re 1681.

'Condescendence thus offered might be proved in various ways, either by witnesses, by *comparatio literarum*, or by oath. In other words, *prout de jure*.

'Some instances, at an earlier period, of allowing writings, signed by one ry only, to be supplied by oath, Dict. ii. 553, and i. 561; but this was upon les that the second notary was not required in the way of solemnity, but only ajorem evidentiam, and that the right of resiling was barred after one notary signed for the party in presence of two witnesses, and accordingly there is a ion as far down as 1739 upon this principle. Clerk, Home, 4th July 1739, bie v. Shiel.

'These suppletory proofs never founded in the real construction of any of the tes. See Acts 1579 and 1593. The first proceeds on no narrative of forgery, oth say that the writings otherwise executed shall bear no faith in judgment, with.

And by Act 1681, such suppletory proofs are expressly rejected without any tion of oath of party, *comparatio literarum*, or any other mode. A writing is not probative *per se*, must be laid aside as a written instrument; yet in a stantiate proof it may have great weight where the existence of the transac- subject of proof, and oath of party may, in many instances, be resorted to oof of the transaction attended always with its qualities.

Oath of party is peculiar to the law of Scotland. Party is made judge in his ause, but acting as such, he is entitled to judge of the whole matter, and not fine his decision to a part. This attempt to restrict his oath is playing fast ose with the law. I may have put my name inadvertently to a paper, believ- to be something else. We every day put our names to papers without read- em, having confidence in those about us. It is enough, therefore, to call on ay whether is this your subscription, and shall I not be allowed to add, I entered into such a transaction, and I don't owe this man a shilling?

If the writing be probative *per se* it will bind me, and I must go to work by tation. If it is not so, other proofs must be resorted to, and these must be according to their own nature.

So far as to ordinary transactions; and it may be added, that the Act 1681 ds on no narrative of preventing forgery, but, on the contrary, supposes that deed may be in danger from the inattention of witnesses. But the inductive is of no consequence. The great object is to prescribe certain precise forms, bservance of which a writing shall bear faith, and without which it shall not. ing entirely holograph has, by very long usage, been held as completely pro- without a testing clause; and this part of the common law is recognised by 1669, c. 9, though thereby limited as to their endurance.

Allowing the writing itself to be proved by oath is merely to take off pre- on.

Bills of exchange and letters in *re mercatoria* have a particular privilege, for e of commerce. Other writings require to be subscribed and attested in a manner, if the party can write, and in another way, if he cannot write. It matter what the form is, but if once fixed it must be observed, otherwise ing is loose and arbitrary.

See Kilk, *voce* Proof, p. 450, and *voce* Writ, p. 610, where it appears, that gh this Court went wrong in 1746 and 1752, in making a groundless distinc- tween missive letters and other writings, the law was admitted as to these writings.

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sum of money, and the sum was paid for delivery of the bond, that payment was merely completion of the transaction, and could affect only the party who received it. The case was quite different from the delivery of a cash credit bond, where the transaction was complete, though nothing were ever advanced upon the strength of it. Drawing money was something that might or might not follow upon the preceding guarantee. To constitute *rei interventus* more must be done than the mere completion of the transaction, and in both the cases, Hamilton and Johnstone, referred to by the Lord Ordinary, it was held that more had been done.[1]

The pursuers, on a review of the whole authorities, maintained the soundness of Mr Bell's doctrine as to the sufficiency of an acknowledgement of subscription,[2] and farther, that they had relevantly averred *rei interventus*,

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"'In case of heritable rights, *i.e.*, those connected with feudal property, we are not left to ordinary rules; for there is another and most important qualification of these rights to be attended to, viz. that writing is necessary to their constitution and that until writing is adhibited there is *locus penitentiæ*, however solemn th bargain may otherwise have been.

"'At all periods of the law of Scotland, certain precise forms were necessary i the conveyance or vesting of feudal property. First, the delivery of possession i presence of the *pares curiæ*, and entering the vassal's name in the court books c the superior. Afterwards a *breve testatum*, in a short and simple form, the se standing in place of subscription, and no witnesses or writer named. Afterward other forms, by 1540, c. 117, &c.

"'But be the form what it will, it is an invariable maxim, that without this for heritage cannot pass, whether by sale, by lease, by wadset, or other lien. See Sta and Craig, and case of Redden, Dict., iii. 222.

"'Neither can any man bind himself in a bargain with respect to such righ without writing. Either party may resile till the transaction be so complete Writing, therefore, is required, not in *majorem evidentiam* only, but as a solemnit and as essential to constitute the right.

"'This is founded on no general principle of common law regarding consens contracts, but upon the unalterable principles of our feudal constitution.

"'Is it enough, then, to say any writing, however imperfect, shall be receiv and if there be a defect it may be *aliunde* supplied? This would be a contrad tion in terms. It is admitted that the defects of a seisin cannot be supplied. N ther can those of an heritable bond, a wadset right, a disposition, &c.

"'A null disposition will remain null as a writing till the end of time, and eit party may resile from it while matters are entire; but if both parties are agr they will corroborate it. They will carry it into execution *rebus ipsis et factis*, homologation, &c.; all which resolves into a different question. But here m take the question as in *nudis finibus contractus*. Party may admit writing. resile from the bargain *rebus integris*, because the writing is null.

"'Great confusion would ensue if any other rule adopted. A conscientious m might be bound; a dishonest man free. The heir of original party might eit be or not, as he pleased. One cautioner might be bound and another free. F admitted where third parties have int. (interest?); but this is laying out of v the *locus penitentiæ* competent to party himself.

"'See notes on case of Grieve.

"'Cautionary is an accessory obligation, and question there is different.— case of Campbell, &c. Kilkerran, *voce* Proof, p. 449. Case of Dow, where the was found admissible to oath. Yet train of decisions against proving the wri by oath.'"

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[1] Hamilton v. Wright, 22d January 1836, Sh. vol. xiv. p. 323, aff. H. of L., February 1838, Sh. and M'L. vol. iii. p. 127; Johnstone v. Grant, 28th Febr 1844, ante, vol. vi. p. 875.

[2] Stat. 1681, c. 5, Bell's Pr. 248-9; Crawford v. Wight, 16th January 173 16,979; Henderson v. Murray, 5th December 1765, M. 17,986; Brebner. January 1803, M. 17,068; and Cases cited by the defenders.

but they did not admit that the acts necessary to constitute it must take place between the creditor and the cautioners. The indenture bore that the money was to be advanced on the faith of the obligation, and if so given, that was a sufficient *rei interventus*, as possession and payment of rent was in the case of a lease. Suppose the deed here had been for payment of a set of annuities, would not payment in successive years suffice? Well, in this case, on the faith of the guarantee and the payments of interest and instalments, the pursuers had abstained from doing diligence against Lang. If the obligation were not good against the cautioners, neither could it be against the debtor, for it was equally informal as regards him. Knowledge by the party against whom *rei interventus* was pleaded was not necessary. It was enough to make the cautioners liable if the advance was made posterior to the subscription, or even if it was made at the time, if made on the faith of their obligation.

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LORD JUSTICE-CLERK.—In support of the reclaiming notes for the defenders, it was most earnestly urged that an improbative obligation was not supported, to any extent, by acknowledgment of the subscription of the party, in cases in which writing was necessary to constitute the obligation, and that the *rei interventus* averred in this case could not receive any effect, because it was only the completion of the transaction—viz. payment at the time of receiving, and in return for the arranged writing. On the other hand, the pursuer, not only in answer to that argument, but as a substantive proposition, not excluded by an interlocutor before however, contended that the acknowledgment of the subscription removed entirely the objection that the writing was improbative by the law of Scotland, and entitled him to decree. No doubt the pursuer has no reclaiming note against the interlocutor, or to that effect; but I am not prepared to say that we might not so vary the interlocutor as to find, if such were our opinions, that any proof of the *rei interventus* condescended on was unnecessary, just as we might, on the plea urged on by the defenders, find that the facts averred would, if proved, amount to *rei interventus* in the view taken by law as to the requisites to constitute proper *rei interventus*. But whether we could at once give effect to the argument in the plea of the pursuer, we must not only consider the point with reference to the demand of the defenders to be assoilzied on the ground contended for by them, but also because the point may enter largely into the question of the relevancy or sufficiency of the *rei interventus* set forth on record. And further, as the question has been elaborately argued, I think it right, if our opinions are adverse, on the point so ...ed, to the view of the defenders, not to leave it open to the pursuer to renew ... demand for decree, if they should fail to prove the *rei interventus* condescended ... On these grounds I think we cannot refuse to intimate our opinion on the question, whether the acknowledgment of the subscription to an improbative writing ...ce removes the objection to the writing, and gives it the full effect of a probative writing, so as to be a sufficient and legal ground for decree in terms thereof. As I do not wish to commit myself, so as to preclude me from considering the question in any other case in which it might be more directly and purely raised ... judgment, I do not intend at any length to consider the terms of the statute, or analyse *seriatim* all the cases on the point. But I have given to them very careful attention. It is important to compare the different reports of some of the cases, ... matters very material, in my opinion, appear in some reports, which cannot be ...ted from other reports of the same case. The consideration of the cases leads ... to the conclusion—1. That if the subscription is acknowledged, the party granter ... the deed is not at once entitled to absolvitor if the other party can prove that ...ters are not entire. 2. That, on the other hand, the acknowledgment of the subscription does not remove the objection to the writing as improbative by the ... of Scotland, so as to entitle the party to whom it was given to judgment ...st the granter, in the same manner as if duly executed. As to both propositions, I have in view cases in which writing is essential to establish the obligation. ... further of opinion, as the result of all the authorities, that a cautionary obli-

[1] Cases of Hamilton and Johnstone.

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gation not in a proper *re mercatoria* is, to use the legal term always employed by Sir Ilay Campbell, strictly *literarum obligatio*, to be constituted by, or, perhaps, to speak more correctly, to be contained in, and evidenced by a deed executed with the solemnities of the statute. The conclusion which arises from all the cases is, that if the action is laid on the informal document alone, matters remaining *in mediis finibus contractus*, and not also on facts taking place on the faith of the document, effect cannot be given to the document as *per se* a ground of judgment, although the defender should acknowledge his subscription.

I take the note of Sir Ilay Campbell in the case of Brown—(quoted above, p. 417).

He ends his note with saying, that the case of Edmonstone was wrong decided, and in the report he is made to say that he did not know the case, and it seemed to him to be wrong. That seems to produce some confusion on the general point, but is cleared up by this, that in the papers in the case before him, the Ordinary's interlocutor in the case of Edmonstone is quoted, which bore, incorrectly, as i appears, that the tenant had entered into possession on the faith of an improbativ missive. Believing that to be the case, Sir Ilay Campbell thought the judgmen altering the Ordinary's interlocutor wrong; but the Court altered, because tha was a mistake as to the facts, for there was no such *rei interventus*. Hence the cas of Edmonstone is in perfect harmony with all the cases, and proceeded on the ne principle stated in the above note of Sir Ilay Campbell. The more the facts of th various cases are considered, it is very clear to my mind that there is not one cas in which judgment has ever been given on the improbative writing against th party subscribing, merely in respect of his acknowledgment of the subscription, i the class of cases in which writing is essential, without the occurrence of after fac which, in the judgment of the Court, amounted, in the whole circumstances of t case, and from the peculiar nature of the transaction or agreement, to be *rei inte ventus*, so that matters were not entire; but things had been done and fulfilled, had taken effect in reliance on the improbative writing. In some cases the fa held to be properly *rei interventus* may to us appear slight; but we do not kno that we have all the materials which the Court had for deciding that point. But the Court did proceed on the ground that matters were not entire, that is sufficie And I do not believe that any one can be cited in which that was not, in truth, t sole ground of judgment. Sir Ilay Campbell's note clears away at once the arg ment raised on the report of the case of Brown. The case of Sinclair—not intel gibly reported—also went on specialties respecting the alleged *rei interventus*. the case of Brebner, Mr Penney stated that there was no *rei interventus* whate I sent for Sir Ilay Campbell's Session papers, and on them there is the following n (which I omitted to read during the argument), which shows that, right or wro the Court went entirely on the facts which had taken place on the faith of missive.

"*Obligation of relief.*

"Interlocutor right.

"Matter not entire.

"Case of heritable rights stands on different footing."

Some doubt was cast on the case of the Dunmore Coal Company, owing, I thi to the loose way in which the judgment is noted in the report, in which the int locutor is not quoted; but there is a very full note of that case in Lord Presid Hope's note-book, which distinguishes the case from that of Bill's Creditors v. D bar Hutchison, 14th June 1810, in the same Division, and which shows that principle was held to be fixed, that if there is not proper *rei interventus* the ackn ledgment of the subscription is of no avail.

"*Informal letter of cautionry.*

"Matthew Young was constituted manager of the Dunmore Coal Company. contract was scrolled, and revised and signed by the parties, and also by And Young, father of Matthew, as cautioner for his intromissions; but it never extended or duly executed. Matthew, however, entered on his office. After a time the company say that they discovered he had been guilty of many malp tices, especially putting the company firm to bills for his own use, and that ond L.465 was then in the circle.

"They arrested him as in *meditatione fugæ*, but his father interponed, and

following proceeding took place. A state of accounts was made out, making a balance of L.470 due by Matthew, besides the bill for L.465. To this state is subjoined a minute holograph of Matthew, but signed not only by him, but by Andrew, binding them to pay the balance by instalments, and to retire the bill. In consequence of this minute Matthew was discharged out of the messenger's custody.

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"Being pursued on this minute, Matthew pleads that the books are before an accountant, and till his report comes in it cannot be known whether any balance is due.

"Andrew not only founds on this plea, but also on the informality of the missive.

"The Lord Ordinary has taken cause to report.

"Missive certainly not probative of itself, and will not go back on principle laid down in Paterson v. Wright, and Bill v. Hutchison Dunbar; but said, has been *rei interventus*.

"In Dunbar's case it was only alleged I might have been arrested, or I might have taken some other step.

"But the Court disregarded this as too remote a consequence. That could be alleged in every case, and would validate every cautionary obligation. But here there was an actual warrant for imprisonment. Debtor has obtained a benefit—immediate liberation—which might be to him and his father worth thousands. It is true that all they could have compelled Matthew to grant under the warrant was caution *judicio sisti*.

"But as Andrew chose voluntarily to grant more, and Matthew reaped the benefit of that obligation, it seems to be a sufficient *rei interventus* to support the writing.

"Therefore incline to sustain it, but will hear my brethren."

The decision is not given in an intelligent form in the Fac. Report. The reporter's note on the Session papers is distinct—"Find writing effectual on ground of *rei interventus*." The interlocutor, which I got from the Register House, is as follows:—

"*Edinburgh*, 1*st February* 1811.—On report of Lord Meadowbank, and having advised the mutual memorials for the parties, the Lords repel the defences, and decern in terms of the conclusions of the libel: Find the pursuers entitled to expenses; allow an account thereof to be given in, and remit to the Auditor to examine the same, and report."

The defences for the cautioner Andrew Young were founded chiefly on the plea, that the deed not being executed in terms of law could not receive effect.

I hold, therefore, that there is no authority for the doctrine that the action ought to be dismissed on the ground taken by the defenders, and as little authority in support of the plea of the pursuer, that the acknowledgment of the subscription entitles the pursuer to judgment without proof of the occurrence of any facts having taken place on the faith of the improbative missive. I have been the more anxious to state my decided opinion on that point, because the third proposition stated by Mr Bell on this subject, 248–9, on which Mr Penney relied, is stated in too broad and absolute terms.

The examination of the cases leads to the conclusion, that from the case of Fogo downwards, there has not been a single case in which the judgment has not been founded on facts which, in the opinion of the Court, amounted to *rei interventus*. I have only to add my hope that the report will contain the notes I have referred to to some of the cases mentioned, especially that long and most instructive note of Sir Ilay Campbell, which happens to be the longest record that I know of the opinion of that great lawyer on any subject.

Then we are brought to the question—have facts been averred, which, if proved, will in this case amount to *rei interventus*? I will not enter at present into the [illegible] point of controversy between the Dean of Faculty and Mr Penney, [illegible] was termed the fulfilment of counter part of the obligation in return [illegible] of receiving the imperfect writing, such as payment across the [illegible] is signed, is *rei interventus*. There may or may not be difficulty [illegible] in the abstract. But the actual facts in the particular case [illegible] and marked character to the act of fulfilment. In this [illegible] while the writing bears payment at the date of subscrip- [illegible]

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tion, and the receipt also, yet that the deed was sent to London, and the money afterwards remitted in reliance on this obligation. That it is quite competent to prove that the money was paid after the date of the obligation, although the writing bore that the money had been paid, the case of Grant v. Johnstone fully shows. I allude in particular to the second report of that case after the verdict.

We are not called upon at present to say whether the facts averred will positively amount to *rei interventus*, for the details may very much affect the character of the facts so averred. Therefore, I only say that enough is averred to go to proof. Neither do I at present enter into the question—whether the knowledge of the cautioner that anything had been done on the faith of the improbative writing, is necessary in order to make out *rei interventus*. In many cases it may not be of any importance. But this I think is clear, viz., that the cautioner's knowledge of what is to be done, and of what has been done, may give to facts the undoubted character of *rei interventus*, and of his adoption of the transaction in circumstances in which it might be doubtful whether the facts otherwise amounted to *rei interventus*. Hence, I think, the amount of knowledge in this case is important. I give no opinion as to whether the repayment of certain instalments of the original advance is or is not *rei interventus*. The case of Bill shows that the allegation that the party abstained from diligence on the faith of the writing, cannot be regarded by itself as any *rei interventus*, unless the writing should stipulate for the forbearance of diligence as the object to be obtained by the obligation in the improbative writing.

But then I must add, that I wish the Court to have the opportunity of considering all the details of the facts. In the case of Grant, there was the simple fact of the advance of money being made after the cautioner had armed the bank's cautioner with the document, and that case seemed well adapted for a jury. But even in that case the examination of the actual facts, as exhibited on the Judge's notes, came to be important. Now, in the shape in which the Lord Ordinary proposes to put the case, the Court would have certain dry and naked findings in point of fact from the Lord Ordinary, the terms of which might, in fact, decide or exclude the questions of law which arise as to the sufficiency of the facts to establish *rei interventus*. That is a mixed question of law and fact, which ought either to arise at a trial, or on evidence taken on commission. And I am not disposed to put the case into a shape by which the Court is to part with that question, and to take the judgment of the Lord Ordinary as final.

Lord Murray.—I consider this case is of great importance. Indeed it is of the utmost importance to persons in England or Scotland to know what the law is on this point. This case comes to us in a different form from any other that has yet occurred. It is an advance of money by an insurance company to certain persons in Glasgow, and the deed is in the English form. A Mr J. Leitch Lang is the first party, the defenders are the second, and the third party is certain persons residing in England. The deed appears very regular, and may be an excellent one, according to the law of England; but the plea is taken that it is insufficient in Scotland through neglect of the Act 1681, c. 5. Upon this point your Lordship has given an opinion that this is not a good deed. Now I am very unwilling to give a decided opinion on that point, though I am far from dissenting from anything your Lordship has said. I had some difficulties, which have been partly dispersed by the remarks which your Lordship has made.

I agree that there ought to be a proof in this case, which is the great question immediately before us. I feel greatly indebted for the trouble taken by your Lordship, and the research made into the authorities. It is a very nice question, and one that requires deliberate consideration. If there is to be an amalgamation of the laws of the two countries, certainly there is no case where it is more desirable than in the case of deeds, on the faith of which advances are made. I think we should allow a proof before answer of all that has taken place.

Lord Cowan.—The Lord Ordinary has not disposed of any of the pleas urged by either party in the record, but has allowed proof, before answer, regarding certain facts on which the pursuers rely as affording, *rei interventus*, a good answer to the objection taken by the defenders to the sufficiency of the written obligation libelled to support the action.

Against this interlocutor the defenders reclaim, maintaining, (1.) that a cautionary obligation,—subject to certain exceptions, to which this case does not belong,-

can be constituted only by a probative writing, and that the mere acknowledgment of the subscription does not make the document in itself actionable; and, (2.) that the facts alleged and admitted to probation are not relevant to support the plea of *rei interventus*.

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In answer the pursuers have pleaded, that, as the defenders admit their subscription to the indenture or bond constituting the obligation, this is sufficient to support the writing as an actionable document of debt; but, at any rate, that the facts, of which they are willing to undertake the proof, do amount to *rei interventus* sufficient in law to obviate the objection to the probativeness of the writing libelled. As no reclaiming note has been presented by the pursuers, the general plea urged by them is not properly before the Court for decision in *hoc statu;* unless, indeed, we were prepared to say that the facts alleged do not amount to *rei interventus*, supposing the admission of the subscription to the bond insufficient to support the action. In that case our decision would require to embrace the conflicting views in law which have been so elaborately argued.

Assuming the Court to hold that the facts proposed to be inquired into are such as present, *prima facie*, at least, a case of relevant averment of *rei interventus*,—it is perhaps unnecessary to express any opinion on the more general point; but having gone over the decisions that were referred to, with care and anxiety, I may say, that I cannot hold the argument submitted by the pursuers to be by any means satisfactory. The opinion which I have formed is rather this;—that, so long as things are entire, the cautioner, who is not bound by a probative written obligation, is not bound at all, so that no action will lie against him on the document although his subscription to it be acknowledged or proved. This appears, indeed, to be merely a corollary from the more general proposition, that there is, as regards contracts which require writing for their constitution, *locus pœnitentiæ dum res sunt integræ*.

The passage from Mr Bell, on which reliance was placed by the pursuer, is certainly entitled to great respect. He says (Pr. 249, s. 3)—"A writing of which the subscription is acknowledged is good evidence of cautionry." The decisions cited in support of this doctrine are those of Brown, 1794, and Sinclair, 1795, both reported in Bell's Fol. Cases. Now, in both, there were facts implying *rei interventus*, and, consequently, rendering their authority unavailing on the general question regarding the legal efficacy *per se* of the improbative document. This is manifest on the face of the report of Sinclair; but the same is true of Brown, though the observations stated to have been made by the bench seem to proceed on a different footing. The facts are stated in the report thus, after citing the improbative letter:—"This letter was not written by the defender, but he signed it along with the Scotts; and on the day after the date of this letter, Thomas Brown did subscribe the bond of caution, and the defender signs as attestor," and this peculiarity of the case is clearly brought out in the report of the decision in the F.C., and in the D., p. 17,058. There was thus an acting on the faith of the improbative writing, and so the Lord President (Campbell) says in his note:—"If matters stood *in mediis finibus contractus*, and the action was laid upon the writing alone, such action could not be maintained, that writing being improbative. But here the action is laid upon the fact, which admits of being proved *prout de jure*, or at least (if not by witnesses), certainly by oath of party, viz., that in consequence of the defender's interference, and granting his letter of relief, the pursuer became cautioner in the suspension, and was obliged to pay the debt."

Further, that this was the view taken of the decision at the time appears in the report in Hume, of Balfour v. Thomson, 8th March 1806, p. 94-5,—in itself an instructive enough case, although not directly applicable to the present. The claim against the cautioner was on an informal missive subscribed by him, but neither holograph nor tested. The Court decided against his plea founded on the informality in respect of *rei interventus*. On the part of the cautioner, it is noted by Mr Hume, reference was made to the case of Edmonstone v. Lang, 23d June 1786; while the charger cited in reply the later cases of Brown v. Campbell, 1794; M'Minn v. Henderson, 16th February 1802; Brebner v. Freeland, 18th January 1803; and some others, which (he said) had finally and equitably settled it, that the objection of informality is obviated *rei interventu;* and he maintained that, in this instance, although the sale had been previously made, there was a subsequent

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and substantial *rei interventus* by the delivery of the grain on the faith of the missive.

This statement of the law is in accordance with the note of Sir Ilay Campbell in the case of Brown. Then the prior cases of Wallace, 1782, Walker, 1785, and Edmonstone, 1786, all recognise the rule that cautionary, in the words of Mr Bell, is proveable only by writing, duly executed according to the requisites of the statutes, or recognised as a privileged writ—subject to exceptions which do not here apply. This may be adverse to the case of Fogo, 1746, in one view of that decision; but the inconsistency between it and those later decisions lies not so much in the principle of judgment as in holding missives not within the provision of the statute 1681. There is no intermediate adverse decisions, because it is plain that the case of Henderson, 1765, was one of *rei interventus*, viz., signing bills on the faith of the informal letter of relief, and it is so treated in subsequent cases. As regards the alleged change in the course of practice after the case of Edmonstone, 1786, I find no trace of it except in the fluctuating opinions of some of the Judges, and in the palpable inaccuracy and incompleteness of the notes taken of those opinions. In truth the element of *rei interventus* in the cases may explain many inconsistencies. For, after carefully examining the decisions which were relied on in the argument in proof of this change, I have become quite satisfied that there was in all of them what the Court, in sustaining the informal writ, held or might have holden to amount to *rei interventus*. The cases of Brown, of Sinclair, of Balfour, of Brebner, of Dunmore Coal Company, and of M'Neill, and all the other cases reported by Mr Hume, are of that description. The only exception is the case of Bill's Creditors in 1810; and in that case the principle was enforced, because there was no *interventus rei*. On this branch of the argument, therefore, I am of opinion that the defenders are right in their view of the law, and that the case of the pursuers cannot be maintained on the informal missive.

The real point in dispute comes to be, whether there be room in the facts of this case, as averred in the record, for the plea of *rei interventus*.

A great deal was said in the argument, that to admit this plea on such averments would be virtually to set aside the statute 1681. This, in the same sense, might be said of every case of the kind. But the truth is, that the remark is based on an erroneous view altogether. The effect of *rei interventus* is not to validate the imperfect writing, and to set it up as *per se* a document of debt. The Act 1681 has its full operation in rendering the writing incapable, by itself, either of being the foundation of diligence, or of supporting an action. The *rei interventus* must be established before the objection of improbativeness is obviated. Being established, then, the informal writing is good evidence of the agreement, and the creditor under it will obtain decree in implement of it. But he could not do summary diligence on the informal document, nor could it be made, like a probative personal bond, the foundation of direct adjudication of the debtor's heritable estate, without being preceded by decree of constitution. To say, therefore, that the Act 1681 is virtually set aside by this plea, is to mistake its nature and effect. It is a good answer to the objection of improbativeness, and makes the informal writing good evidence of the contract. This, in substance, is its effect, when it is applicable and can be pleaded, and no more.

The question then, is, whether the facts alleged by the pursuers, and offered to be proved, are sufficient to make out *rei interventus?* And as to this I am very clear that there exists no good ground for holding the averments so insufficient and irrelevant as to justify the recall of the Lord Ordinary's interlocutor remitting them to probation before answer.

The case, in itself, and as stated in the record, is very peculiar. The pursuers carry on business in London, in life and fire assurance and annuities. On the security of a policy opened with them by James Leitch Lang, and on the further security of the defenders, an advance of L.800 was agreed to be made by them to Lang as the principal obligant. An indenture or bond was accordingly prepared at London in the English form, and transmitted to Glasgow, the residence of the defenders. It was sent by the secretary of this English company to Robert Baird, writer there, the agent in that city for the pursuers. The indenture was executed in the English form on 27th October 1852, and was retransmitted on the same day to the pursuers. Their secretary, on 1st November, made the necessary remittance through

Mr Baird; and on 3d November J. Leitch Lang acknowledged receipt of that remittance. Such are the allegations in articles 8 and 9 of the condescendence, which the pursuers undertake to prove; and in addition thereto, they aver and offer to instruct knowledge on the part of the defenders, that the money was received by the principal debtor on the faith, and in respect of the deed of indenture or bond. Can these facts, if proved, be held altogether irrelevant in a question of *rei interventus?* I am by no means of that mind.

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No question has been stirred regarding the validity of this English deed in such a transaction as this. The nature of Mr Baird's agency in Glasgow, even, has not been explained on the record. The transaction is taken as a Scotch transaction, and must be so dealt with. Had the transaction been carried through entirely in England, and had also England been the *locus solutionis*, there might have been room for holding compliance with the Act 1681 not requisite for a deed in the English form, though executed in Scotland, especially if there was no Scotch agency of the company. But I take the deed, as the pursuers themselves have done, to be invalid and informal as a written document of debt by the law of Scotland. Still the specialties of the transaction are very material, as regards the point of *rei interventus*. This bond in the English form, according to the statements of the pursuers, is sent down from London for execution in Glasgow. It is executed by the defenders in the English form, with the view of its transmission to London, to be there acted on by the pursuers. In reliance on the English deed thus transmitted to them, the money is remitted to Glasgow, and paid over, in terms of the bond, to the principal obligant. And this is done in the knowledge of the defenders, his cautioners. I can scarcely figure a stronger set of facts deserving of consideration in a case of *rei interventus*, unless the broad proposition which was contended for by the defenders can be entertained, that in no case can implement or completion of the original transaction, even after an interval from the date of execution, in the case of a money obligation, be held in law ground to support the plea.

Were that proposition true in its absolute form, and not confined to money bonds, I shall only say I think that most of the cases in the books under this category must be held to have been erroneously decided. Take as examples the case of Henderson, where the subscription of bills instantly followed the granting of the obligation of relief; or that of Brown v. Campbell, 1794, where the letter of relief was immediately followed by the subscription of the bond of caution, by the party in whose favour the informal missive of relief was granted; or Balfour v. Thomson, 1806, in which delivery of the subject purchased followed immediately on receipt of the informal obligation of cautionry; or those cases already cited, where the liberation of the debtor followed the cautioner's obligation. All these were in implement of the original obligation, and nothing followed but the completion or fulfilment of the contemplated transaction. That the cautionary obligation was not in the same writing as the obligation come under by the principal, cannot affect the question. That that has generally happened is true. But if, on the creditor refusing to transact with the principal on his own credit, he gets a cautioner to subscribe the informal writing along with him, and then gets the transaction carried through,—the same principles are certainly applicable as would have been, had the debtor granted a separate obligation, and then obtained the cautioner's informal obligation, and so got the contract carried through.

It seems to me that the matter of fact which the Lord Ordinary has remitted for proof may—I do not go further—raise precisely such a state of circumstances as are represented by Professor Bell in his Principles, p. 26, to be the foundation of the plea.

I am sensible of the difference caused by this being a money obligation, and of the difficulty on that point which your Lordship seems to have felt in the case of Grant v. Johnstone. It is not necessary at present that this should be disposed of, as we are all of opinion that there should be in the first place inquiry into the facts; and I can very well imagine that such a state of circumstances may be brought out by the proof as to render the peculiarity of little moment. All I shall say, therefore, is, that, according to my present views, I think it ought not to be an obstacle in the way of that course of procedure being adopted which is contemplated by the Court.

Altogether, I am clear for refusing this reclaiming note.

No. 100. LORD WOOD absent.

Feb. 12, 1857. Wood.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor of the Lord Ordinary reclaimed against; but, of new, find that facts are averred on the record which it is important to send to proof before answer; and therefore allow the pursuers to prove before answer the facts averred by them on record, and allow the defenders a conjunct probation; and find the proof ought to proceed by commission: Appoint Mr A. T. Boyle, advocate, commissioner; and grant diligence to both parties to obtain such documents and writings as may seem to bear on the said facts, with power to the commissioner to call for any writings which he thinks material for the information of the Court; reserving all questions of expenses."

D. J. MACBRAIR, S.S.C.—A. HAMILTON, W.S.—MURRAY & RHIND, W.S.—Agents.

No. 101. GEORGE WOOD (Wordsworth's Factor), Petitioner.—*Young.*

Factor loco tutoris—Power to borrow.—A factor *loco tutoris* obtained special powers to sell heritage greatly affected by debts. He was unsuccessful in effecting a sale; but being of opinion that the property was worth the upset price, and a creditor being about to adjudge the property,—Power granted to the factor to borrow a sum sufficient to pay off the debts.

Feb. 13, 1857. 1ST DIVISION. Ld. Mackenzie L.

SEE ante, vol. xviii. p. 732.

The petitioner was factor *loco tutoris* appointed to the children of the late Samuel Wordsworth, and on 6th March 1856 obtained special power to sell certain heritage, for the purpose of paying off various heritable and personal debts affecting the estate. The present application set forth that, in terms of the authority then granted to him, the factor "immediately advertised Drumbank house and stabling for sale, and also the property at Nottingham Place, at the upset prices fixed by the Court. As stated in the report made to the Accountant, the Drumbank property was sold, but no offer was obtained for the Nottingham Place property, and the factor considered it more beneficial for the interest of the pupil-heir that a sum should be borrowed to pay off the debts, rather than apply to the Court for authority to reduce the upset price. In the factor's own opinion, and that of other parties, he considers the Nottingham Place property worth the upset price, viz. L.6000. That property yields an annual rental of L.455, 7s. 6d., and is only burdened with a feu-duty of L.34, 6s. 3d."

The present application was for powers to borrow a sum of L.5000. There was already a sum of L.3298 heritably secured over the property falling under the factor's management. This security was in existence at the death of the late Mr Wordsworth. Out of the L.5000 to be borrowed, the factor proposed to pay off the present heritable debts, and to grant an heritable security over the whole property under his management. In this way there would only be one heritable creditor; and the party who was to give the loan had agreed to allow it to remain as long as it might be required, while the interest was regularly paid up.

The Lord Ordinary reported the case on 21st November 1856, when the Court pronounced the following interlocutor:—"The Lords, on report of Lord Mackenzie, Ordinary, allow this case to stand over, in respect of the case of Maconochie, Graham's factor, now before the whole Court."

A note was now lodged by the factor, stating that since that date the principal personal creditor had raised an action, and obtained decree for L.3000 against the factor, "and may now proceed to adjudge the property, by which a large amount of expenses will be incurred, and the interests of the pupil thereby seriously injured. If the powers craved were granted to

borrow a sum of L.5000, the estate would be preserved for behoof of the heir. The annual rental of the whole property under the factor's management is about L.694, 7s. 6d., subject to an annual feu-duty of L.43, 17s. 3d. The deceased Mr Wordsworth, by his contract of marriage, bound himself to pay an annuity of L.100 per year to his widow. If authority was granted to the factor to borrow the L.5000, the only burdens on the estate would be the interest on that sum, and the annuity to the deceased's widow." He therefore prayed the Court to resume consideration of the case, and grant powers to borrow the sum of L.5000.

No 101.

Feb. 13, 1857. Crighton.

Lord Deas.—I have no objection to concur in granting this application, in the special circumstances that the creditor is about to adjudge the property. The whole of this case, from beginning to end, is a very peculiar one, and the Court, as I understand, go entirely on these special circumstances.

Lord President.—Undoubtedly—as creating a necessity.

The Court pronounced the following interlocutor:—"The Lords, on report of Lord Mackenzie, Grant special powers to the factor to borrow the sum of L.5000, and to grant a bond and disposition in security therefor, containing all usual and necessary clauses, over the property under his charge, as prayed for; and decern *ad interim*."

John Robertson, Jun., S.S.C.—Agent.

David Crighton, Petitioner.—*Black*. No. 102.

Factor loco tutoris—Special powers to sell and make up titles.—Authority granted to a factor *loco tutoris* to make up titles in the person of a pupil with the view of carrying through a sale of heritage belonging to the pupil—the negotiations for the sale having been begun and all but completed during the lifetime of the pupil's father.

The late Mr Gloag of Perth had been in treaty with the Bank of Scotland for the sale by him to the Bank of certain house property. Before the transaction was completed Mr Gloag died, leaving an only son, a pupil, to whom the petitioner was appointed factor *loco tutoris*. This petition stated that the Bank were still willing to carry through the purchase, on the footing that a title to the property should be made under the authority of the Court in the person of the pupil by the petitioner; and that, under the farther authority of the Court, the property should be thereafter conveyed by the petitioner to the Bank, on the Bank paying to him the price arranged with the deceased.

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L.

The petition farther stated, that before Mr Gloag's death, the negotiations had resulted in the Bank making, and Mr Gloag accepting, an offer for the property of L.560: that the property was very old, and could not be permanently improved by any ordinary repairs, but would require to be wholly taken down and remodelled: that the present income of the pupil was barely adequate for his proper aliment and education, consisting solely of the return from that property. The petitioner, therefore, craved special powers to make up titles in the person of the pupil, to enable him to carry through the sale, which he considered would be most advantageous to the pupil, and beneficial to his estate.

On the report of the Lord Ordinary, whose opinion was also favourable to the powers craved for being granted,

Lord President.—At the present stage, we can only grant the power to make up titles, and remit to the Lord Ordinary.

Lord Deas.—I can only concur in this petition being granted on the footing that the property was substantially sold during the father's lifetime.

The Court pronounced the following interlocutor:—"On report of Lord Mackenzie, Ordinary, grant authority to the petitioner to complete a feudal title to the said property in the person of the pupil,

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Feb. 13, 1857.
Stewart.

the said Alexander Brown Gloag, and decern *ad interim*: *Quoad ultra* remit to the Lord Ordinary to inquire, and report."

D. Curror, S.S.C.—Agent.

No. 103.

JAMES STEWART, Petitioner.—*Baillie.*

Statutes 4 *Geo. II, cap.* 21, *and* 13 *George III, cap.* 21—*When do the descendants of an emigrant to America lose their privileges of British subjects?*—The son and grandson of a person who had emigrated to America *held* entitled, although born and resident there, to the privileges of British subjects, so far, at least, as to give valid consents to a disentail.

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In a petition for disentail, the three consenting heirs were stated to be resident in America. They had been born there. They were the son and grandsons of a Thomas Stewart of Orkney, a natural born subject of Great Britain, who had emigrated to America, and the question was whether their consents were valid.

The Lord Ordinary remitted to Mr Ross, S.S.C., who reported that had Stewart emigrated and been a citizen of the States, and continued as such at the period of the treaty of independence in 1783, whereby the allegiance of American citizens to the Sovereign of Great Britain was dissevered, "it is apprehended that, upon the authority of the case of Dundas,[1] he and his children would have become aliens, and incapable of succeeding to heritage in Scotland; and if so, it is apprehended the said Archibald Douglas Stewart the elder and his two sons could not now be viewed as heirs of entail entitled to succeed to the said entailed estate of Brugh. Upon inquiry, however, the Reporter has ascertained, from family documents exhibited to him by the petitioner's agent, that the said deceased Thomas Stewart did not emigrate to America before the year 1802, and although he died there, his allegiance to the Sovereign of this country still continued, and consequently his children and grandchildren appear entitled to all the privileges of natural born subjects, in virtue of the statutes 4 George II, chap. 21, and 13 George III. chap. 21." The Lord Ordinary now reported the case, stating at same time that he had himself examined the documents referred to in the report and was satisfied that this person had not gone to America till 1802.

The Court therefore approved of the draft deed of disentail.

William Peacock, S.S.C.—Agent.

No. 104.

Duffus and Lawson v. Mackay and Others.

JOHN DUFFUS, AND WILLIAM LAWSON AND MANDATORIES, Petitioners.—*Macfarlane—Gorrie.*

A. F. & D. MACKAY AND OTHERS, Respondents.—*Penney—Mure.*

Ship—Bankruptcy—Arrestment ad fund. jur.—Act 17 *&* 18 *Vict. cap.* 104 (*Merchant Shipping Act*)—*Partnership.*—*Held* (in accordance with a majority of both Divisions, *diss.* Lord Deas), that under the Merchant Shipping Act a certificate of registry is such *prima facie* evidence of title to a ship, that the registered owners are entitled to unconditional recall of arrestments used by creditors of the former owners of the ship—such arresters averring and offering to prove that the transaction by which the ship was transferred to such registered owners was fraudulent and collusive. In this case ihe ship belonged to Nova Scotia, and was arrested at Leith while under the registry of the *debtor*. A transfer had been effected by him at Halifax after she had sailed, but before the date of the arrestments. At the date of the arrestments the transfer had not been intimated.

Observed, per Lord Deas, that the circumstances of this case were *prima facie* not favourable to the supposition of a *bona fide* transfer of the ship, the bill of sal

[1] Dundas v. Dundas, 13th Nov. 1839, ante, vol. ii. p. 31.

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being dated on the very day that the granter of it, and the company of which he was a partner, stopped payment.

The petitioners, Duffus and Lawson, were merchants in Halifax, Nova Scotia, and were represented in this action by their mandatories, T. and W. Campbell and Company, of Glasgow. This petition stated that Duffus and Lawson were joint registered owners of the barque "Ermina," of Halifax, now lying dismantled in the port of Leith. A certificate of registry was produced, bearing date "12th Septr. 1856—3½ P.M.," but the petitioners alleged that they had acquired the vessel about a month previously. They stated, that on 22d August 1856, the "Ermina" sailed from Richmond, in the United States, for Leith, where she arrived on 6th October 1856; but that, on her arrival, she was arrested *ad fundandam jurisdictionem* by trading firms in Liverpool and Glasgow. These arrestments were used by A. F. and D. Mackay, of Liverpool, and by other firms, as against the firm of J. E. Greenwood and Company of Liverpool—and John Edward Greenwood, the only partner in this country of that firm, and Simon Fitch Barss, and Daniel Kirkland Harris, merchants and shipowners in Halifax, Nova Scotia, also alleged partners of J. E. Greenwood and Company of Liverpool. The petitioners now prayed for recall of these arrestments. "They owed no sum to any of the arresters, but the arrestments had been used apparently in the belief that the vessel and freight were the property of J. E. Greenwood and Company of Liverpool, or Barss and Harris of Halifax, or of the individual partners of these firms, whereas the fact was, as above stated, that the petitioners became the registered proprietors of the vessel in August 1856." The petition was presented without caution.

Answers were lodged by the arresters. They denied that the petitioners were proprietors of the vessel. They set forth various debts for which decree had been obtained by them against the firm of Greenwood and Company; and they averred, that when these debts were incurred by J. E. Greenwood and Company, "the said Simon F. Barss and Daniel K. Harris were partners of the said company; and when the respective arrestments were used, the barque 'Ermina' was the property of the said company, or of the said Simon F. Barss and Daniel K. Harris, or one or other of them, and liable to be attached for the debts of the company, which suspended payment on or about the 6th day of September last. On learning that the vessel had arrived at Leith, the respondents were, in these circumstances, under the necessity of having recourse to the foresaid arrestments to secure payment of their respective debts." The answers also contained the following averments:—"It does not seem to be disputed by the petitioners that the said vessel was at one time the property of the firm of J. E. Greenwood and Company, or of one or other of the individual partners of that firm; but it is said that the petitioners are now the owners of the vessel, and that it became their property in the month of August last. Of this the petitioners have not produced any evidence. No bill of sale has been produced, and the pretended certificate of registry is not evidence of ownership. It is not framed in conformity with the requirements of the statute 17 and 18 Vict. c. 104, by which all such matters are now regulated; and even if it had been so framed, and were proved to be a true certificate of what it purported to contain, it would be altogether insufficient of itself to prove that any transfer of the ship had been effected in favour of the petitioners.—Scott and Gifford v. Kerr, November 25, [illegible].

Not only, however, has there been no bill of sale, or other legal evidence of the transfer produced, but it is averred that no such evidence exists, as no transfer of the ship was ever effected in favour of the petitioners. The vessel was not the sole property of Simon F. Barss, and he had no title to sell or execute a transfer thereof. But further, if any bill of sale or deed of transfer passed between the parties, it was not a *bona fide* transfer for

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onerous considerations, but a collusive and colourable transaction between conjunct and confident persons. The petitioner Mr Duffus stands in the relation of father-in-law to Mr Harris, and neither he nor Mr Lawson were creditors of the company." At 6th October, the date of the arrestments, the change of registry had not been communicated to the captain. This petition was not presented till 18th November, by which time the new certificate of registry had been transmitted. The transfer did not bear to include the freight, and it was not alleged that it did so.

On 23d January 1857, the Court pronounced the following interlocutor:—"In respect that the Judges of this Division of the Court are equally divided in opinion, direct this cause to be judged by the Inner-House Judges of both Divisions; and appoint the same to be heard, by one counsel on each side, before the Judges of this Division, with the addition of three Judges of the other Division of the Court."

The case was heard on 7th February. The petitioners pleaded;—That little harm could result, in ordinary circumstances, from arresting a debtor's funds in the hands of a third party, more especially if that third party did not hold any property of the alleged debtor, for the arrestment attached no specific subject, but merely the funds, if any, in the custody of that person. But it was very different with regard to a ship. Arrestment of a ship partook more of the nature of poinding. It was not followed out by a furthcoming, but by action and decree of sale, and the sale was immediate. It attached the subject, and laid a nexus upon it, and the right of ownership was at once transferred. For that reason, the proceedings must be rigidly scrutinised. Here the petitioners were not stated to be debtors of these arresters. There was not even a *prima facie* case here to the effect that this ship was truly the property, not of the petitioners, but of the debtors of these arresters. Nor could there be, for Duffus and Lawson were registered owners, and that of itself was sufficient to entitle them to have these arrestments recalled. Under the Merchant Shipping Act,[1] a ship could not be dealt with without a written title. The person entered in the register was so much owner that a vendition by him to a third party—the transaction being in good faith—would be good, and a reduction would not deprive that third party of his property. In a word, the registered owners were the owners of the ship. It must therefore be held *prima facie* that Duffus and Lawson were owners.

But it was said that the registry was not sufficient to prove their title—that the bill of sale must be looked at, and that the bill was informal. But in a summary proceeding the registry was conclusive, and it was incompetent to go to its acts and warrants. But the bill itself was unobjectionable. It bore to be executed "in the presence of J. W. Ritchie." The objection was, that this witness was not described: also, that the body of the deed was not in conformity to the statutory form. Admittedly, the body of the deed was not in strict conformity to schedule E of the Act, but section 9 empowered the Board of Trade to alter the forms, and this bill of lading was in strict conformity with the form issued by the Board of Trade. Such a document was not intended to be filled up by lawyers but by merchants and it would be too rigid to hold that such a critical objection as this would render the bill null, and all that had followed on it. On the contrary, the object of the Commissioners was to relieve the public of forms which were found to be inconvenient. This bill of sale had been received by the Registrar in England as a good bill of sale. Farther, bills of sale, such as this, were daily received by the custom-house officers in Glasgow, Liverpool, and London, although the witnesses were not designed. They were received a

[1] 17 & 18 Vict. cap. 104 (August 1856), sections 18, 19, 55.

not liable to any defect.[1] But none of these documents could be got at till the certificate of registry was cut down. It was *prima facie* evidence, and could only be cut down in a proper rescissory action. The presumption could not be overcome in a summary process.[2] Therefore the arrestments were incompetent, and ought to be recalled.

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Pleaded for the arresters;—This vessel was originally part of the stock of Greenwood and Company, and was registered in the name of Barss, a partner of Greenwood and Company, and debtor of the arresters. Unless there was proper evidence that the vessel had properly passed out of his ownership, she was arrestable by his creditors. The petitioners averred that she had so passed out of his ownership by virtue of an onerous contract of sale on 14th August 1856, and that they registered the transfer on 12th September 1856. The arresters averred, and were prepared to prove, that there was no such onerous sale—that the whole proceeding was collusive, and an intended fraud on the part of Greenwood and Company, and that in place of there being a sale on 14th August, there was in reality an assignation in trust for certain favoured creditors, made no doubt on 14th August, but being the day also which the arresters were prepared to prove was the date of the bankruptcy of these people. There was nothing to prevent the arresters proving these statements, or to compel the Court at once to recall these arrestments, and so let these parties take the vessel out of the jurisdiction of the Court. Nor were the documents founded on by the petitioners in terms of the Act. Therefore the Court could give no effect to them. But supposing them to be unexceptionable, the Registry Act did not bar the arresters from impugning them. The Registry Act had not in view to regulate the private title of proprietors but the privileges of vessels, and the certificate of registry was not conclusive evidence of ownership—neither on principle nor authority—so as to warrant the Court to declare the mere production of it a sufficient title in a disputed transaction. It would lead to the greatest injustice even if held *prima facie* evidence of ownership, for it would enable a party easily to defeat the rights of creditors where a transaction was most collusive. There was no declaration in the Act that such a certificate should be *prima facie* proof of ownership. It was only *prima facie* evidence of registration.[3] The petitioners had no case unless they could shew that the ownership of the vessel had been competently and effectually taken out of the hands of the original owner.[4] The bill of sale must be in terms of schedule E of the Act. The words of the Act were imperative. It must be executed in presence of, and be attested by one or more witnesses.

But it was said that the Commissioners had power to alter this, and so had issued a form in accordance with which this bill of sale was executed. There had been an intentional alteration by the Commissioners of the schedule, requiring that the residence and description of the witness should be inserted. Section 96 first directs the Commissioners to issue forms in accordance with the statutory schedule, and second, to make alterations with consent of the Board of Trade, and after due public notice. This form was issued under the first duty imposed on the Commissioners as a statutory schedule. It was issued in April, the statute took effect in May, and this schedule had been acted on ever since. The statutory requisition contained in the

[1] M'Arthur v. M'Brair's Trustee, 20th June 1844, ante, vol. vi. p. 1175; Ord v. Barton, 3d July 1846, ante, vol. viii. p. 1011; Smith's Maritime Practice, p. 66.

[2] Sect. [illegible] et seq.

[3] Sect. [illegible]; Scott v. Gifford, 25th Nov. 1828, and 10th Nov. 1832—(See op. of Lord [illegible]); Abbot on Shipping (10 ed.), p. 209, *note*.

[4] Sects. [illegible].

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schedule, requiring the description and place of residence of the witnesses to be inserted, was not inserted in the form. But why? not because the Commissioners intended that the description and place of residence of the witness should be omitted, but because in the blank the actual description and place of residence itself were to be inserted. It would be absurd to say that the statutory directions were to be inserted in that blank, which was left, not for the direction, but for the description itself. And so with other details—*e. g.* the word "signed," was not in this blank, because the signature itself was to be there; but it might just as well be maintained, that because the statutory direction to sign was not there, that therefore the Commissioners had done away with the necessity of a signature. This was a mere schedule to be filled up, but to be filled up according to the instructions of the statute; and if the registrar had received bills of sale in which these formalities had not been observed, he was either neglecting or misunderstanding his duty. The description and place of residence of the witness was not a form, but a statutory requisite. The bill of sale, therefore, being defective, was no evidence of title. The ship stood in the person of Barss; and when these arrestments were asked to be recalled at once, on the ground that the petitioners had acquired the ship from Barss, the first requisition was to give evidence of the transfer. The only evidence could be the statutory evidence, and that was altogether defective.—A correspondence was also produced, to shew that the averments of the sale being collusive were not made at random; and it was stated that a furthcoming, containing rescissory and declaratory conclusions, had been raised.

Of this date the case was advised.

Lord Justice-Clerk.—This is a petition to recall arrestments of a ship as incompetent, and to free and disburden the ship thereof. In disposing of that petition I cannot proceed on any other rules than those which regulate this Scotch diligence, and which, in particular, are applicable to the necessary remedies for rendering that diligence effectual.

This ship, sailing from the Port of Halifax, is by the certificate of registry stated to be, in terms of the statute, the property of the petitioners. The certificate is issued by the proper party, the registrar of the port. It is complete in all its particulars, and is regular in point of form. It states the former owner and seller, the date of the bill of sale, with which the registrar had been satisfied. The certificate bears, which is its object, to certify that it is a complete copy of the register-book of transactions relating to ships registered under the Act of Parliament referred to. The petitioners are thus the registered owners of the ship, and so the certificate vouches and authenticates.

The respondents have asserted their ship as the property of other parties, said to be their debtors, and maintain the competency of such an arrestment.

In the ordinary case of moveables, to which there is no written or statutory title it is no objection to the competency of an arrestment that the arrestee says he ha no funds of the common debtor, or that the same thing belongs to himself by virtu of preference, compensation, or otherwise. For, in the furthcoming, he can appea and assert and make good his right; and, if he is confident of his right to th money, may use it in the meantime.

But, when there is an actual written title to a subject, say rents of lands, vesting th right so long as it stands unchallenged in A B, and especially if that title is statutory title, no arrestment can competently be used, according to rules applicabl to such diligence, in direct contradiction to that title. The competency of a arrestment will generally be found to be well tested by the competency of settlin the matter of right, and making the arrestment effectual in a furthcoming. Nor in the case of Loudon and Company v. Young, 21st May 1856, in which a part arrested for the debt of a husband the rents of land vested by a feudal titl in the wife, it was found, without any hesitation, that, in a furthcoming, it w competent to challenge the title to the property, or to convert that action into reduction or declarator, and to establish that the property had been bought with th husband's money, or was a fraudulent transaction to protect his property again his creditors; and, hence, that the arrestments were wholly ineffectual.

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Now the question here is,—is there a title to this vessel sufficient to protect it from arrestment *de plano*, on the averment that it is the property of other persons? The attempt to deny that effect—indeed any effect whatever—to the register of the vessel has been to me matter of the greatest astonishment. The vessel can have no other sailing title than that produced. It is a statutory title, and her only sailing title. The property is not disowned by the parties registered as having been made up without their consent or knowledge. They claim the vessel as the registered owners. In no other way can the ship be stated to be the property of any one. It has received this statutory stamp of ownership. Then is this title denied effect by the arrestment or not? The pleas of the party put that beyond doubt; for, in support of the arrestment, they propose to go back even on the bill of sale, and desire the Court to refuse effect to that,—1st, on account of alleged *ex facie* objections to the bill of sale, but chiefly that it was a false and fraudulent transaction; the ship, again, not being truly the property of the former registered owners, whose title is also to be challenged; or that, at all events, the sale was one in trust for the behoof of a body of creditors, and that the petitioners now fraudulently claim it as their private property; and, in order to sustain the arrestment, they ask for proof of their averments, the bare mention of which shews at once, to the satisfaction of my mind, that the arrestment was wholly incompetent, and that they must establish and make out a great deal indeed before the *prima facie* and only title to the ship is to be disregarded.

That the petitioners are registered as the owners of the vessel is not disputed. The certificate, indeed, is declared to be *prima facie* evidence of what is in the registry. Hence, having the registry in this way before us by the certificate, the question is a very simple one, is the registry not a good *prima facie* title in favour of the party registered by the officer on evidence complete to his mind as the owner?

The attempt to go back on the bill of sale, and then on the right and title of the seller, in defence of this arrestment, illustrates most emphatically to my mind that the arrestment used in disregard of the registry is incompetent, for we now see what must be made out in order to have the slightest appearance of a warrant to deny effect to the registry. I say to the registry, for the certificate is declared to be *prima facie* evidence of what is on the registry.

I give no opinion as to whether an action may be brought to cut down or to find the registry cannot receive effect, whether by challenging the transaction as a fraud by Barss the seller as not the true owner, or because the petitioners hold in trust for creditors, or on any other ground—or whether an arrestment might at once proceed on such an action, or whether the title by the register would not equally exclude any such summary diligence. Such questions are not before us. I abstain the more, because there may be very nice questions, not only whether the allegations are competent in any shape, but also whether these questions can be tried and adjudicated upon in this country, or only in the Courts of Halifax. We have only to deal with an arrestment upon action raised against third parties, and on the assumption, in direct face of the registry, that the ship belongs to these parties, and can at once be attached as their property. I never saw a more flagrantly incompetent proceeding.

Something was suggested as to the respondents' finding caution, as the condition of sustaining the arrestment,—1, That can only be done if the arrestment is competent; and, 2, if competent, the party is entitled to have a judgment to that effect [illegible] the petition.

An attempt has been made to induce the Court to sustain the arrestment by the [illegible] papers, which, it is said, raise a suspicion or distrust of the [illegible] on the face of the registry. There is nothing more hazardous [illegible] the competency of diligence or the effect of regular titles, than [illegible] entertain suspicions that there may be,—for it is only the [illegible] mind—something wrong, what it is we cannot tell, at the bottom [illegible]. The Court would be in a strange position if we acted on such [illegible] the arrestments, and then, when the challenge is tried in a [illegible] evidence, it was found that there was no ground whatever [illegible]

[illegible] an action first raised of furthcoming, in which it was

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stated rescissory and declaratory conclusions had been introduced. I give no opinion on that apparently anomalous furthcoming, because it is still a furthcoming, intended to render effectual the arrestments before us, and, if these are incompetent, we cannot refuse to recall because a furthcoming has been used. The other conclusions *ex concessis* of the theory of such an action must proceed and receive effect before the furthcoming can be effectual, and this exhibits strongly what is necessary to render the arrestment competent. If these arrestments shall be sustained, there is not a ship sailing under the British flag and under the British Registry Acts, which may not be at once attached as somehow the property of, or because it ought to be found to be the property of, some unknown parties, debtors to the users of the diligence,—notwithstanding the perfect regularity of the registry, exhibiting one party as owner in his own right.

I am not prepared to face that result.

Lord Murray.—This case is entirely a question of averment. The real question is, whether there is a good ground of arrestment? It does not appear to me that this arrestment is competent. No sufficient ground has been shewn for it. To say that this is a fraudulent conveyance is not enough. If it be fraudulent there are means of redress. But we must give effect to the petitioners' title till it is laid aside.

Lord Cowan.—The first of the arrestments sought to be recalled was executed *ad fundandam jurisdictionem* on 9th October 1856. Of same date, arrestment in security followed on proceedings instituted by the respondents, Mackay and Company of Liverpool, and Mandatory, directed against Greenwood and Company of Liverpool, and the individual partners of that firm, viz., Mr Greenwood of Liverpool, and Messrs Barss and Harris of Halifax, Nova Scotia.

The arrestment of the ship sets forth that these parties, or one or other of them, are the owners of the vessel; and the arrestment of the freight proceeds on the same assumption.

The arrestments used by the other respondents, which are of later date, are in similar terms.

The petitioners ask for recall of the arrestments on the ground that the vessel thereby attached is not the property of Greenwood and Company, or of any of the individual partners of that firm, but belongs exclusively to them; and their plea is that the arrestments used by the respondents are for that reason illegal, and ough to be recalled without caution.

The petitioners maintain not only that the respondents have failed to prov their allegation of ownership, but they refer to the certificate of registry, whic bears that the original owner of the vessel, Simon F. Barss, had transferred t them the vessel by bill of sale, dated 14th August 1856, which was followed by a entry in the Registry at Halifax, dated 12th September 1856, 3½ P. M. No objec tion is taken to the correctness of the entry in the Registry or of the certificat produced, but the formality of the bill of sale has been objected to, on grounds t be afterwards noticed.

Supposing the objection to the bill of sale not fatal to the formality of the titl I am unable to discover any sufficient legal ground for refusing to it effect in th question; and if it is to receive effect, then these arrestments must, in my opinio be held illegal, as an attachment of property not belonging to the debtors of th respondents.

A party who comes into Court asserting ownership in British shipping, and a vancing claims on that footing, is bound to instruct his title as owner. The case Walker v. Pollock, 5th March 1825, and other cases, establish that propositio But where creditors seek to attach shipping property as belonging to their debt the same *onus* lies upon them. They must instruct the legal right and title und the Registry Acts to be in their debtor. And if, instead of satisfying this *onus*, t Registry, when produced, or a certified copy of it under section 107, shews th the legal title is in other parties, the attempted attachment of the vessel cannot b be challengeable.

The allegation is, that the transfer to the petitioners was not in *bona fide*, b collusive and colourable only, and in defraud of the creditors of Greenwood a Company, or of Mr Barss, one of the partners; and hence it is maintained that t title relied on by the petitioners is to be disregarded. In some of the letters which reference is made in the summons, it is not disputed that an assignation

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transfer took place, but it is asserted that this transfer, though *ex facie* absolute, was for behoof generally of the creditors of the original owners. The proceedings taken by the respondents, however, are for their own individual behoof.

From the dates it will be observed that the completion of the sale to the petitioners by entry in the Registry took place on 12th September 1856, about a month before the first arrestment of the vessel. It is stated in the petition that she sailed from Richmond on 22d August, and arrived in Leith on 6th October. The bill of sale bears to be dated 14th August, and the entry in the Registry having been delayed until 12th September, must have been made when the vessel was on her voyage. The fact of the sale having been thereby completed, had, however, been communicated to the master; and so soon as the first arrestment *ad fundandum* was laid on, his agents in Leith intimated on same day—9th October—to the agent of the respondents, that the property of the vessel was in the petitioners; and that any farther proceedings with the view of attaching her as for the debt of Greenwood and Company, or of Mr Barss, would be objected to as illegal. This intimation would not in itself justify interference with the respondents' diligence. But there has since been transmitted the certificate of registry to which I have referred, with the relative deed of sale.

There may or may not be ground for the allegations of the respondents as to the fraudulent and collusive nature of the transfer to the petitioners. That question, as it appears to me, cannot be entertained in these proceedings. Effect must be given to the legal title of ownership *ex facie* in the petitioners—to whatever challenge their title may be exposed on competent grounds and in any Court of competent jurisdiction.

The entry of ownership in the Register, especially when supported by a bill of sale, is not to be got the better of in the summary manner proposed by the respondents. The 107th section of the recent statute may be held to support that view. But, irrespective of that special provision, I apprehend it to be the rule in all cases such as this, in which the property in shipping behoves to be instructed, to hold the Registry, until regularly impugned, good evidence of the title. Now, neither the bill of sale nor the Registry gives the slightest support to the allegations of the respondents. *Ex facie*, the transaction purports to be a completed transfer from the original owner Mr Barss to the petitioners, in consideration of the sum of L.3000, whereof the receipt is acknowledged. I apprehend that to get behind the title, so as to bring back the vessel into the condition of being truly the property of their debtors, and attachable for their debts, the respondents must institute proceedings against the petitioners. It is out of the question, without proceedings of any kind directed against the holders of the legal title, to attach property for the debts of parties who were, prior to the date of such attachment, divested of it. The *ex facie* title must be reduced and set aside, or in some competent way rendered unavailable, before the rights of the party claiming under it can be interfered with in the manner attempted.

The respondents did not in their argument refer to any authority sanctioning the proceedings they have adopted. I am not aware of any case in which an attempt like this has been made to get beyond an *ex facie* regular title, without reductive or declaratory proceedings directed against the party vested with the property under that title. In a recent case, which occurred in the Second Division of the Court, this principle was given effect to, as has been explained by the Lord Justice-Clerk. The case is Loudoun and Company v. Young and others, 21st May [illegible].

I do not express any opinion whether arrestments taken as in proceedings against the petitioners, would, or would not, be effectual. The question which would then [illegible] for the decision of the Court would be in many important respects different from the present. No such proceedings have been instituted. This being so, I think it [illegible] that the arrestments are incapable of support; and that it would be a serious, and, as I think, a perilous precedent to entertain this diligence with the view of [illegible] pointed at by the respondents. There are, in truth, no *termini* [illegible] it in these proceedings.

[illegible] have alleged that the bill of sale produced by the petitioners [illegible], and ought not to be sustained as legal evidence of their [illegible] vessel. I do not wish to express any opinion on the alleged

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invalidity of the bill of sale. It seems to me sufficient for the decision of this case, that it has been framed by the public officers in Halifax, and been held sufficient evidence to justify the entry of the transfer in the Registry in favour of the petitioners. They must be taken *hoc statu* as in the right of ownership.

No special case has been made with regard to the arrestment of the freight. The vessel had sailed on her voyage from the United States before the completion of the transfer by entry in the Registry. But that took place before completion of the voyage. Till then—*i. e.* arrival of the vessel at Leith—the freight of that voyage was not earned, and it is that freight which has been arrested. Farther, it would seem that the only arrestment to found jurisdiction was of the vessel. At any rate no distinction has been taken. The arrestment of the freight must therefore follow that of the ship, and be recalled.

Lord Ivory.—I cannot say that I have a very clear opinion upon this case. I formerly thought that we should have a better statement of facts. But we have not got that; and therefore resuming consideration of the merits on the averments of parties such as they are, I have come to be of opinion that the arrestments should be recalled, in the first place, on the competency; in the second place, on the special circumstances in which the arresting parties are now before the Court. This vessel was originally registered in name of Barss, and the arrestments are laid on the ship as his property; but, at that date, a change had taken place in the registry, and the ship stood as the property of Duffus and Lawson. In that simple view of the matter, it is not necessary to ask whether the title of Duffus and Lawson be a good title of property. The entry in the registry is a requisite without which there could be no title of property; and the more important consideration appears to be this, that the party arresting the vessel as the property of Barss must be prepared to show that it is the property of Barss. Now, as against the registry no such conclusion can be incidentally or indirectly arrived at. It may be arrived at by cutting down the certificate of registry, which is *prima facie* evidence of right; but until it is made good that Barss is the owner of the vessel, arrestment of th vessel as against him seems to be incompetent. Much more am I disposed to hol this opinion; for, so far as the case has gone, no step has been taken to call th certificate in question. And that leads me to the second ground, that these arrest ments are taken out so far back as 30th September 1856. The first arrestment 9th October 1856. We are now at the 13th February; and after the lapse of many months, no proceeding has been taken to clear up and explicate the rights the parties as arresting creditors. There ought to have been something done that course of time. It is not proposed that these arrestments shall stand ov indefinitely. There has been time at least to begin to challenge the right; and that ground of expediency, in the exercise of the discretion of the Court, I am di posed to recall the arrestments. As to some matters, however, I am still puzzle On 6th October, the change in the register had not been intimated to the captai or any one else. This voyage, therefore, was under Barss's registration; and befo the bill of sale or registration was communicated to the arresting creditors, th have laid on their diligence with reference to the faith of the existing registry. is not till the 7th November that the new certificate is communicated. It is ve true, that in a letter of the agents of 9th October, it is stated that the shipmas had heard something of the sort. But there is no evidence of that, nor anythi which could have affected the movements of the ship. I am not prepared to s that this could affect the weight of this judgment. But it is awkward that t Court should be left so ill informed.

Lord Cuninghame.—The arrestments, in virtue of which the ship in questi has been detained in the port of Leith since October last, at the instance of t respondents, merchants in Liverpool and Glasgow, were executed as the initial st of legal diligence for securing payment of debts said to be owing to these parti either by a company called J. E. Greenwood and Company, merchants in Liverp or by a company called Barss and Harris, in Halifax, Nova Scotia. The petiti ers, who are not alleged to be liable for these debts, have applied to the Court have the ship relieved from this diligence, in respect that she belongs exclusi to them; and, in support of this application, they have produced not only existing certificate of registry, bearing that they have been the registered ow of her since the 12th day of September last, but also a bill of sale dated the 1

of August, on which that registry proceeded. The arresters resist this application, on allegations which, as stated in their printed answers, are not quite intelligible or consistent, but which, as explained at the oral debate, come, as I understand, to this, that the granter of the bill of sale was a Mr Barss, one of the partners of the company above mentioned,—that the consideration for which it was granted was not the payment of a price, as is set forth in the document, but to satisfy or secure debts previously owing to the petitioners and others; and that Barss, and the companies of which he is a partner, stopped payment about that time.

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The question is, whether, in the face of the title which the petitioners have produced to the ship, the respondents are entitled to insist on her being still detained under diligence which authorises them to attach only the effects of their own debtors? It must be kept in view that the question now before us is this, and not whether the respondent, in a proper possessory action, would be entitled to an interdict. If they had instituted proceedings for rescinding the transfer from Barss to the petitioners, and for having the name of Barss restored to the registers, and had applied to this Court to interdict the petitioners from removing the vessel during the dependence of such an action, the case would have fallen under a different category; and it might have been in the discretion of the Court to regulate the interim possession or custody of the vessel on such conditions, or caution or otherways, as might have appeared to them to be proper in the exercise of a sound discretion.

But with reference to the only question now before us, I am of opinion that, at the dates of the arrestments in October last the ship was not attachable by arrestment or otherways, as being the property of Barss, or for payment of his debts; because, *ex facie* of the then existing register, he was not an owner of her or of any part of her. According to the provision of the Merchant Shipping Act, 1854, no party can be recognised by a Court of Law as being the owner of a British ship, unless he be entered as such in her register. But Barss' name did not appear on the ship's register, as it existed at the date of these arrestments, and as it still exists. This appears from the official certificate produced, which, by the 107th section of the statute, is legal evidence of the contents of the register. On the contrary, on the face of that register, the petitioners then stood, and still stand, as the only owners of the ship; and, as such, they, in terms of the 43d section of that statute, had "power absolutely to dispose of her, and to give effectual receipts for any money paid or advanced by way of consideration for her." I therefore think that the Court cannot competently, in this state of matters, sustain the diligence which has been commenced by the creditors of Barss for attaching this ship as being his property; and that the enquiry into which the respondents propose to enter in support of this diligence is inadmissible.

Even if they had alleged that the petitioners held the vessel under a latent trust for Barss, or either of the companies of which he is said to have been a partner, such an inquiry would be inadmissible in the face of the register. This would have been incompetent under the former Registry Acts, according to the cases of Macarthurs, 20th Jan. 1844, and Ord v. Barton, 3d July 1846. And it is at least equally incompetent under the provisions of the existing statute.

It may be observed, that in these two cases the question in legal effect was—Whether the ships were arrestable for the debts of companies for whose behoof they were said to have been held by the individuals whose names were on the register? because the claimants were the trustees under sequestrations of the estates of those companies, and these sequestrations were by the Bankrupt Act to be equivalent to completed arrestments? If, in virtue merely of these statutory arrestments, the trustees, as arresters, had caused the ships to be dismantled and detained, applications by the registered owners to have the ships released from such attachments could not have been successfully resisted on the allegations of the trustees that the vessels belonged to other than the registered owners, since such allegations were held to be inadmissible in the face of the register in ordinary judicial procedure. I [illegible] that the prayer of this petition must have been granted, even if the [illegible] produced nothing more than the certificate of registry. But they [illegible] that title by producing also the bill of sale in their favour. The [illegible] of that document is not disputed. No objection is stated to it, [illegible] subscribing witness is not designed in the manner directed in the [illegible] annexed to the Merchant Shipping Act. But in the present discus-

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sion, at all events, I do not think that effect could be given to that objection, even if the question turned, not upon the register, but upon the validity of the bill of sale, in respect that the 55th section of the statute, although it requires a bill of sale to be attested by one or more witnesses, does not expressly enact that the designation of these witnesses must be inserted,—that although the bill of sale is directed to be according to the form of a schedule in the appendix, or as near thereto as circumstances permit, and in that schedule there is a direction to insert the description and place of residence of the attesting witness or witnesses, there is no enactment that the omission of that direction shall nullify the bill of sale,—that, on the contrary, by the 96th section, the Commissioners of Customs are authorised to supply forms of bills of sale, with such alterations thereon as they, with consent of the Board of Trade, might think proper to make,—that the bill of sale in question, which consists of one of the schedules so issued by the Commissioners of Customs, differs in several particulars from the schedule in the appendix to the Act, and *inter alia* in not containing the direction above mentioned as to the insertion of the description and place of residence of the subscribing witness or witnesses, —that, accordingly, the Registrar himself held the bill of sale as it stands to satisfy the requirements of the statute, inasmuch as he not only entered the names of the vendees in the register as the owners of the vessel, but made the statutory indorsement on the bill of sale itself,—and that he did so, although, in terms of the 11th section of the Merchants Shipping Act Amendment Act 1855 (18 & 19 Vict. c. 91), he could not have been required to do these things without the express directions of the Commissioners of Customs, if the transfer had been in any form other than that prescribed and approved by, or in pursuance of, the Merchants Shipping Act 1854.

Even if the inquiry offered by the respondents had not been incompetent in this application, I would not have been prepared to sustain the relevancy of their allegations. These allegations, as stated in their printed answers, are vague, unintelligible, and inconsistent; and their import, even as stated by them at the oral debate, was not that the ship had not been truly transferred to the petitioners, nor even that the consideration for which she was transferred had not been onerous, but only that the transfer, instead of having been an absolute sale to the petitioners, for a price paid down at the time, was granted in satisfaction or security for prior debts owing by the vendor to themselves or others of his creditors. And even assuming the truth of that statement, and that, moreover, Barss and the companies of which he is said to have been a partner stopped payment about the time when the bill of sale was granted, yet, as neither he nor these companies are alleged to have been rendered bankrupt, would these allegations be sufficient, according to the law of Nova Scotia, to have entitled the respondents to have that bill of sale declared to be a nullity, and Barss's name restored to the register, so as to entitle them, by separate diligence at their own instance, to acquire a preference over the other creditors? This was not alleged by the respondents, either in their answers to the petition or at the oral debate. And as the decision of such a question would depend on the law of the colony, I think that, in the absence of such an allegation, the grounds upon which the respondents oppose the recall of their attachment of this vessel by legal diligence are irrelevant as well as incompetent.

Lord Deas.—The ship here in question arrived at Leith on 6th October 1856. She was then sailing under a certificate of registry which bore that she was the property of Simon Fitch Barss, a debtor of the respondents. She had no papers except this certificate of registry. In this state of matters, the respondents, availing themselves of their legal rights as creditors of Barss, used arrestments of the ship and freight, for the double purpose of founding jurisdiction against their debtor, who was out of the kingdom, and of attaching the vessel in security and for payment of their debt, for which they afterwards obtained decree. Their actions and arrestments were also adapted to cover the case of Barss holding the ship as trustee for the company of which he was a partner. But that makes no difference here,—the simpler view being to take the case as if the actions and arrestments had been against Barss alone. The agent for the respondents Duffus and Lawson intimated an objection to these arrestments on 9th October, on the ground that the master "has received notice from Barss and Harris of Halifax that the vessel *now* stands registered there in name of John Duffus and William Law

son, their assignees." At this time there was obviously no evidence of the alleged transfer in this country. Neither the master nor the agent had seen it, and consequently it is misdescribed in this letter as flowing from Barss and Harris, whereas it was granted by Barss alone. Accordingly, in his letter of 11th October 1856, the agent for Duffus and Lawson writes, "The vessel having been transferred and registered *after she left Halifax*, we cannot show you any indorsement on the certificate of registry." About a month after the first arrestments had been used, the master seems for the first time to have obtained possession of the certificate of transfer from Barss to Duffus and Lawson, and thereupon this petition was presented for recall of the arrestments. The respondents resist that recall (unless caution shall be found) on the twofold ground—1st, that the bill of sale is *ex facie* defective and disconform to the statute; and 2d, that it is collusive and fraudulent.

Now, if we were here in an action of forthcoming, or in an action of sale, the question would arise, Whether and to what effect the grounds of objection to the transfer could be competently investigated and decided in such an action? But that is not the position in which we are now placed. The question at present is, Whether, by the instant and unconditional recall of these arrestments, the arresting creditors are to be deprived of all opportunity of establishing, in such form of action as may be requisite, that the ship, which, but for this transfer, unquestionably was and would still be the property of their debtor, truly is and has all along been his property; and that this freight, which, for anything I see, never was in any way assigned over by him, is still also his property? For this purpose, the respondents have stated they intend forthwith to adopt all necessary proceedings, and have already raised an action of reduction and declarator, to negative and set aside the transfer. Now, however clear it may come to be, by the result of these proceedings, that the ship and freight remain, as before, the property of Barss (whether for himself or his partnership), any judgment to that effect will be of no avail, if in the meantime the arrestments are unconditionally recalled, the freight uplifted, and the ship carried (as of course it will be) out of the jurisdiction of this Court. Arresting of new, as the property of Duffus and Lawson, even if there should be opportunity for doing so, will not prevent this injustice,—for, if the ship and freight be not the property of Duffus and Lawson, such arrestments will be inept. The only safe course seems to me to be to allow the existing arrestments to stand; and although other arrestments should be used, upon the footing that the ship and freight belong to Duffus and Lawson (to meet the event of this being so found), there would be no incompetency in that course, which was the course followed in Connon v. Ballinten, 14th Nov. 1848, where both sets of arrestments were allowed to stand—the one set being used upon the footing that the ship still belonged to the bankrupt, who, prior to sequestration, had conveyed it by a transfer said to be collusive and fraudulent; and the other upon the footing that the ship belonged to the vendee, who there, as here, had obtained himself entered in the registry as the owner.

If the arrestments are allowed to stand, justice may ultimately be done. The parties using them are responsible for the consequences, if they have used them nimiously and illegally. If your Lordships think these parties ought to find caution, I have no objections to their being called upon to do so. Those of them who are within the jurisdiction could have very little motive for declining to do so, for their responsibility will be the same either way. But, although that question was put expressly to Duffus and Lawson, it has never yet been put to the respondents. They have not even had an opportunity of making and meeting averments in the ordinary form of condescendence and answers. The material allegations of fact, and the pleas in law, rest equally upon verbal statement at the bar. And in this state of the case, it is proposed to sweep away, at once and unconditionally, the whole arrestments, including even those used to found jurisdiction against the debtors, who have not been made parties to this application,—the consequence of all which will be, that, if this transfer be actually fraudulent and collusive, justice never can be done, at least by this Court.

I cannot concur in that course. If indeed it could be shewn that the existence of this transfer, and its entry in the registry, rendered the arrestments *incompetent*, [illegible] a great deal to be said. But I am not prepared to hold that every [illegible] his power, by a transfer of this sort, at once to render the diligence

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of arrestment by his creditors incompetent, although the transfer may be a mere juggle, and the ship all the time truly remains his property. I think the creditors here, who found the ship sailing in this country as the property of their debtor, who had been the registered owner of her for years, were entitled to arrest her as such; and that when a transfer, granted as this was, is produced against them, they are entitled to reasonable time and opportunity for setting it aside; the effect of which would be (if they proved successful), to sweep that transfer away as if it had never existed. If there shall be undue delay in following out proceedings for this purpose, the Court may recall the arrestments on the ground of *mora;*—but *that* is not a ground which as yet enters, or is alleged to enter into this case. A creditor may have a material interest that his diligence shall stand as of a particular date. He is not bound, in all circumstances, to sweep away every colourable and collusive title before resorting to that diligence. He may poind the moveables of his debtor in the possession of a third party, although possession usually presumes property; and he may arrest the moveable property of his debtor, although the debtor has given a collusive and fraudulent written title to it to a third party. No doubt, if your Lordships think that there are no grounds even *prima facie* for suspecting the *bona fides* of the vendee's title, you may, in the exercise of your discretion, recall the diligence so long as that title shall not be set aside. But the diligence is not necessarily *incompetent.* And, if we are to go upon the circumstances, we ought to see what the circumstances are. Here, even as the case stands, they are *prima facie* not favourable to the supposition of a *bona fide* transfer of the ship. The bill of sale is dated on the very day that the granter of it, and the company of which he was a partner, stopped payment. It bears to be absolute, and for a price paid of L.3000. One of the partners says, he understood it to be for the benefit of all the creditors. Barss and Harris say, on the other hand, it was a purchase long ago made from them, and that, if the Scotch law favours the attachments, the purchasers will fall back upon their estate for the price, and cause them a loss of L.5000. One of the alleged purchasers is the father-in-law of Harris, the partner of Barss the seller. And, in short, there is no reason to think that the respondents are in *mala fide* in maintaining that the transfer is something different from what it *ex facie* purports to be, or that Duffus and Lawson are in *bona fide* in alleging that the ship has become theirs by a fair and absolute purchase. There is thus no ground for holding this to be an abuse of the diligence of arrestment, any more than for holding the diligence to be incompetent; and, in this state of matters, even apart from any technical objection to the bill of sale, I should not be for interfering without caution with parties using their legal rights by resorting to the ordinary diligence of the law, which is all that has been done here. The objection to the bill of sale, however, appears to me to be *prima facie* well founded,—the bill of sale being disconform to the statute,—and this, of course, strengthens my objection to the unconditional recall of the arrestments against the ship.

As regards the freight, which is not alluded to in the bill of sale, I do not see even an allegation that it belongs to the petitioners. The vessel had sailed, and consequently the contract of affreightment had been entered into before she left the foreign port; and the petitioner's statement (in their agent's letter of 11th October) is that the vessel had been transferred while at sea, whether before or after the contract of affreightment was made, is nowhere stated. There is no explanation whatever of the grounds on which the freight is said to belong to the petitioners, and no averment even that it does so.

I have only to add, that I am not satisfied that this application should in any view have been disposed of without making up a record, and without bringing into the field the respondent's debtors, before proceeding on the footing that the ship and freight, which have been attached as their property, are truly the property of other parties. If it were clear that these parties ought to be in the field, I have no doubt it would be *pars judicis* to order them to be called, as was held by the House of Lords in Bell v. Willison (1 Shaw's Ap. p. 220), and by this Court in Bennet and M'Farlane v. Burgess, &c., 27th May 1828. But I do not say it is clearly necessary to call these parties, and I do not rest my opinion upon this ground, but upon the other and more substantial grounds already stated.

Lord President.—I retain the opinion I formerly entertained. These arrestments should be recalled. The case of a ship is a peculiar one. It is peculiar as

affects the nature of the property itself, and peculiar also as regards the nature of the title to that property. It is peculiar as to the manner in which the arrestments once laid on are to be followed up. Therefore, it is a case in which we are not to be led into the ordinary course of *in dubio* requiring caution. We must see our way more clearly in regard to the arrestment of a ship than in the ordinary case of arrestment, and parties residing in the colonies, at a distance from caution, are more especially entitled to every consideration in a question of arrestment.

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Now this ship appears, in the title produced to us, to be not the property of Greenwood and Company, or any partner of them, but of Duffus and Lawson. Upon the face of that title I see no clear nullity, nothing which shews an attempt to transfer the vessel improperly and ineffectually from the original owners to these persons now in possession. On the contrary, the certificate of registry and bill of sale are *ex facie* good; and that being so, I cannot listen to these vague allegations of a collusive transaction, whereby it is said there is something improper in the apparent transfer to these parties. If we were to enter into an inquiry as to the nature of the right in this ship, and to have proof of the facts adduced from Halifax, and then to inquire as to the law of that country, and its effect upon this transaction, we would in effect expose these petitioners to all the evils which could arise from this vessel being detained till an ordinary action should dispose of this question. There is nothing in their title to lead me to hold that this vessel did belong to a debtor of the arresters at the date of the arrestments, but to another party, and I am for granting that party his demand to have the arrestment recalled. Nothing was said to us about the freight, and therefore I do not farther allude to it.

The Court pronounced the following interlocutor:—"The Lords of the First Division of the Court having, along with three Judges of the other Division of the Court, heard the counsel for the parties, their Lordships of the First Division, after consulting with the other Division of the Court, and according to the opinion of the majority of the Judges present at the hearing, recall the arrestments mentioned in the petition, free and disburden the ship and freight mentioned in the petition of the said arrestments: Appoint the arresters, at least Cunard, Brett, and Austen and mandatory, mentioned in the petition, to restore the rudder and apparelling of the said vessel, and authorise the master, Elisha Card, mentioned in the petition, to resume the direction, possession, and control thereof, as if no such arrestment had been used, and decern: Find the arresters liable to the petitioners in the expenses of process," &c.

Robert Finlay, S.S.C.—John Harvey, S.S.C.—Agents.

Robert Williamson, Senior, and Robert Williamson, Junior, Pursuers. No. 105.
—*Pattison—Fraser.*

Robert Kennedy, Defender.—*D. F. Inglis—Gifford.*

Lease—Rei interventus—Proof.—A tenant sublet part of his farm, and made in his note-book a jotting, which was signed both by himself and the sub-tenant. Possession followed in terms of that jotting. *Held* (*abs.* Lord Wood), that the tenant, who averred that the jotting produced in an action against him for the rent, was not the one he signed, but was false and fabricated, must undertake an improbation of it; and having done so, *held*, on the evidence, that he had failed to prove his averment.

Writ—Pencil writing.—Question, Whether pencil writing is entitled to be viewed as favourably as writing in ink?

The Williamsons, a father and son, brought, in the Sheriff-court of Dumfriesshire, an action against Robert Kennedy for L.40, "being the debt owing for the pasturage of a portion of the farm of Clockclowie."

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I

The pursuers had been tenants of this farm, which consisted principally of moorland, but they had taken a farm in Ireland, and had already removed part of their stock thither, when the junior pursuer let to the defender, they

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said, the whole pasture on the south side of Clockclowie, except the meadow. A memorandum of the agreement was at the time made by the junior pursuer in his note-book, and was subscribed by him and by the defender. As produced in process, it was in these terms:—"*Kirkconnal*, 1853.—I have let to Mr Robert Kennedy the whole of the south side of Clocklowie, except the meadow, from 1st April till Whitsunday 1853, for L.40 sterling. (Signed) R. WILLIAMSON. ROBERT KENNEDY." The defender had entered into possession with a stock of sheep, which he finally removed without paying any rent, and hence the present action.

The defence was, that the writing did not truly represent the bargain made; and, with the exception of the date and place, and the defender's signature, was false and fabricated; the rest of the original writing having been rubbed out and obliterated, and the present fabricated and substituted in its place. The whole lands, and not merely the south side, were said to have been let to the defender, and been represented as capable of feeding forty scores of sheep; but, when he had sent shepherds with thirty-four score, they were only allowed to occupy the south side, which was not worth more than about L.15, and would not feed above eighteen score. The defender had, accordingly, been obliged to take other pasture for his sheep.

A proof having been allowed *pro ut de jure*, the junior pursuer and the defender were examined, and respectively deponed in terms of their allegations. Parties, too, who had been present at the making of the bargain, deponed that what was let was "the grass of Clockclowie," without any specification of north or south, and that it had been represented as carrying forty score. This was admitted and alleged to be the fact by Williamson. Shepherds were also adduced to prove that, when Kennedy's sheep were put on the land, Williamson's servants told them they must confine them to the south side. This was accordingly done, and Kennedy gave as the reason for his not having complained, that Williamson was from home, having gone to Ireland.

The Sheriff-substitute pronounced the following interlocutor:—"*6th June* 1854.—Finds that the memorandum written on the book No. 2, being written in pencil, and challenged as vitiated, cannot bear faith in judgment: Finds that the agreement betwixt the parties as to the set of the pasture was a verbal agreement, not reduced to writing, and therefore proveable by witnesses: Finds that, in terms of said verbal agreement, the pursuer let to the defender the whole pasture on the farm of Clockclowie for the sum of L.40, but that he gave possession to the defender only of the south side of said farm: Finds that said defender is liable to the pursuer in payment of such part only of the said sum of L.40 as effeirs to the value of that portion of the farm of which he obtained possession," &c.*

On appeal, the Sheriff-depute (M. Napier) altered this interlocutor, find-

* The note upon the first point was as follows:—"It is apprehended that a pencil memorandum, such as that produced in No. 2, can in no sense be looked upon as a writing binding on the parties whose names it bears. An agreement written in ink, if written on erasures, is null; an agreement written in pencil, the marks of which may be so easily effaced, and different writing substituted, may be considered as wholly erased and altered. In an ink writing, the erasure is necessarily visible to the eye; in a pencil writing, it is in general impossible to detect the erasure; and it is equally possible that such a writing may be either vitiated or not vitiated. The Sheriff-substitute is not aware of any authorities on the point; but he apprehends, that before an agreement can be held to be reduced to writing, so as to exclude parole testimony, it must be a *bona fide* writing in ink, and not a mere jotting or memorandum in pencil. Such a jotting may be good *quantum valeat*, as an adminicle of evidence; but to hold that it is such a writing as wholly excludes all other evidence, would in most cases leave the rights and interests of parties to rest upon a very mutable and fragile basis."

ing that the document could bear no faith till it was stamped, which it was not, and therefore he allowed it to be stamped.* And of a subsequent date, after the document had been stamped, and farther procedure had taken place before the Sheriff-substitute, the Sheriff pronounced this interlocutor:—"20*th July* 1855.—In respect that the defender alleges the writing produced and founded on is not the writing so written out and subscribed, but is, (with the exception of the place and date written on the first line thereof, and the defender's signature bearing to be subscribed thereto), a false and fabricated writing: Recalls the interlocutor appealed against, and, before farther proceeding in the cause, ordains the record to be opened up, and allows the defender to propone improbation." †

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The defender thereupon proponed improbation, and lodged a condescendence in the following terms:—"The paper, parchment, vellum, or other material on which the document, No. 2 of process, founded on by the pursuers, is written, had been written on, from the date down to the signature of the defender, before the writing now appearing on it was written. And the writing which had been so written on it previously had been rubbed out, obliterated, or effaced."

A proof of this condescendence having been allowed, the defender adduced two doctors, the Sheriff-clerk-depute, and a watchmaker, who deponed generally that the fibre was disturbed, except where the dates and signatures were written; but one of them expressed a decided opinion that there was no disturbance of the fibre where the word "south" was written.

The pursuer produced three doctors, two watchmakers, and an engraver, who admitted the roughness of the page, which seemed to them caused by much fingering; but deponed that, with the aid of the microscope, they could discern no trace of former writing.

The Sheriff-substitute held that the evidence was sufficient to improbate

* "NOTE.—The agreement to set, produced by the pursuer, cannot be judicially regarded until it be stamped. The Sheriff is not aware of any such law in Scotland, as that the fact of a writing being in pencil instead of ink rendered the same vitiated, and null and void. Whether it suffices, in any given case, to prove the will and intention of the writer is another question depending on the circumstances. Pencil may be a fragile and unsatisfactory material; but it is not an incompetent material. In England the point has been expressly decided. Chief-Justice Abbot, in Gear v. Physic, 1826, said—'There is no authority for saying, that where the law requires a contract to be in writing, that writing must be in ink.' Judge Bayley said—'I think that a writing in pencil is a writing within the meaning of that term at common law; and that it is a writing within the custom of merchants. I cannot see any reason why, when the law requires a contract to be in writing, that contract shall be void, if it be written in pencil.' Another Judge concurred: 'There are several other cases to the same effect.'—See Ross's Leading Cases in Commercial Law."

† "NOTE.—The missive in question contains, or does not contain, the terms of the bargain into which the parties entered as to the set of the Clockclowie pasture; not according to whether it be written with pencil or in ink (a material, by the way, which is susceptible of being as completely erased by a forger as is pencil writing), but according to whether the fraud and forgery averred by the defender was really committed. The interlocutor now recalled would give the defender the full benefit of that averment, without any explicit finding or decision that his plea of forgery (and a very strong one it is) has been completely established by proof. The Sheriff cannot deal with so serious and consequential an averment in the shape now presented to him. The defender, unless he chooses to withdraw his averment of forgery, must propone improbation in proper form. Accordingly the Sheriff has opened the record, and remitted the case to be dealt with on that footing, exclusive altogether of the proposition stated in the Sheriff-substitute's note to his former interlocutor, of date [illegible] June 1854—'That, before an agreemeut can be held to be reduced to writing, so as to exclude parole testimony, it must be a *bona fide* writing in ink.'"

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the writing, but on a reclaiming note the Sheriff-depute altered that judgment.*

The defender brought the case by note of advocation before the Second Division of the Court, maintaining—The *onus* lay on the pursuers to prove their case. Had they done so? The document produced was not sufficient to do so. It was not probative, nor was it even holograph of the party against whom it was proposed to be used. It was altogether worthless, but for the defender's admission of his signature, and that must be taken with the qualification attached to that admission, viz., that he never signed the writing now prefixed to it. Moreover, pencil writing was in a less favourable position than ink—rubbing of pencil was equivalent to erasure in ink. There could be no doubt but there had been rubbing here.

The pursuers replied;—The *onus* of cutting down the writing lay on the defender. There was no foundation for a distinction between a writing in pencil and one in ink, and till this memorandum was set aside, the position of matters was this:—*Rei interventus* had followed on a written contract acquiesced in during the whole period during which it was operative, and no objection stated till the defender was called upon to fulfil his part of the contract by paying rent. The kind of evidence necessary to set aside the writing was such as would be required to convict of forgery. Unless the defender could bring his case up to this, he must fail. His evidence did not even approach to such a case.

Lord Justice-Clerk.—I concur entirely in the view taken by the Sheriff of this case. It is admitted, and is not matter of dispute, that the agreement for the sub-lease was written in the pocket-book of the pursuer, and signed by both parties, and therefore I dismiss from consideration the question of the value or authority of an agreement written in pencil alone.

I am not aware of any difference in the value of pencil and of ink. There are no doubt greater risks of obliteration in the one case than in the other; but otherwise, I see no difference. Here it is admitted that an agreement in pencil was followed by possession. Now, however informal or invalid the agreement may have been, if followed by possession that would make it good. So that the only question is, Does the pencil agreement, as we now have it, contain what was originally written? or does it not contain something which was not there originally? The sub-tenant, when pursued for the rent, alleged that this was not a case where the writing could receive effect, as it had been entirely obliterated, with the exception of the date and the signature.

Now, it is not quite clear on his evidence whether he means to assert a full or a

* "Note.—The kind of contradictory proof as to the gross fraud alleged by the defender in this case (and the whole of which proof on either side is little more than expressions of opinion), arises not so much from the missives in question having been written with a pencil instead of with pen and ink, as from having been so written in a small jotting-book of every-day use, and obviously of a nature to be written and rewritten upon with pencil, and to be constantly thumbed, and having pencil jottings on the opposite page, shutting upon the pencil writing in question. The Sheriff thinks it would be perfectly preposterous to hold (especially in the face of very ample contradictory evidence from various microscopic observers) from expressions of opinion as to rubbing, and previous pencil writing rubbed out, that the gross and criminal fraud alleged has been established under the defender's very imperfect improbatory record. And if the defender is now put to any disadvantage or difficulty in proving such an allegation, by reason of the unusual materials adopted in putting their bargain into writing, he has himself to blame; for, by his own admission, the note-book, with the pencil writing, was put into his own hand, and he signed it in pencil. The evidence of casual witnesses (not called to witness what was written) as to what they heard of the previous communings between the parties, is nothing to the purpose of what was written and signed by both parties. The alleged fraud and forgery not having been established, the missive as it stands signed by both parties, and possession having followed on the missive, is the proper evidence of the terms of the bargain."

partial obliteration. But, at all events, I think Sheriff Napier said quite rightly, that this was a very serious case; indeed, one that could only be taken up on such evidence as would warrant conviction for forgery; for although the signature is genuine, there can be no doubt that, if the writing which originally preceded it has been obliterated, and a new writing superinduced, that amounts to the crime of forgery. So the Sheriff says, "you must improve this writing." A minute was then given in, and then a condescendence, and truly a more vague or general one I never saw; it is not clear whether the defender adheres to the original statement made by him or not. The condescendence should have been much more distinct, and should, above all, have contained a specific statement of what words they were that be improved.

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As it is, the case is reduced to this issue,—Is that a false and fabricated entry? The burden of proof lies on the defender. I do not enter into whether there has been *rei interventus* or not. A disputed and improbative writing may be set up by that. But the burden is properly put upon the defender to improve the writing. I cannot enter into the parole evidence as to what passed at the making of the bargain. Is this document genuine? That is the only question, because, if so, we cannot take into account the recollection, a year after, of parties who had no interest in the matter, to fix in their memories what was passing. Besides, none of the parties present heard the document read over, therefore their evidence would not be testimony as to the contents of the document, even if it were competent,—but as to what they understood was passing between the parties.

Now, as to the evidence regarding this improbative writing, that upon one side seems to be just as good as that on the other. The question can be determined only on the same evidence which would be sufficient to obtain a criminal conviction, but the evidence we have is quite insufficient for this purpose, and most unsatisfactory. Why, what is stated against it? that this which has been in the man's pocket these two years is rubbed—there is evidence that the fibre of the paper would be disturbed by the use of India rubber or bread; but I do not see anything more than that the glaze is off the paper. But even if it be disturbed, what evidence is there that it was rubbed for the purpose of obliteration? There the word "south" is not touched at all, on the defender's own evidence. Neither is there any evidence pointing to its having been rubbed and put wrong. He sends his shepherds to take possession, and Williamson's servants seem to have got distinct information, and they said, "You must not come across to the north side, but must confine your sheep to the south alone." Well, does the defender at once say, "This is not my bargain, I repudiate it?" It is very true that something seems to have been said at the time the bargain was made as to the number of sheep the ground would carry; but that is to be treated as a mere piece of exaggeration. But the defender neither writes, nor sends any message to Williamson upon the subject. He says he called, but did not find him at home, and when he does see him afterwards, he acquiesces, and sends away part of his stock, and no objection, apparently, was stated till defences were lodged. So far thus is the real evidence from helping the defence, that I hold that it shews that he was aware of the existence of the restriction alleged by the pursuer.

LORD MURRAY.—I concur. Here, as always where persons of skill are examined, the evidence is most unsatisfactory and contradictory. It is always so in forgery cases in the criminal court. I feel here very little the wiser for the evidence as to the writing, but see that of the defender's shepherds, who say, "the pursuer had sheep on the north side,"—that is pointed evidence at the time, and the defender acquiesced.

LORD WOOD was absent.

LORD COWAN.—The proof seems to me to place this case on the same footing as if there had been a formal written contract between the parties. The writing libelled is in pencil, and improbative. But the defender obtained possession precisely in terms of the missive. He got from the first limited possession, and he makes no complaint—he acquiesces in the clearest possible way. Well, a demand is made for payment, and then, for the first time, he says he did not get the possession he bargained for. Then, as to the question raised about pencil writings, there may, in some cases, be difficulties. There are none here. The validity of a regularly probative deed written in pencil, I do not think has ever been decided. Looking to the facilities with which forgery may be made, I am not prepared to

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say that the document is in the same position as if it had been written in ink. Here the defender admits he put his name to a pencil memorandum, and left it in the pursuer's custody, and its effect must, under the proof, be determined just as if it had been in ink. But to get quit of it as an adminicle of evidence of the contract, he offered to improve it; and the question is, has he done so? I think his proof is only brought up to this, that there is an appearance of roughness on the face of the paper, while the important word "south" is not even said to be affected at all. Can we, upon this, convict the pursuer of having deliberately forged this document? There is no evidence on which we can do this.

I think the Sheriff's judgment is right, and his note, which is most cautious and guarded, precisely expresses my view.

THE COURT pronounced the following interlocutor:—"Refuse the note of advocation: Remit *simpliciter* to the Sheriff: Find the respondents entitled to the expenses in this Court; and remit to the Sheriff to decern for the same when taxed."

JOHN ROBERTSON, Junior, S.S.C.—MILLER & CRAWFORD, S.S.C.—Agents.

No. 106.

WILLIAM M'KEAN, Pursuer.—*W. M. Thomson.*

Proving the tenor—Casus amissionis.—The mere changing of his chambers by an agent is not of itself a sufficient *casus amissionis*. Circumstances in which the *casus amissionis held* proved where the deed had not been seen since the dissolution of partnership of a law firm who had the charge of it.

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1ST DIVISION.
Lord Deas.
L.

WILLIAM M'KEAN brought this action of proving the tenor of a disposition executed by his late father. He stated, that after being executed, the disposition was for some time in the custody of Messrs Lamond and Monteath, writers in Glasgow; that while in their custody it had been lost, and although a most careful search had been made, both by the pursuer and Messrs Lamond and Monteath, they had been unable to recover it. The pursuer was possessed of the scroll of the disposition and reconveyance in his favour, and of the instrument of sasine following thereon; and the writer of the deed and the witnesses to the execution were alive, and could prove the terms and execution of the same.

The Court, on 10th December 1853, sustained the adminicles, and allowed a proof of the tenor and *casus amissionis*.

The evidence corroborated the pursuer's statement. Mr Lamond stated that his impression was that the deed had been lost on the occasion of a dissolution of partnership, when his partner removed from the office which up to that time had been occupied by the firm. There was then a division of papers and documents, and he had never seen it since. Mr Monteath was now in India. The other witnesses identified the draft, and proved the execution of the deed.

The pursuer now submitted that a change of the agent's chambers was of itself sufficient *casus amissionis* to entitle him to decree.[1]

LORD PRESIDENT.—I rather think a case has here been made out. But certainly the abstract principle has never been laid down, that if an agent changes his chambers once or twice, that is a sufficient *casus amissionis*.

DECREE in terms of the libel.

JAMES BURNESS, S.S.C.—Agent.

[1] Walker v. Brock, 24th Jan. 1852, ante, vol. xiv. p. 362.

Miss Barbara Haig, Pursuer.—*Dundas.* No. 107.
Misses Sophia and Mary Haig, Defenders.—*Patton.*

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Haig v. Haigs.

Succession.—A landed proprietor, by antenuptial marriage-contract, destined his lands to his heirs-male, whom failing, to his heirs-female of that or any subsequent marriage, whom likewise failing to his own nearest heirs and assignees whatsoever in fee, the eldest heir-female always succeeding without division; declaring that it should not be lawful for the heirs to alter the order of succession. The granter of the conveyance afterwards executed a gratuitous disposition in favour of his son, "and the heirs of his body, whom failing, to me, my heirs and assignees, heritably and irredeemably," qualified with an obligation on the disponee, on completing his title, and entering with the superior, "to renounce and redispone the said lands and pertinents to and in favour of me (the father) and my heirs and assignees, heritably and irredeemably, to be holden of and under him," the son, and his foresaids in blench. *Held* (altering judgment of Lord Benholme), that the destination of the disposition altered the destination in the marriage-contract, but that the granter could not defeat the destination in the marriage-contract by a gratuitous deed; nor could the heir, who had only an expectancy under the marriage-contract provision. Therefore, the granter having died, and also his son, without issue, *held* that the eldest heir-female succeeded to the lands, to the exclusion of heirs portioners.

1st Division.
Ld. Benholme.
C.

James Haig, senior of Bemersyde, entered into an antenuptial contract of marriage in 1794 with Miss Isabella Watson, whereby he disponed the lands of Bemersyde to himself in liferent, and to the heirs-male of the marriage; whom failing, to the heirs-male of any subsequent marriage; whom failing, to the heirs-female of the marriage; whom failing, to the heirs female of any subsequent marriage; whom likewise failing, "to his own nearest heirs and assignees whatsoever in fee, the eldest heir-female always succeeding without division." There was also a declaration against altering the order of succession.

There were several children born of the marriage; and, in 1817, Mr Haig executed a gratuitous disposition in favour of his eldest son, James Haig, junior, with the view of giving a freehold qualification, and the question now was, whether or not the destination in that disposition had evacuated or altered the destination contained in the marriage-contract? and, if so, whether such alteration was within the power of the parties?

The terms of the disposition of 1817 were as follows:—Mr Haig "disponed, 'From me, my heirs and successors, to and in favour of the said James Haig, junior, and the heirs of his body; whom failing, to me, my heirs and assignees whomsoever, heritably and irredeemably, All and Whole the town and lands of Bemersyde,' &c. 'All incorporated into one free barony, called the barony of Bemersyde.' But excepting therefrom the lands called the Third and the lands called Northfield, with the pertinents of the same respectively, as therein particularly described; which lands of Third and Northfield were declared to be nowise included in the disposition. 'But always with and under this provision and declaration, as it is hereby specially provided and declared, that the said James Haig, junior, shall be bound, as by acceptation hereof, he binds and obliges himself and his foresaids, so soon as he shall have completed his titles to the lands hereby disponed, by sasine and entry with the superior, to reconvey and redispone the said lands and pertinents to and in favour of me, and my heirs and assignees, heritably and irredeemably, to be holden of and under him, the said James Haig, junior, and his foresaids, for payment of the sum of one penny Scots, in name of blench duty, &c. 'And for that purpose, to grant dispositions containing obligation to infeft, precept of sasine, clause of warrandice, and all other deeds requisite. In which lands and barony, and others above disponed, with the foresaid exceptions, and under the foresaid provision and declaration, I oblige myself and my foresaids to infeft and seise the said James Haig,

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junior, and his foresaids, upon their own charges and expenses, to be holden from me and my foresaids, of and under our immediate lawful superiors of the same, in the like manner, and as fully in all respects as I, my predecessors and authors, held, hold, or might have holden the same, and that either by resignation or confirmation, or both.'"

Mr Haig, senior, died in 1840. Mr Haig, junior, died in 1854, without issue. He had been infeft on the precept contained in the disposition of 1817, and afterwards obtained a charter of confirmation. He had also, on his father's death, expede a general service, and took infeftment on a Crown charter of 1791—the precept in which, however, was afterwards discovered to be exhausted.

The pursuer, Barbara Haig, and her two sisters, Sophia and Mary, the defenders, were the only surviving children of Mr Haig senior. The pursuer, as eldest daughter, claimed to be heir-female of provision under her father's contract of marriage. The defenders maintained that the succession had been altered by the deed of 1817, and now devolved upon the pursuer and defenders as heirs-portioners. The action contained declaratory conclusions that the deed of 1817, and titles completed thereon, were not intended to alter, and had not the effect of altering, the destination under the marriage-contract; that, notwithstanding thereof, the destination still subsisted, and remained in full force to regulate the succession to the lands of Bemersyde; and that, in virtue thereof, the pursuer was entitled to succeed to the whole of these lands without division; or, in the event of its being found that the destination in the marriage-contract was altered by the disposition of 1817, then the action concluded to have that disposition reduced, with all that had followed thereon; and, being so reduced, then it further concluded to have it declared that the pursuer was now entitled to succeed without division to the lands of Bemersyde, to the entire exclusion of the defenders, her younger sisters, as heirs-portioners-at-law of their father.

The Lord Ordinary, on 20th March 1855, pronounced the following interlocutor:—"Finds that the late James Haig, the father of the pursuer and defenders, had right to the estate of Bemersyde, under a Crown charter, dated 3d February 1791, by which that estate was granted to him, and to the other heirs-male procreate of the marriage of his father and mother; whom failing, to the nearest heirs and assignees whatsoever of his said father: Finds, that by the marriage-contract between the said James Haig and the mother of the pursuer and defenders, dated 11th December 1794, this estate was conveyed by James Haig to himself in liferent, and to the heirs-male o that marriage; whom failing, to the heirs-male of any subsequent marriag he might enter into; whom failing, to the heirs-female of the then presen marriage, with other substitutions in fee, with an exclusion of heirs-portioners in favour of the eldest heir-female, and with a prohibition agains altering the said order of succession: Finds, that by the said marriage contract, the said James Haig bound and obliged himself, and his heirs an successors, to infeft himself in liferent, and the said heirs of the marriage contract, in their order, in fee, in the said estate: Finds that the order an destination of heirs contained in the said marriage-contract has never bee effectually altered or evacuated either by the said James Haig, or by hi son, the last James Haig, and that this marriage-contract still remains th ruling deed of destination of the said estate: Finds that the pursuer, as th eldest heir-female of the marriage, is now the heir of provision under th said marriage-contract entitled to succeed to the said estate to the exclusio of the defenders, her sisters: Therefore decerns and declares in terms of th first declaratory conclusion of the summons: Finds no expenses due t either party." *

* "Note.—In consequence of the blunder committed in the [illegible] of Jas

The defenders reclaimed. The argument is embodied in the opinion of Lord Curriehill. No. 107.

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Lord Curriehill.—The question is, whether the succession to the greater part of the estate of Bemersyde has devolved on the pursuer exclusively, as eldest heir-female, or upon her and her sisters, the defenders, as heirs-portioners?

The pursuer's claim is founded upon the marriage-contract, dated 11th December 1794, between the parents of the parties—James Haig, then of Bemersyde, and Isabella Watson,—whereby the former conveyed that estate to himself, "in liferent, and to the heirs-male to be procreated betwixt him and the said Isabella Watson, whom failing, to the heirs-male of any subsequent marriage the said James Haig shall enter into, whom also failing, to the heirs-female to be procreated betwixt the said James Haig and Miss Isabella Watson, whom failing, to the heirs-female of any subsequent marriage he shall enter into, whom likewise failing, to the said James Haig, his own nearest heirs and assignees whatsoever, in fee, the eldest heir-female always succeeding without division,"—reserving, however, to Mr Haig power to prefer any one of the younger heirs-female he might think proper, and declaring "that it shall not be lawful for any of the said heirs or substitutes to alter or change the order of succession as hereby established." Mr Haig, the granter of this conveyance, having died, leaving one son, James, and three daughters of this marriage, and without leaving children of any other marriage, and James, the son, having subsequently died without issue, the eldest daughter now claims the succession under the above destination, as being the eldest heir-female of the marriage. Her claim is well founded, unless that destination has been effectually altered. And, accordingly, there is no dispute that she exclusively succeeds to a portion of the estate, as to which no such alteration is alleged to have taken place. The question is, whether or not there has been such an alteration as to the remainder of the estate?

The defenders maintain that that destination was evacuated or altered as to that part of the estate which is in dispute, by their father having, on 31st March 1817, disponed the same to his son, with a destination expressed in different terms, viz.,

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Haig, his infeftment on the Crown charter of 1791 appears to be inept. But still he had a good personal title to the estate, which enabled him effectually to convey it under the destination of the marriage-contract.

"The conveyance by James Haig to his son of 31st March 1817, for the purpose of conferring upon the latter a freehold qualification, cannot be held as an implement of the marriage-contract, and an evacuation of the destination therein contained in favour of the other heirs of provision. For, 1st, that conveyance only embraced part of the estate; and, 2dly, it conferred no substantial right to the part conveyed; the son being bound immediately to reconvey the *dominium utile*. The reconveyance was to be made in favour of his father, his heirs and assignees.

"The Lord Ordinary is inclined to think that such a reconveyance would have operated in favour of the heirs of provision under the marriage-contract, which was then the ruling destination of the estate. In consequence of the father not being himself validly infeft in the estate, the title expede by the son under the conveyance of 1817 appears to be inept as part of a feudal progress, and the precept in the open charter of 1791 still remained unexhausted.

"When his father died, James Haig, junior, manifested his intention of holding the estate under the destination of the marriage-contract, by expeding a service under that marriage-contract, and executing the precept in the Crown charter of 1791.

"Whether the title thus made up by him is perfectly regular may admit of a doubt, in respect that the marriage-contract contains no express assignation of the precept of 1791. If that doubt could be removed, then the last James Haig was duly infeft under the mid-couple of the marriage-contract, which would infer a destination in favour of the pursuer.

"If the infeftment of James Haig be considered defective, the pursuer cannot directly serve in special to him, as heir of provision, but she is still entitled to make effectual the destination in her favour contained in the marriage-contract, even although it should be necessary that the precept of 1791 should be taken up, in the first place, by all the three heirs-portioners."

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"from me my heirs and successors, to and in favour of the said James Haig junior, and the heirs of his body, whom failing, to me my heirs and assignees whomsoever, heritably and irredeemably." That disposition was a gratuitous one, and was qualified with an obligation on the disponee, on his completing his title and entering with the superior, "to renounce and re-dispone the said lands and pertinents to and in favour of me (the father) and my heirs and assignees heritably and irredeemably, to be holden of and under him, the said James Haig junior, and his foresaids, in blench."

The pursuer makes two answers to this defence—1. That according to the true construction of this destination it does not import an alteration of the former destination, and that as the term *heirs* is flexible, the destination in this disposition should be read as meaning the heirs to whom the estate had already been destined; and, 2, That on the other hand, the conveyance, if it does import an alteration of the destination in the contract of marriage, was *ultra vires* of the granter. The summons accordingly contains alternatively a declaratory conclusion for carrying into effect the former plea, if it should be sustained; and a rescissory conclusion under which effect may be given to the latter plea, if it should be sustained. The Lord Ordinary has decerned in terms of the declaratory conclusion only.

I. The first of these pleas is founded chiefly on an allegation that the intention of the granter of the disposition of 1817 was merely to create a freehold qualification in favour of his son, and not to alter the existing destination of the estate. There is no evidence in support of this allegation, except what appears on the face of the conveyance itself. And in the first place, such an intention is at variance with the *prima facie* and technical meaning of the language of the conveyance, because the deed sets out by conveying the subjects from not only the granter himself, but also *from his heirs and successors*,—the natural meaning of which is, that the then existing destination in favour of these heirs and successors was to be cut off. Then the parties to whom the subjects are destined by this disposition are not generally the granter himself and his heirs and successors, but himself and the heirs of his body, whom failing, himself and his heirs and assignees whomsoever. This destination differs from that in the contract of marriage in several respects. For example, the exclusion of heirs-portioners,—the preference of heirs-male of the body to general heirs-male,—and the distinction between the heirs of different marriages, are done away. Nor is this all. The intention appearing *ex facie* of the disposition itself was that only a mid-superiority should be held under this title; and that after that conveyance should be feudalised in the person of the grantee, a new estate consisting of sub-feu of the *dominium utile* should be created by the latter in favour of his father, with a destination different from either of the former, viz., in favour of the father and his heirs and assignees whomsoever. In these circumstances, and in conformity with the principle of the case of Molle, 13th December 1841, F. C., and a series of prior cases, I do not think that we are warranted in construing the destination in the disposition of 1817 as being the same as that in the contract of 1794. When that disposition was granted, the parties either had, or had not, the destination in the contract of marriage in their view. If they had, then their change in the terms of the destination must be held to have been intentional. And if they had not, then the destination in the disposition cannot be held to be deprived of its proper meaning by reference to what was not then in their view. On these grounds, I think that the declaratory conclusion of the action is not well founded, and that the Lord Ordinary's interlocutor, in so far as it decerns in terms of that conclusion, ought to be recalled.

II. The question remains, whether this alteration of the destination was within the power of the parties to the disposition of 1817. The granter of that deed himself had not the power to alter it; because that destination, being a provision in an antenuptial contract of marriage in favour of the heirs of the marriage, conferred upon these heirs not only a *spes successionis*, but likewise a *jus crediti*, which the granter could not afterwards defeat nor alter by a gratuitous deed; and the disposition of 1817 was granted only, as is expressly set forth in its own preamble, for the love, favour, and affection of the granter for the grantee. Nor could this want of power in the granter be supplied by the concurrence of the grantee. Although the latter was then the apparent heir of the marriage, he had not power to alter that destination, or authorise his father to do so; because it was

an express condition of the provision in his favour, that it should not be altered nor changed by any act of the heirs or substitutes. But for this disabling condition of the provision in the contract, it might have been held that, by their joint deed, the father and son could evacuate the destination in that contract, on the principle of the case of Carruthers of Dormont, 19th May 1812, and 16th December 1819. That principle is, that the expectant heir of a marriage is, even during his father's lifetime, the creditor in the *jus crediti* created by a provision in an antenuptial contract in favour of the heirs of the marriage; that, as such, he may then receive implement of that provision by having the estate which forms the subject of the provision propelled to him; and that, consequently, he has power to discharge the provision on any terms he may think proper, if he be not expressly prohibited from doing so. In that case there was no such prohibition; and a discharge of the provision granted in such a predicament by the heir expectant of the marriage was sustained, even although eventually that expectant heir predeceased her father. But the principle of that case does not apply to the present one, where the heir of the marriage was disabled by an express condition of his right from altering the destination. As that disability would have operated, even if the right to the estate had become vested in him, either by its being propelled to him by his father, while alive, under the destination in the contract, or by his having survived his father, and made up his title as heir of provision under the contract, *a fortiori* does it operate in the existing case; the heir of the marriage having had only an expectancy in 1817 under the qualified provision in the contract of 1794, and his right under that contract, moreover, having never been feudalised.

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The defenders maintain, that as the disposition of 1817 was the proper deed of the father, and the son merely accepted of it, that acceptance was not properly a deed of alteration on his part, and is not struck at by the prohibition in the contract. That argument will not bear examination. Its unsoundness is tested by this,—that if the disposition of 1817 had not been accepted of by the grantee, it would have had no effect whatever; acceptance by the grantee being as necessary as delivery by the granter, to render effectual a disposition *inter vivos*. Moreover, according to the principle of the case of Dormont, the apparent heir of the marriage is, in such a transaction, the proper party who evacuates the destination; because he is the creditor in the *jus crediti* created by the antenuptial provision, and it is he, and not the obligant or debtor who has the title to discharge it. But, in truth, such a proceeding is ineffectual, unless it be the act of both parties, and the expectant heir be not prohibited from entering into it; and when, as in this case, both are disabled from doing the thing, the one by a legal prohibition, and the other by a conventional one, such an act cannot be effectual.

I am therefore of opinion, that the disposition of 1817, and the investiture following thereon, in so far as the destination in the marriage-contract of 1794 was altered, is invalid, and ought to be reduced under the recissory conclusion of the action.

The discussion of this question has been encumbered with several matters which do not appear to me to have any connection with it. One of these is a question which was raised as to the validity of a sasine which was expede in 1791, in favour of Mr Haig, the party who made the conveyance in the contract of marriage in 1794. But as he was confessedly the owner of the estate in 1794, in virtue of a provision of it in his favour in the marriage-contract of his parents, dated 17th October 1757, and a retour of his general service as heir of provision under that contract, and a Crown charter of resignation following thereon, the validity of the destination in his own contract of 1794 is equally binding, whether his right to the estate was real or personal. Although that sasine may have been null, on the principle of the case of the Magistrates of Brechin, 11th December 1840, I abstain from going into that irrelevant question.

Equally irrelevant to this question is the discussion which was raised as to the validity of another instrument of sasine expede by the last Mr Haig in 1846, on the same precept as that on which the sasine of 1791 proceeded. Although that sasine [illegible] have been inept, in respect of one of the midcouples by which Mr Haig [illegible] to be connected with it not having been recited in terms of the [illegible] I also abstain from going into that question; because that sasine, whether valid or not, could have no effect in either supporting or defeating the destination in the contract of 1794.

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An argument, founded on the 43d section of the Disentail Act, 11 and 12 Vict. c. 36, is equally foreign to this question; for, even supposing that that enactment were held to render abortive destinations in onerous contracts of marriage, it would not operate retrospectively. Urquhart, 11th July 1853, Macqueen's Reports, I. 658.

The Lord President and Lord Ivory concurred.

Lord Deas.—The argument suggested various questions of importance, which I concur in thinking it is not necessary to decide. James Haig, *senior*, was *in titulo* to execute the conveyance contained in his marriage-contract of 1794, whether his right was personal or feudal. If, therefore, neither he nor his son, James Haig, *junior*, had power, gratuitously, to alter the destination in that contract, it is unnecessary to go farther; for, in that view, the destination stands, and the pursuer is entitled to succeed to the estate. Now, I agree in holding, that neither father nor son could so alter that destination. The father could not do it, because this would have been contrary to the good faith of the marriage-contract. No doubt he might propel the fee to the son, and if the son had been unfettered, then, upon the principle of the case of Carruthers, the father and son together might have evacuated the destination, although the fee had not been actually propelled. But the son was subject to the prohibition in the contract, which bears, "that it should not be lawful for any of the said heirs or substitutes to alter or change the order of succession as thereby established;" and consequently, although the fee had been actually propelled to him, he could not have gratuitously altered. All this has been fully stated by Lord Curriehill. The only qualification I have to adject to his Lordship's views is, that it seems to me unnecessary to decide what would have been the effect of the destination in the deed of 1817 had the powers of the parties been different from what they were.

Lord Curriehill.—The Lord Ordinary "decerns and declares in terms of the first declaratory conclusion of the summons," which proceeds upon the footing that the destination in the deed of 1817 was not intended or calculated to alter the destination in the marriage-contract, and would not have that effect although left unreduced.

Lord Deas.—If it be necessary to decide that point, I am prepared, as at present advised, to concur upon it also with Lord Curriehill. But I think the course should be to decide upon the reductive conclusions, and the declaratory conclusion which is made consequent upon the reduction.

Here it was explained from the bar, that the parties had proceeded as in a declarator, so that the production had not been satisfied, and it was proposed to hold this done now. But the attention of the Court being thus called to the state of the process, they were unanimously of opinion that the case must go back to the Lord Ordinary to be put in shape before judgment; and the following interlocutor was pronounced:—"Recall the interlocutor reclaimed against: Find that the record in this case was prematrely closed; and, of consent of parties, open up the same: Further, they remit to the Lord Ordinary to have the production satisfied; and thereafter to proceed with the cause as shall be just."

Of this date the Lord Ordinary verbally reported the case, and stated that the production was now satisfied, and the proceedings properly in shape.

Lord President.—The Lord Ordinary having now reported this case on a closed record, with the productions, I understand that the parties refer to their previous argument, and we now pronounce the judgment which we formerly pronounced.

The Court pronounced the following interlocutor:—"The Lords, on report of Lord Benholme, Ordinary, and having considered the closed record, and heard counsel for the parties, reduce, decern, and declare, in terms of the reductive conclusions of the libel: Further, they find, declare, and decern, in terms of that declaratory conclusion of the libel which is consequent upon the reduction of the writings under challenge: Find no expenses due to either party, and decern."

Hay & Pringle, W.S.—Smith & Kinnear, W.S.—Agents.

DONALD LINDSAY (Somerville's Curator), Petitioner.—*Fraser*. No. 108.
ROBINA AND ELIZABETH SOMERVILLE, Respondents.—*G. G. Bell*.

Feb. 17, 1857.
Lindsay.

Curator Bonis—Power of Sale.—Special powers granted to the *curator bonis* of a lunatic to sell heritage, where the annual income was insufficient to provide for the interest of debt, the expenses of management, and the proper maintenance of the lunatic—all which a sale would remedy (*abs.* Lord Ivory).

1st Division.
Ld. Mackenzie
L.

SOMERVILLE, a lunatic, was proprietor of the estate of Airhouse, of which the free rental was L.649. He was also proprietor of a house in Edinburgh, the rent of which was L.34. He had a claim upon Campbell of Islay's sequestrated estate for L.1118, 18s. 10d., and he had a road debt of L.85. On the other hand, the estate was so burdened with debt, that the lunatic's present whole available free income was only L.38, 16s. 1d. Should the interest on the heritable debt fall to 3½ per cent., the free available income would be about L.88. Should it rise to 5 per cent., there would be an annual deficiency of about L.62.

The lunatic was boarded in the Edinburgh Lunatic Asylum at L.60 per annum, the lowest rate of board next to that for paupers. The cost of his clothes and other necessaries amounted to from L.20 to L.30 a-year. The deficiency in his income for his maintenance was supplemented from the thinnings of wood, which realised about L.60 per annum—a source, however, which would be available only for five years. The only other source of supplementing his income was the realisation of the debt on Campbell of Islay's estate, which it was not anticipated could be made available for several years.

The petitioner, Donald Lindsay, was appointed Somerville's curator in 1853. He now applied for special powers to sell the lunatic's landed estate, on the ground that such a sum would be got for it as, after paying the debts, would leave a free available income of at least L.200. A certificate from Dr Skae, of the Lunatic Asylum, was produced, to the effect that there was little prospect of the lunatic being restored so as to be able to take charge of his own affairs, but that greater liberty, extended walks, and more generous treatment, might materially contribute to his comfort, if not his cure. To enable him to enjoy these advantages, however, his board would require to be at least L.200 a-year.

There was also produced a valuation and report by Mr Dickson of Saughton Mains, which, after stating the generally deteriorated condition of the estate, concluded that "the sale of the estate was not only expedient and advantageous for Mr Somerville's interest, but was also necessary and indispensable for saving the reversion of his property." The Accountant of Court was "decidedly of opinion that the interests of the ward would be best consulted by empowering the curator to sell the estate of Airhouse. The Accountant, indeed, thinks that in this case ruin and penury cannot otherwise be averted from the ward."

This petition was intimated to the sisters of the lunatic, who lodged answers, objecting to the proposed sale of their brother's estate. They stated that, "from their brother's attachment to the place, they felt assured that a sale would have a most injurious effect on him, and would either aggravate and confirm his mental indisposition beyond hope of recovery, or, if concealed, in the event of his recovery would assuredly induce a hopeless relapse." They also stated that "the apparent abundance of money at present, and the prospect of a speedy reduction of interest on heritable securities, may be expected soon to leave considerably more ample means at the curator's disposal for requisite improvements on the estate, or otherways; and the prospect of the affairs of the ward getting into a better state of arrange-

No. 108. ment may be supposed considerably to lessen the yearly expenditure, from the management being simplified."

Feb. 17, 1857. Lindsay.

The Lord Ordinary reported the case to the First Division, who, on 22d November 1855, granted permission to take proof for the *curator bonis*, and also for the respondents.

The respondents did not lead proof, but the curator adduced evidence corroborative of his statements in the petition. It appeared that the available income had now considerably decreased, owing to the interest of money lately borrowed, necessary repairs on the house of Airhouse, and other unavoidable expenditure. In the course of Dr Skae's examination, he stated that "he now thought there was little or no prospect of the lunatic's recovery."

Of this date, the case was put to the roll. No appearance was made for the respondents.

Lord President.—The petitioner has satisfied me that a legal necessity for disposing of this property, such as we referred to in the recent case of Maconochie, has been made out. The sale is shewn to be necessary as well for the benefit of the lunatic as to prevent absolute loss to the estate. The free income of the lunatic only just exceeds what is necessary for his annual support. The dividends payable to him as a creditor on the Islay estate, are not a permanent source of income. Neither is the revenue derived from the sale of wood; and even if it were so, the L.60 so derived, and the present surplus, after paying for his board, are not adequate for the lunatic's proper maintenance. We must consider his interest. If he is in an asylum at the rate of L.60 per annum, he is maintained at a rate only one stage removed from a pauper lunatic, and cannot enjoy any of those advantages which, by paying a higher board, might prove beneficial to his health. Besides, the estate may become less valuable. It is at present in a neglected condition, and, for many reasons, it is difficult to get good tenants. Every thing supports the statements made by Mr Dickson and Mr Lindsay, to the effect that the estate is gradually becoming worse. There is not only a case made out of necessity for a sale to prevent loss to the estate, but it is also necessary for the sake of the lunatic. Dr Skae reports, that he desires many things which his income will not afford him: His interests thus require the property to be sold, in order that he may have such comforts as his means entitle him to enjoy. It may be for the interest of others that these comforts should be denied to him, but it is the interest of the lunatic, not of his heirs, we are bound to consider.

We cannot take the statement of the parties who object that there will be injury to the lunatic by the sale of the estate, that he is so much bent upon possessing it, that if he is aware of the sale, it will so affect his mind as to make his insanity permanent; or, if he hears of it after a recovery, it will produce a relapse. In support of these allegations, there is no proof. We must assume, therefore, that they cannot be supported, or proof would have been led.

Lord Curriehill concurred.

Lord Deas.—I concur in the judgment proposed by your Lordships. I do not go into the details of the figures, but the result I think is, that the annual income is insufficient to provide for the interest of debt, the expenses of management, and the lunatic's maintenance (which is truly of the nature of a debt), in the way in which he ought to be kept,—and indeed it is very doubtful whether the income be sufficient to provide for his maintenance even on the footing of the board remaining at its present low and inadequate rate. In these circumstances, I think there is a legal necessity for the sale.

Lord Ivory absent.

The Court pronounced the following interlocutor:—"On report of Lord Mackenzie, and having advised the proof led in this cause, and having heard counsel for the factor thereon, no appearance being made for the respondents, grants power to the curator, after due advertisement, to dispose of the estate of Airhouse by public roup at a price not lower than L.18,000."

G. & G. Dunlop, W.S.—William Traquair, W.S.—Agents.

No. 109.

Feb. 18, 1857.

Hamilton v. Caledonian Railway Co.

Thomas Hamilton, Pursuer.—*Sol.-Gen. Maitland—Gifford.*
The Caledonian Railway Company, Defenders.—*D. F. Inglis—Patton.*

Railway Company—Liability—Reparation—What is a lawful passenger—Statute 8 & 9 Vict. cap. 83, *sect.* 101.—Parties travelling by the Caledonian Railway without a ticket are charged excess fares, according to a schedule furnished to the station masters;—*Held*, that a person who had works at different stations along the line, and was in use to travel, as it suited his convenience, beyond the station for which he had taken out his ticket, was, when so travelling without a ticket, and not seeking to evade payment of his fare, a lawful passenger, and as such was entitled to recover damages for injury from an accident which took place during the journey through the fault of the Company.

1st Division. Lord Neaves. C.

The pursuer Hamilton, brick and tile manufacturer at Auchengray, brought this action of damages against the Caledonian Railway Company for injuries sustained by him in consequence of a collision between a passenger train by which he was travelling, and a goods train on the defenders' line of railway.

The defence was, that at the time of the accident, the pursuer was not a lawful passenger, inasmuch as he was travelling without a ticket. He was thus acting in contravention of the bye-laws of the Company, and actually subject to penalties for so trespassing.

The following issue was adjusted on 10th June 1856, and sent to trial before Lord Neaves on 12th July 1856:—"Whether, on or about the 9th July 1855, the pursuer was a passenger travelling by the Caledonian Railway from the Carstairs Junction Station to the Mid-Calder Station; and whether, at or near the Ballgreen or Burnbrae Siding or Station of the Caledonian Railway, through the fault of the defenders, a collision took place on the said railway, or sidings thereof, between the train in which the pursuer was so travelling and another train; and whether, in consequence of the said collision, the pursuer was injured in his person, to his loss, injury, and damage."

The jury returned a verdict for the pursuer—damages L.230.

The case now came before the Court on a bill of exceptions. The nature of the case will be shewn by the following articles of the pursuer's statement which were put in evidence:—"In reference to the defenders' statement that the pursuer was travelling without a proper ticket, the pursuer has to make the following explanations:—In the superintendence of the various brickworks belonging to the pursuer, and the prosecution of his business, the pursuer had very frequent occasion to make use of the defenders' railway, and he is well known to the ticket-collectors, porters, and other servants on the line. It frequently happens that the pursuer, from want of time or otherwise, is unable to overtake the business which he had intended on any particular day, and thus he often omits leaving the train at the station at which he originally intended to leave, and for which he held a ticket, and passes on to a further station. In consequence of meeting customers and otherwise, the pursuer has often occasion to change his mind as to the station at which to stop, and although holding only a special return ticket for a particular station, he finds it necessary to stop at some other, either within or beyond it.

"On such occasions it has been the pursuer's invariable practice to consult his convenience and the exigencies of his trade as to the station at which he stops; and in case he travelled a greater distance than that covered by the ticket, he paid the difference of fare when the ticket was given up. This was the pursuer's invariable practice, and it was recognised, approved of, and acted on by the Railway Company for a considerable length of time. Not the slightest objections were ever made by the Railway Company to the pursuer's practice in this respect. The Railway Company not only for a

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long period have dealt with the pursuer on the footing above explained, but they have dealt, and still deal with many others and the pursuer on the same footing. Indeed, any passenger to a particular station is always allowed to change his mind and proceed to a more distant station, paying the difference of fare on giving up his ticket. This is the universal practice of railways throughout the kingdom, and a passenger so acting is not chargeable with a violation of any of the statutes.

"On the said 9th July 1855, being the day of the collision in question, the pursuer, in the morning, applied at Auchengray for a day-ticket to Carstairs and back. One of the porters, called Sommerville, was acting as a ticket seller, and the pursuer offered him a pound-note for change. The train was just coming up, and Sommerville refused to take the money, and hurriedly handed the pursuer a ticket, saying, 'You can pay on your return.' The pursuer put the ticket in his pocket without looking at it, and ran across to the train, by which he proceeded to Carstairs. On finishing his business at Carstairs, the pursuer found he was in time for the express train leaving Carstairs at 11.35. This train, however, did not stop at Auchengray, and the pursuer resolved to go on with it to Mid-Calder and visit his tile-works at Broxburn. He accordingly took his seat in the train, by which he proceeded till the collision occurred as above narrated. The pursuer did do so on the footing that he was to pay for the extra distance he had travelled, as well as the price of the ticket, when he should give up his ticket. Not the slightest objection was made to his doing so. And the Railway Company had always allowed him to act in the manner and on the footing above explained. The ticket was found in the pursuer's pocket, and it was not until many weeks after the collision that the pursuer saw it, and discovered that it was only a return ticket between Auchengray and Carnwath. Carnwath is a mile and a-half from Carstairs."

There was produced in evidence a table of excess fares used by the station-masters on the Caledonian Railway, and an admission by the Company that, "at the stations of the railway, whenever a passenger travels further than the distance for which his ticket was granted, the Company and its servants exact from him the difference of fare in money, and that this is of frequent occurrence, and that the sums so paid are stated in the the Company's books to the credit of the ordinary revenue."

Smith, the station-master at Auchengray, also deponed, that "on the day o the accident, and after it happened, or next day, Mure, the pursuer's foreman paid the ticket, *i.e.*, 7d., being price of return ticket to Carnwath. I ha asked him for it. Sometime afterwards 9d. was sent me as from the pursue by Robert Brydone, then a railway porter, now abroad. I had sent Brydon with an account, and he brought back 9d. more, as for return ticket t Carstairs."

And Sommerville, a porter at the same station, deponed,—"Pursuer aske for third-class return to Carnwath, and I gave it. I am sure he so asked I was not paid for it. He asked if I could change a pound-note, which could not. I reported this to Mr Smith."

"Thereafter Lord Neaves charged the jury; and in reference to the ter 'passenger' in the issue, directed the jury in point of law, that a passenge in this issue means a lawful passenger—*i.e.* a person lawfully in the railwa carriage in order to be conveyed by it; and that a person feloniously o clandestinely or fraudulently in such carriage would not be a passenger i the sense of the issue. And the said Lord Ordinary further gave it as hi direction in point of law, that a person in a carriage contravening the statut 8th & 9th Victoria, which he explained to the jury, would not be a passenge

"*First Exception.*—Whereupon the counsel for the defenders asked h Lordship to direct the jury that a person in a railway carriage without ticket, and in violation of the bye-laws and regulations of the Company,

not a passenger in the sense of the issue. The Lord Ordinary declined so to direct the jury. Whereupon the counsel for the defenders tendered their exception accordingly. No. 109. Feb. 18, 1857. Hamilton v. Caledonian Railway Co.

"*Second Exception.*—And the counsel for the defenders further asked his Lordship to charge the jury, that if the jury are satisfied that the pursuer took out a return ticket from and back to Auchengray, with the view of going on to Mid-Calder on his return, and not stopping at Auchengray, the pursuer cannot recover under this action. But the said Lord Ordinary refused so to charge the jury. Whereupon the counsel for the defenders tendered their exception accordingly.

"*Third exception.*—And thereafter the counsel for the defenders further asked his Lordship to charge the jury, that if the jury are satisfied upon the evidence that the pursuer was travelling in the train, at the time when the accident happened, without a ticket, and without the authority or consent of any official of the Company, they were bound to find for the defenders. The Lord Ordinary refused so to charge the jury. Whereupon the counsel for the defenders tendered their exception accordingly."

The Railway Company now pleaded;—That, as carriers, they were not under the statute but common law; and the question was, whether, in this case, there was any contract for the safe carriage of the pursuer? There was not, inasmuch as the pursuer was not a lawful passenger, not having complied with the regulations essential to make a contract. The Company were only carriers on the conditions which they themselves offered to the public, and which must be accepted in order to make a contract. Writing was not essential to its constitution. It only required an undertaking to carry the passenger from one particular place to another, but here there was no such undertaking. The pursuer had no right to go into the carriage, much less to be carried in it. It was of no consequence whether he was within any of the three categories mentioned by the presiding Judge. The fact was, that he was in the train without any contract with the Company to convey him. The duty of safe carriage did not arise from the fact of travelling, but from the contract to convey; and to the undertaking to carry or convey, the law superadded the duty of carrying safely. By its regulations the Company refused to carry a drunken person, but suppose he was smuggled into the train, would the Company be responsible for his safety? Their legal responsibility rested on a contract to carry, and that was shewn by the fact, that in every case in which an injury occurred, the pursuer pleaded this ground of liability with perfect success. If this pursuer had lost his luggage at Carstairs, the Company would not have been responsible.[1] He was truly in the position of a person getting up behind a carriage and getting his leg broken by an accident. The direction, therefore, was inadequate to put the jury in possession of the law.

LORD PRESIDENT.—Does your principle of law apply to a person having a third class ticket going into a first class carriage?

D. F. Inglis.—I am unable to answer that. There may be a difficulty about that.

Pleaded for the pursuer;—The verdict of the jury established that there was negligence on the part of the defenders, and that the pursuer was a passenger, unless the breach of the Company's bye-laws made him no passenger. A special contract was not necessary to make the Company liable. Liability for the safety of passengers was founded on duty,[2] and was incurred

[1] [illegible] v. Caledonian Railway Co., 27th May 1852, ante, vol. xiv. p. 806.

[2] [illegible] v. York, Newcastle, and Berwick Railway Company, 1851, 11 Scott's [illegible]; Collett v. London and North Western Railway Company, 6th [illegible] Adolphus and Ellis, p. 984; Great Northern Railway Company

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by the Company as common carriers. The pursuer was a passenger in the proper sense of the issue. The constitution of express contract between the parties *ab ante* before the pursuer went into the carriage was not necessary to make him so. The liability of common carriers, generally, was constituted without any previous contract. Thus, in the case of a mail coach or omnibus, there was no preceding payment. The pursuer was not acting fraudulently and with an intention of avoiding payment for his journey. Therefore, whether there was an express contract or not, there was, of necessity, some kind of contract, for the Railway Company advertised that they had trains by which it was safe to travel, and the pursuer was entitled, as one of the public, to hold that the Railway Company had undertaken to carry him safely by all of these advertised trains. The defence was rested on the bye-laws of the Company. It was not immaterial that these existed only by virtue of sect. 101 of the statute, which did not invert the liability of the Company as public carriers. If, at common law, the Railway Company were responsible for the pursuer's safety, the Act did not relieve them of that responsibility. The purpose of these bye-laws was to establish certain important regulations for the convenience and comfort of the journey; for example, the prevention of smoking, and destroying the carriage. And so in regard to a ticket. It was for convenience that every one should take out a ticket, and compliance with that regulation was sufficiently secured by the sanction of a penalty of 40s. on parties not complying with it. But the argument for the Railway Company would lead to extraordinary results. A person, in perfect good faith, might, in ignorance, take his seat in a train without a ticket, and be injured. Would it be an answer to say that he was not a passenger? It would, in a word, confer upon the Railway Company an immunity which they were not entitled to as common carriers.

After avizandum,—

Lord President (after going over the facts, and stating that there was a conflict of evidence as to whether the pursuer asked for the ticket which was in his possession or not.)—Parties travelling beyond the proper distance for which they have tickets are in use to be charged excess fare, and there is a column in the Railway table of fares applicable to such excess fares, which the Railway Company are entitled to exact. It is a fact that the Railway Company do exac these excess fares, and the pursuer states that he was in use to travel—when occasion required, or it suited his convenience—beyond the distance for which he ha taken out a ticket, paying the excess fare. That is not distinctly corroborated b the officers of the Railway Company. There is a difference of opinion as to wha would have been the duty of the officer at Midcalder when this party had arrive there. But that is only a difference of opinion as to the check which the Compan have in cases of fraud, and which would depend on the fact whether the party wa acting honestly or not, whether or not he was wishing to avoid payment of his far

Farther, the accident having occurred, an officer of the Railway called on th pursuer, who had an account-current with the Company, and his foreman the paid the price of the return ticket to Carnwath. He subsequently paid a fu ther sum of ninepence, as for a return ticket to Carstairs, and the money does no appear to have been returned to him. He himself does not say that he paid it, bu that his wife paid it. But the officer of the Company says that the person who he sent for the account brought it, and there the matter stops.

In that state of matters the case went to a jury.

The statute of 8 & 9 Victoria, referred to in his charge by the presiding Judg provides "that any person who shall travel or attempt to travel in any carriag used on the railway, without having previously paid his fare, and with intent avoid payment thereof, or who, having paid his fare for a certain distance, sh

v. Harrison, 3d July 1854, 10 Huddleston and Gordon (Exchequer Reports p. 376.

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knowingly and wilfully proceed in any such carriage beyond such distance, without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof, or who shall knowingly and wilfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage, is for every such offence liable to a penalty of forty shillings; and any person committing such offence may be lawfully apprehended and detained by the Company's officers and servants, until he can be conveniently taken before some Justice."

The jury found for the pursuer, and that finding has established certain matters. It has established that the collision took place through the fault of the Railway Company, and that the pursuer suffered damage thereby. It has also established that the pursuer was not in the train feloniously, or clandestinely, or fraudulently, and that he was not a person who travelled without a ticket, or beyond the distance, with the intention of not paying the value. But then the Railway Company called on the Judge to give certain farther directions, and the question is, Whether, by refusing to give these other directions, the Judge has erred, so that the verdict must be set aside? If, in regard to any of these matters, it shall appear to the Court that the direction asked to be given was one which was required, in order to guide the jury to a right conclusion on the point of law, then that exception must be sustained. If, on the other hand, it appears to the Court that in regard to all of them, taking them separately, there was none of them which it was necessary for the Judge to give in order to guide the jury to a right conclusion in point of law, then the exceptions cannot be sustained. It is not enough, in the case of a direction as to duty, that there is nothing wrong in the direction stated. If it is not pertinent, or even if pertinent, if the matter of it is another way of putting a thing already put by the Judge; or, if not necessary to guide the jury, then there is no reason for sustaining it. But if it is not of that character, but such that in its own terms it is defective, and apt to lead the jury to a wrong conclusion, then it is not a direction which the Judge ought to give.

Each of these directions must be viewed in reference to its circumstances.

The first is, "that a person in a railway carriage without a ticket, and in violation of the bye-laws and regulations of the Company, is not a passenger in the sense of the issue." We think the presiding Judge did right in not giving that direction. We think that a person may be a passenger in the sense of the Act, although he may not have a ticket; and as to the violation of the regulations of the Company, it is not very clearly stated what these regulations are. He may be a passenger, though without a ticket, if he has been in use so to travel, and the officers of the Company know that he had so travelled. If so, he is no doubt travelling in violation of the regulations, because they say that no person shall enter a carriage without a ticket; yet, if he is so allowed to travel, and pay for his ticket at the end of the journey, and if there is usage to that effect, he is a lawful passenger in the sense of this issue. This first direction was not a direction the Judge was bound to give.

The second direction is, "that if the jury are satisfied that the pursuer took out a return ticket from and back to Auchengray, with the view of going on to Mid-Calder on his return, and not stopping at Auchengray, the pursuer cannot recover under this action." That is one view of putting the case favourably for the pursuer, because it does not introduce the element of his having taken a ticket only from Auchengray to Carstairs and back. It puts it as a case in which he cannot recover under this action. That was a right enough way of putting that part of the case, for if the pursuer asked for a ticket from Auchengray to Carstairs Junction and back, and it was a mistake giving him the other, then he is to be held in the same position as if he had got a ticket to go to Carstairs and back, and the direction allows that; but it says that in that case, if he had the intention of travelling back to Mid-Calder, and not to Auchengray, he was not entitled to recover under this action. Now that ignores previous usage or practice, or the knowledge of the officials at Carstairs Junction that the pursuer was going to Mid-Calder, and because that he had no intention of paying his fare, because the Judge who negatived it, charged the jury, that if he had no intention of paying his fare, he was not a lawful passenger. Here again, therefore, if this party, in conformity with usage, and intending to pay his fare on his arrival at Mid-Calder, according to such usage, did so travel to Mid-Calder, because it suited him better to go on than to

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stop at Auchengray, we cannot hold that in that case it would have been right to direct the jury in the terms required by the Railway Company. It would have been necessary to take into consideration the matter of usage and *bona fides* on the part of the pursuer. This exception, therefore, we must also disallow.

The third direction is, " that if the jury are satisfied upon the evidence that the pursuer was travelling in the train, at the time when the accident happened, without a ticket, and without the authority or consent of any official of the Company, they were bound to find for the defenders." Now, as I read that direction, it is that the pursuer was travelling without a ticket, and without the authority or consent of the officials of the Company, on that particular occasion, not with reference to any usage to that effect, nor any inference of authority to be drawn from practice, but without express authority to travel without a ticket at that time. According to the finding of the jury, there was usage the other way. And if the jury were of opinion that there was such usage, then this was taking such element from them, and consequently the direction would be defective. On these grounds, we think that none of these exceptions should be allowed.

The Court pronounced the following interlocutor:—" Disallow the bill of exceptions, and find the defenders liable to the pursuer in the expenses incurred by him in the discussion of the bill of exceptions: Allow an account thereof," &c.

John Robertson, S.S.C.—Hope, Oliphant, & Mackay, W.S.—Agents.

No. 110. William Stevenson and Others, (Stevenson's Trustees), Real Raisers.—*D. F. Inglis—Sol.-Gen. Maitland.*
John Dumbreck and Others, Claimants and Objectors.—*Pattison—W. Ivory.*

Trustee—Liability—Tutor and curator—Caution—Bankruptcy—Discharge b *a minor and tutor for pupil.*—A truster provided for the payment to his children certain portions of his estate at a specified time, declaring his daughters shou enjoy a liferent only of their share,—the fee going to their children,—and the j *mariti* and right of administration of his daughters' husbands being excluded. T period for the distribution of trust-funds having arrived, the husband of one of t daughters (then dead) applied for and obtained payment of the shares appertaini to his two children, a pupil and a minor. Being in embarassed circumstances, t trustees required him to find caution to account for the money to his children wh they reached majority, and for its proper application. He found caution, and one the cautioners was appointed factor. The father then granted a discharge as tut for his pupil son, and curator for the minor—the minor and cautioners being a parties to the deed. The father misapplied part of the funds, and the factor t rest. The latter also was sequestrated. In a multiplepoinding and exoneration the trustees;—*Held* (altering judgment of Lord Cowan), that *mala fides* not bei alleged against them, and the father having been admittedly entitled in law uplift the money, and the caution, though extrajudicial, having been admitte sufficient at the time, the trustees were entitled to take credit for the sums so p by them, and were not liable either to the pupil or minor for the subsequent m application of the funds or insufficiency of the cautioners.

Process—Multiplepoinding—Opening of Record.—A closed record in a multip poinding carries with it all the finality and effects of a closed record in an ordin action: Therefore, *held* incompetent to open up a record closed on the above st ments for the purpose of introducing such averments of knowledge on the par the trustees in regard to the bankrupt and insolvent circumstances and previ conduct of the father of the beneficiaries as could have implied *mala fides* on t part in paying the money to him, without, at least, judicial caution.

Feb. 18, 1856. — 1st Division. Lord Cowan. C.

This litigation commenced in 1848. In 1809, the deceased Willi Stevenson executed a trust-disposition and deed of settlement by which conveyed his whole heritable and moveable estate to certain trustees for purposes therein mentioned. The deed contained this direction:—" In

second place, I will and appoint, that the said trustees, or quorum foresaid, account for or pay and divide the whole proceeds of the foresaid heritable subjects, effects, debts, sums of money, and others, hereby conveyed, with the rents, interest, and profits, if any be, under the deductions before and after mentioned, to and among my said children before named, or any other child or children to be lawfully procreated of my body, in the proportions after mentioned, on their respectively attaining the age of 25 years complete." No. 110. — Feb. 18, 1857. Stevenson's Trustees v. Dumbreck.

This was followed by a declaration that "the shares or proportions of my foresaid subjects and effects to which my said daughters shall be entitled are conveyed to them only in liferent, during all the days of their lives, and to the child or children who may be lawfully procreated of their bodies in fee: and which liferent provisions in favour of my said daughters shall be exclusive of the *jus mariti* or right of administration of any husband whom they may marry, and shall not be affectable by their debts or deeds, or liable to be attached by their creditors, and that any receipts or discharges to be granted by them to my said trustees shall be equally valid and effectual as if granted with consent of their said husbands."

The provisions in favour of his children were then declared by the truster to be in full of legitim. He appointed his trustees to be tutors and curators to his children during their pupillarities and minorities, and declared that they should not, in either of their capacities of trust-disponees, executors, or tutors, be liable in diligence, or for omissions or negligence, nor *in solidum* with or for one another, or for any factor to be appointed by them.

There was no exclusion of the tutorial and curatorial powers of the father of his daughters' children.

William Stevenson, the truster, died on 27th July 1839. He left three sons and three daughters. Their shares of their father's estate were fixed by the terms of the trust-deed. One of the daughters, Margaret Stevenson, had previously married a Mr John Dumbreck. She died about six months after her father, in January 1840. She left two children, Charles, aged six years, and John, aged fifteen.

Charles and John Dumbreck were the objectors in this action of multiplepoinding and exoneration raised by their grandfather's surviving trustees.

Article 3 of the statement for the trustees was as follows:—"The objectors' mother at the time of her death had attained the age of 25 years. Between the date of her death and the date of the discharge to be immediately noticed, of 20th October 1841, certain small payments were made for behoof of the objectors to meet the expense of their clothing, maintenance, and education—their father having been unfortunate in business and unable to support them. The objectors and their father, as curator for the one and administrator for the other, insisted further for payment of the full sum due to them, and raised an action against the trustees to enforce that demand, which the latter were advised they could not resist. The balance (amounting to about L.590) was therefore agreed to be paid, and, accordingly, the discharge already referred to was granted by the objectors' father as administrator-in-law and tutor for his son Charles, then in pupillarity, and by the objector John, then a minor, and his father, as his curator."

The discharge was dated 20th October 1841, and proceeded on this preamble:—"And whereas I, the said John Dumbreck, junior, being now in the years of minority, applied to the said trustees, with consent of my said father, for payment of my share of the said provision, and I, the said John Dumbreck, senior, also applied, as administrator-in-law and tutor to the said Charles Dumbreck, my second son, who is still in the years of pupillarity, for payment of the other half of the said provision payable to him—and whereas the said trustees agreed to comply with these applica-

No. 110. tions, upon condition that we should grant to them a valid and formal discharge, with warrandice, and security to the effect underwritten;" therefore, in consideration of L.588, 10s. 5d. paid to them, "being the balance of their mother's share and proportion of her father's means and estate," they *simpliciter* discharged the trustees of the same.

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Articles 5 and 6 of the statement for the trustees were as follow:—"In order as far as practicable to secure and protect the objector's interest in the sums thus paid, the trustees stipulated that William Waddell, sometime baker in Cumbernauld, and Michael Waddell, writer in Glasgow, should become, conjunctly and severally, bound that the objector's father should faithfully and properly discharge the office of administrator-in-law and tutor and curator for his said sons, as regarded the sums of money paid over to him as aforesaid, and should duly count and reckon with them when they came of age. The object of this stipulation was to enable the objectors, when they came of age, to go against William and Michael Waddell, as well as against their father, if the money had not been duly applied for their benefit, or was not fully accounted for. An obligation to this effect was accordingly inserted in the deed of discharge, which was signed by the Messrs Waddell, who, at the sametime, became parties to the clause of warrandice in the deed.

(6), The circumstances of the objectors' father being at the time in an unsatisfactory state, it had farther been arranged between the parties that a factory should be granted by the objectors and their father for their respective rights foresaid, in favour of the said Michael Waddell, to enable him to uplift and invest all sums of money to which the objectors had right for their behoof. Accordingly, a deed of factory and commission was granted, of even date with the said discharge, by the objector John Dumbreck, junior, and his father as his curator, and by the father as administrator and tutor for his son Charles, authorising Michael Waddell to uplift and receive the foresaid sums, and any additional sum which might come to be payable, and to 'deposit or otherwise invest the said sums either in bank or on heritable or personal security, according to his discretion, in his own name, for their behoof.'"

The objectors' answer to that last statement was: "Admitted that the objectors' father's circumstances were in an unsatisfactory state, but it is not known that the deed of factory and commission was granted in favour of Michael Waddell."

In the condescendence of the fund *in medio*, the trustees credited themselves with a sum of L.11,879, 15s. 6d., as being "sums paid to the different members of the family." That sum of L.11,879, 15s. 6d. included the L.590 referred to in the above discharge.

The objections to the condescendence were thus stated in articles 6 and 7 of the objectors' statements:—"Objection 6, for C. Dumbreck.—The sums before mentioned, alleged to have been so paid to or for behoof of the objector and his brother John, were not so paid or applied. The objector's father whose right of administration was excluded by the trust-deed, applied the sums that came into his hands for his own behoof and purposes. The discharge before mentioned granted by the objector's brother John, his father and Messrs Waddell, was not signed by the objector, as he was then a boy of about seven years of age, and incapable of granting it. The alleged cautioner, Mr Michael Waddell, received the foresaid sum of L.598, 8s., and instead of applying it for behoof of the objector and his brother, he, at various times, made certain payments therefrom to the objector's father, who, in like manner, applied them solely to his own purposes. The said Michael Waddell has lately been sequestrated in terms of the Bankrupt Act, and, at the date of his sequestration, there remained in his hands of the above sum no less than L.351 unaccounted for."

The objection for John Dumbreck, junior, was in similar terms, only that he stated that the discharge "was not signed by the objector voluntarily, but he was compelled or unduly induced by his father to do so when he was only fifteen years of age."

"Objection 7, for C. Dumbreck.—The objector's father, since the death of his mother, has been twice married, and has a family by each wife. The objector and his brother John have been totally neglected by him, and their provisions under the settlement of their maternal grandfather appropriated as above mentioned."

The objection for John Dumbreck was in similar terms.

In these circumstances the objectors pleaded, that the payments objected to were not duly made by the trustees, nor warranted by the terms or nature of the trust. And Charles Dumbreck farther pleaded, that the discharge founded on was not binding on him, in respect it was not granted by him, nor by any one entitled under the trust-deed, to receive the fund in question on his behalf. And John Dumbreck pleaded, that in the circumstances the discharge was not binding on him, or, at all events, was reducible at his instance, on the head of minority and lesion.

The trustees pleaded, that the deed of discharge and deed of factory and commission, followed by the action and decree, effectually barred the objector John Dumbreck, junior, from challenging or repudiating the payments now objected to, and equally barred Charles Dumbreck from challenging them. That they the trustees were entitled to pay the objectors' provisions to them, and to their father as curator, and as tutor and administrator; and, having done so in good faith, to the extent stated in the condescendence of the fund *in medio*, they could not be held bound to pay the sums a second time.

The Lord Ordinary, on 17th January 1854, pronounced the following interlocutor:—"Finds that, in accounting with the objector Charles Dumbreck, the trustees of Mr Stevenson are not entitled to take credit for the two sums alleged to have been paid by them on his account to his father John Dumbreck, as his administrator-in-law, conform to discharge No. 68, and receipt dated 12th June 1843, No. 66 of process, and to that effect sustains the objections for the said Charles Dumbreck; and, as regards the objections stated by John Dumbreck, repels the same, in respect of said discharge and receipt, and decerns: Finds the said Charles Dumbreck entitled to the expenses incurred by him, as these shall be taxed in conformity with the principle explained in the annexed note; but finds no expenses due *hinc inde* as between John Dumbreck and the trustees: Appoints an account of the expenses found due to be lodged," &c.*

* "NOTE.—The points adverted to in the note to the interlocutor of 20th May 1852 were ably argued at the renewed debate; but, while the Lord Ordinary still feels the question as to the validity of the payments by the trustees objected to by John and Charles Dumbreck attended with considerable difficulty, he has arrived at the conclusion embodied in the interlocutor without much hesitation. The position of the two objectors is materially different; and this difference requires to be attended to in the argument. At the time the payment was made to the father, his son Charles was in pupillarity, and the discharge relied on by the trustees was consequently granted by the father alone as administrator-in-law; but his son John was in minority, and the discharge bears to be granted by him and by his father, as his administrator-in-law and curator. A great variety of letters and documents have been recovered by the parties, and were largely commented upon at the debate. The Lord Ordinary thinks that, while, on the one hand, there is no evidence to [illegible] the trustees, or their agent and factor, the deceased Mr Jameson, in a [illegible] collusion, or to hold them as having acted in bad faith in the [illegible] is, on the other hand, clear proof that they were perfectly aware [illegible] circumstances, and the embarrassed state of his affairs, and

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All parties reclaimed. On 27th May 1856 the case was called, and in the course of the debate, the counsel for the trustees contended that the

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that they well knew that, to part with the money to him, in his character of administrator-in-law, was to peril the safety of the fund. Nay, it is shown by the productions, that, having themselves this belief, they consulted counsel as to the course they ought to follow, and were advised that they could not safely pay to the father, in the state of his circumstances, except under a decree of this Court. The trustees and their agent and factor were, nevertheless, persuaded to pay over the fund, without such sanction, to the father, or rather to his agent Michael Waddell, acting under a deed of factory and commission from the father. Certain precautionary measures, no doubt, were taken by the trustees to guard against the possible loss of the children's funds; and it is for consideration how far the adoption of those measures is sufficient to protect them from the responsibility that would otherwise have been the legal consequence of their acts.

"On one point the Lord Ordinary has formed a clear opinion. In the state of the father's affairs, as established by the documents in process, and as admitted in the record by the trustees, payment to him of the funds of his pupil child, without any security for their faithful application, would not have been justifiable, and his discharge could have no effect as a protection to them. The powers of the father, as administrator-in-law, were at an early period defined by the Court in a case very analogous to the present—Govan v. Richardson, 12th February 1633, D. 16,263. The debtor there refused to pay to the father, and consigned the money in a suspension, and thereby obtained judicial exoneration; and the Lords found the same ought not to be given up to the father, 'until the time he found caution to make the same furthcoming to her—the pupil—at her lawful age, in respect he was but a poor man, and it was feared that he might spend the money to the bairn's prejudice.' The same principle is recognised in the other cases to which reference has been made in the former note; and, in the case of Johnston, 1822, the father, being bankrupt, was superseded altogether, and a judicial factor appointed. This is consonant with legal principle. The bankruptcy of a mandatory empowered to uplif money operates the presumed revocation of the mandate; and no debtor, in th knowledge of his bankruptcy, could safely pay to the mandatory. The office o administrator conferred by law on the father cannot but be similarly affected by hi bankruptcy—or even without bankruptcy by his known embarrassment and povert The debtors to the children, when aware of the father's condition, cannot be i safety to pay to him so circumstanced.

"This principle is peculiarly applicable to a case like the present. This is no the ordinary case of debtor and creditor. The trustees act under a family settle ment, by the terms of which the granter makes provision for his children and grand children; and, although the trustees are not nominated tutors and curators, it is appre hended that they stand, nevertheless, in a more responsible position to the grand children of their constituent than mere ordinary debtors in a sum of money. T some extent, there is a duty imposed on them with regard to the funds under the charge belonging to children under age; and they must take care that the partie legally entitled to require payment, for behoof of the children, are in a situatio duly to manage the funds when paid to them. And, accordingly, in all cases this kind, the Court will, upon the representation of trustees, see that the interes of pupil and minor children are sufficiently protected.

"The next inquiry regards the effect of the steps taken by the trustees to prote the children from any loss of their provisions that might arise from the father havin got the money; and it is here that the distinction in the situation of the two obje tors comes to be of practical moment.

"What the trustees did was, first, to insist upon caution being given by the fathe not merely in aid of the warrandice contained in the discharge, but to the effe that the father should faithfully and properly fulfil the office of administrator-in-la and tutor and curator for his sons, in so far as related to the sums paid over to hi for their behoof respectively by the trustees; and, second, as part of the transactio that the father and his minor son should execute a factory and commission in favo of Michael Waddell, who acted as his agent in carrying through the transactio and became one of his cautioners, by which power was conferred on the factor

statements on record did not disclose such a case as was assumed in the Lord Ordinary's note, and therefore that his Lordship's judgment was un- No. 110.

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uplift the money, and to deposit or invest the same according to his discretion, under the obligation of accounting to the sons when they came of age, and subject to the declaration that the factory should be revocable on no pretence whatever during the nonage of the sons. Stevenson's Trustees v. Dumbreck.

"Now, 1st, as regards the objector Charles Dumbreck, the pupil, it appears to the Lord Ordinary, that what the trustees thus did cannot protect them against the claims for his provision. As he was no party to the discharge and receipt, it is considered that, in transacting as they did with his father as administrator-in-law, and sanctioning the money getting into the hands of Michael Waddell, the trustees acted unjustifiably, and cannot plead the payment as exonerating them from their liability to account to the true creditor. They, no doubt, took the obligation, not merely of Michael Waddell, but also of his father William Waddell, as cautioners to the effect mentioned; but this cannot protect them from direct liability — (1.) Because, apart from the specialties of the case, having extrajudicially accepted of caution, and not sought judicial sanction to their proceedings, they must take on themselves the responsibility of making that caution effectual: (2.) Because, in the special circumstances of this case, they ought not to have paid to the administrator-in-law, even upon caution, but ought to have taken the judgment of the Court as to the terms on which and the parties to whom it behoved them to make payment of the pupil's money; and (3.) Because, in fact, from the peculiar transaction under which the money was paid, payment was not made to the administrator-in-law, so as to place the funds under his charge, but was made to another person altogether, in whose hands the funds were placed truly beyond the control of the legal administrator.

"2d, The position of the other objector is different. Being in minority at the date of the discharge and receipt, these deeds bear to be executed by him, with the consent of his father, as his curator; and, in like manner, the factory and commission in favour of Michael Waddell is granted by him with his father's consent. These deeds are in all respects regular; and the Lord Ordinary does not see sufficient ground, under this record, for refusing effect to them as deeds by which the objector is bound. There may be room for the discharge and factory being set aside at the objector's instance, now that he is come of age, on the special grounds stated in the record. No such proceeding, however, has been yet attempted. The discharge, as well as the factory and commission, and also the subsequent receipt, stand unchallenged; and it must be held that the steps that were taken by the trustees had the consent of the objector. In the face of his own deeds, he cannot be allowed to dispute the payments made by the trustees on the ground of their being unjustifiable and illegal. They are entitled, as matters stand, to place the payments to his debit—leaving him to make his recourse good against those parties with whom he and his curator consented to entrust the administration of his funds.

"The grounds on which the discharge is objected to are set forth in article 6th of the objector's statement. They are, in substance—(1.) That the discharge was not signed by the objector voluntarily, but under compulsion or undue inducement by his father; (2.) That Michael Waddell, who received the money, instead of applying it for behoof of the objector, at various times, made payments to the father for his own purposes; and (3.) That Michael Waddell has lately been sequestrated, having in his hands at the time a large amount of the money unaccounted for. The question is, Whether, in this accounting with the trustees, these matters of fact are relevant to obviate their right to take credit for the sum indisputably paid to the objector and his factor with the consent of his father? The Lord Ordinary thinks they are not. It is not said that the trustees were parties to the alleged compulsion and undue inducement under which the objector acted in signing the discharge. Neither is it alleged that the trustees—and there is no [illegible] documentary evidence to that effect—were aware of the money, [illegible] to Michael Waddell, having been improperly given to the father [illegible]. And, finally, that the money has been lost through the [illegible] of Michael Waddell cannot affect the trustees, assuming them

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warranted by the facts. Counsel for the objectors thereupon moved for leave to make an addition to the record, such as, without materially altering it, would remove the objection now taken to it; and the Court, "before answer," allowed the objectors to state in a minute the addition they proposed to make. That minute having been lodged, was answered by the trustees; and on 13th January 1857 the case was again called.

The minute for the objectors contained the following statements, with corresponding pleas:—"1. The sums referred to in the 4th and 5th objections[1] for the said objectors, and for which the said trustees have taken credit in their accounts, were not paid to or applied for behoof of the said objectors. The said sums were paid away by the trustees or their factor—during the pupillarity of Charles and the minority of John Dumbreck—to the objectors' father, who was then bankrupt, or at least insolvent, and who was in great want, and unable even to provide the ordinary means of subsistence for himself or his children; and of all this the said trustees, who were brothers-in-law of the objectors' father, were well aware before they paid to him the said sums. 2. The trustees were also perfectly aware, before they so paid away the said sums, that the objectors' father was not a fit or proper person to be entrusted therewith. Before paying to him the sum of L.588, 10s. 5d., referred to in the discharge No. 68 of process, and the sum of L.28, 1s. 1d., referred to in the receipt No. 66 of process, the trustees were well aware that the objectors' father had demanded the said sums from them, in order to apply the same, or at least a portion thereof, in the conduct of his own business, and that he had already applied for his own behoof a considerable portion of the funds belonging to the objectors, which had been previously paid to him by the trustees."

It further stated that the trustees had been advised by counsel that it was not safe for them to pay the funds without judicial authority; but notwithstanding this, they had paid away the funds, and the consequence was, tha the greater portion was lost or misapplied. The minute also stated specia objections to the discharge, and to two receipts produced in process.

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entitled and bound to have paid to the parties by whom the discharge in their favou was granted.

"The objector contended, that there was no necessity for an action of reductio on the head of minority and lesion, but that, *ope exceptionis*, the discharge an receipt might be objected to in this accounting.

"There are cases in which such an action is not necessary, as when the act b the minor—to which he excepts—bears from its character and on the face of it presumption of lesion. Here no such case exists; and there are not even releva statements to support an action of reduction on the head of minority and lesio The lesion alleged to have been suffered by the minor is not so much from the ac to which the trustees were alone parties, viz., payment of the minor's money Michael Waddell, as from his and the father's alleged malversation and wrong acts, and the factor's subsequent bankruptcy. As regards the payment of the mon by itself, the trustees would have been bound to pay the minor on his requisiti had his father been dead, and had the minor had no curators. But the father's co currence, both in the discharge and in the commission and factory to Waddell, und which the money was paid to the latter, made it imperative on the trustees to p over the money as required. Their *bona fides* in so acting is assumed, for the doc mentary evidence does not make out the reverse.

"The Lord Ordinary, on the whole, considers that the trustees are entitled take credit for those payments on account of this objector.

"The Auditor, in taxing the account of expenses found due to Charles Dumbre will keep in view, that the other objector has been found entitled to no expens and proceed upon the principles of taxation which appear to him properly applic to a case of combined discussion like this—reporting to the Lord Ordinary his vi unless there be some rule recognised in practice in similar cases, which he wi course follow."

[1] These objections merely specified the various payments objected to.

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The trustees, in their answers, denied the objectors' statements, and pleaded;—That the statement in the minute being intended to establish grounds of objection to the raisers' accounts, and of liability against them, which were entirely new, and inconsistent with those previously maintained by the objectors on the closed record, it was incompetent, and ought not to be received.

Lord President.—It appears to me that this minute proposes entirely to alter this record and the shape of the case. The record is closed on objections by the Dumbrecks to the statements of the trustees. On 18th March 1851, the Lord Ordinary "closes the record upon the adjusted papers for the parties, being Nos. 14, 15, 16, and so on, of process." It is not said that any of the documents embraced in this interlocutor contain elements for disposing of the case not now before us. The minute proposes to alter the record most materially. The first article, perhaps, is not so objectionable. The word "insolvent," which occurs in it, I do not remember to have seen in the previous record. But the second statement stands in a different predicament. The trustees are said to have been "perfectly aware," before they paid the money, that the objectors' father was not a fit person to be entrusted with it. There is something here averred in addition to the pecuniary embarrassments of the father. It is said that he had demanded the said sums "from the trustees in order to apply them" in the conduct of his own business, and that he had already misappropriated a considerable portion of the funds. I regard that as a new averment. It is intended to represent something different from the mere description of the pecuniary circumstances of the father. The statement as to the perfect knowledge of the trustees is very important as regards the good faith of the trustees. In that respect it alters the case altogether. It is in vain to argue that the matters here averred are sufficiently within the statements of the trustees themselves. If so, the objectors have such benefit from them as the statements admit of, and there can be no loss to the objectors by refusing to add their own averments to the record. But I regard these averments as altering the record, and, for that reason, I am not prepared to receive them. To do so would be going farther than we have done in any case, and it would be a bad precedent. There is no proposal to add the statements in the minute as *res noviter*, and therefore, I give no opinion upon that point. But, in the circumstances, I am of opinion that we should refuse the objectors' motion. There is a concluded proof as well as a closed record, and, looking upon this proposed addition as a total change of the record, and not an explanation of it, I am for refusing to allow it to be received.

Lord Ivory.—I cannot say that I am able to differ. It is an unfortunate result, however, for the parties. This question arises on the motion of the objectors' counsel in the middle of the debate on the merits, when, finding themselves pressed by the line of argument for the trustees, they thought to better their position by getting the record opened. The fair meaning of such a proceeding on the face of it points strongly to an alteration of the record in order to better their case. Their may be situations in which a party's case may be relieved of superfluity and light thrown on what is dark, without trenching on the essence of the averments which constitute the record; and such minutes, containing explanatory statements, we have been in use to allow, under such conditions as to expenses or otherwise, as we see fit. But it is impossible to look upon this minute otherwise than as an attempt to change the substance of the record, and in any other action this would not have been competent under the Judicature Act. It is true that a multiplepoinding and other such processes are excepted in the Act of Parliament, and specially dealt with in the Act of Sederunt. But, nevertheless, the statute and the Act point to this, that the ordinary form shall be followed as far as possible and expedient, and I am not aware that this case—the record being closed—does not carry with it all the finality and effects of a closed record in ordinary actions: Therefore we are here as in other cases where the party wishes to open up a record in order to introduce new and essential matter. I doubt the competency of that. I regret it in this case, but it is of more importance to protect the interests of the public, which laxity in form is apt to endanger. Therefore I agree that this motion should be refused.

As to opening the record, on looking at the interlocutor sheet, I see it stands in

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a very peculiar position. The interlocutor and note of the Lord Ordinary, upon which this new view of the case is introduced, is dated on 20th May 1852, and both parties appeared then to hold that there was sufficient within the case for dealing with it in that new view of it; and so diligence *ad probandum* was moved for and granted. Probation is not renounced till long after that date—December 1853—the minute is lodged of that date, but not fee-funded till May 1854. Avizandum with the condescendence of the fund and the objections to it was made on 8th December 1853, so that at the very moment that the minute is said to have been lodged, the case was lying before the Lord Ordinary, who could not have seen that minute, and his interlocutor is dated on 17th January 1854. A very plausible argument may be raised that that was a proceeding by which neither party could be bound in reference to this interlocutor. But that does not touch this minute, the competency of receiving which we are now considering. I am, upon the whole, of opinion that we cannot receive it.

Lord Curriehill.—Upon what ground are we asked to add this minute to the record? It is not on the ground that the interlocutor closing the record in a multiplepoinding in a question as to the fund *in medio*, is not in the same predicament as other interlocutors closing records. Had that proposition been contended for, I was quite prepared to negative it. Nor is it on the ground of the allegations in the minute being *res noviter*. The footing on which the motion is made is, that it falls under the rule established by some decisions of this Court, that when there are in a record ambiguous expressions, the Court will give the party the privilege for its own satisfaction of explaining these. But I agree entirely with your Lordship that the allegations we are now asked to admit are not of the character of explanations of what is ambiguous, but are new matter altogether; therefore they are inadmissible.

I wish only further to remark that the Court should be very cautious how they extend that privilege farther than it has already been recognised. It is of the worst consequence to encourage parties to make ambiguous or slovenly statements in the record, in the belief that when pressed as to their meaning, they may be allowed to put upon them the meaning which best suits them by way of explanation. We are bound to guard against that, not only in justice to the rules of Court, but for another reason of very great importance, that a very large proportion of the time of this Court has been occupied of late in construing and attempting to find out the meaning of records, and I shall be very unwilling to extend any rule which will have the effect of increasing that difficulty.

Lord Deas concurred. We have constantly occasion to remark upon the loose and imperfect manner in which records are prepared in this Court, which leads to great waste of the public time, and great expense to litigants. If the advisers of parties will not take warning from these remarks, the parties themselves must bear the consequences. There is no other way of enforcing those forms of procedure which are essential to the ends of justice.

The Court pronounced the following interlocutor:—"Refuse to allow the statements contained in the said minute to be held as part of the closed record, or to be added thereto; and reserve the question of expenses of the discussion in regard to the matter."

The debate on the merits was then resumed. The trustees pleaded;—That they were entitled to take credit for the sums objected to. The objection that they ought to have obtained judicial authority before paying to the father, was entitled to no weight. No doubt had they obtained such authority they would have been perfectly safe; but it did not follow that because they had not obtained such authority they ought not to have made these payments, nor that they ought to be visited with a penalty for doing extrajudicially what they might with perfect safety have done judicially. In so acting they had saved the expense of such judicial procedure to the estate; and the whole question was, had their conduct brought loss to the estate which judicial procedure would have averted? If not, there was no liability. Previous decisions established nothing more than this, that when an administrator-in-law was in embarrassed or bankrupt circumstances, tr

tees were not safe to pay to him without security. There was no rule that judicial caution alone would protect trustees paying funds to an administrator-in-law in embarrassed circumstances. Such a rule might be very politic, but it did not exist, and without it the objectors had no case.[1]

The objectors pleaded;—That judicial caution implied enquiry by the Court into all the circumstances of the case, and the sanction of the Court, as the guardian of all pupils and minors in the kingdom. The trustees having acted on their own authority, took upon themselves all liability for whatever loss might arise from their proceedings; and their own statements disclosed such a case of knowledge on their part as did not warrant them in paying without judicial sanction. Farther, this was not an ordinary case of debtor and creditor. The trustees acted under a family settlement, by the terms of which the granter made provision for his children and grandchildren, and although the trustees were not nominated tutors and curators to the grandchildren, they stood, nevertheless, in a more responsible position to the grandchildren than mere ordinary debtors in a sum of money.[2]

Lord Curriehill.—The only purpose of the trust-settlement of the late Mr Stevenson which we have occasion to consider, is that by which the trustees are appointed to account for or pay the proceeds and revenues of the subjects conveyed to them to the truster's children, on their respectively attaining the age of 25 years complete. The deed also provides that the shares or proportions to which the truster's daughters shall be entitled are conveyed to them only in liferent, and to their children in fee. These liferent provisions in favour of his daughters are declared to be exclusive of the *jus mariti* or right of administration of their husbands. The provisions in favour of his children are also declared to be in full of legitim, and every other claim whatever. The trustees are appointed tutors and curators to the truster's children during their pupillarities, and there is a declaration that the persons so named shall not, in their capacities of trust-disponees, executors, or tutors, be liable in diligence, or for omissions or negligence, nor in *solidum* with or for one another, or for any factor to be appointed by them.

The truster survived the execution of this deed about thirty years. He died in 1839, leaving three sons and three daughters, one of whom was married to Dumbreck. She died soon after her father, leaving two sons, the objectors in this action. They were entitled to the share of which their mother had the liferent, and that right vested in them immediately on their mother's death. It appears that, after the death of Mrs Dumbreck, various sums were paid by the trustees for the support and education of these children. These sums were paid to their father, as their administrator-in-law. In 1841, the funds had been realised to a considerable extent, and a division to a large amount was ready to be made. The sum divisible among the children of Mrs Dumbreck amounted to the sum of L.294 to each of them. That sum was demanded from the trustees by the children, or on their behalf by their father as administrator-in-law; and it is stated, and not denied, that action was raised for payment of it. In that year a sum was paid to the father for behoof of his children as administrator-in-law, and tutor for the youngest son, and curator for the eldest. A discharge was granted by the father in that capacity—the eldest son, a minor, being also a party to the discharge. The deed also contains a clause of warrandice. It is dated in October 1841.

So the matter rested till 1848, when the present action was raised at the instance of the trustees. The grounds upon which these payments, for which the

[1] Govan v. Richardson, February 1633, Dict. 16,263; Wilkie, February 1788, Dict. 16,311; Witherspoon, December 1775, Dict. 16,372; Grahame, Dict. 16,383; Johnston v. Wilson, 11th July 1822.

[2] Fife, 6th Feb. 1750, Dict. 16,354; Forbes, 9th July 1673, Dict. 16, 287; Donaldson, 18th June 1833; M'Laurin, 28th June 1831; Boswell, 25th Feb. 1747, Dict. 16,353; [illegible] B. 1, T. 6, sect. 55—B. 1, T. 7, sect. 3; Stair, B. 1, T. 5, sect. 12; Bankton, B. 1, T. 6, sect. 2; Bell's Prin., sect. 2068, 2 Fraser, p. 72; Manuel v. Manuel, [illegible] January 1853, ante, vol. xv. p. 285.

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trustees take credit in the condescendence of the fund *in medio* are objected to, are contained in the 6th article of the objectors' statements. Our duty is now to decide this case case upon the facts and pleas in the record. We are not entitled to travel beyond it. If there is anything material not contained in the record, it is the objectors' fault or misfortune that it is not stated. But the question we have to determine is, Whether there is a relevant case stated in this record? The nature of the objections there set forth is, that the funds were not paid or applied to or on behalf of the objectors, that is to say, that their father did not so apply them. Of course these sums were not so applied by the trustees, because they were out of their hands, being paid to the person legally authorised to receive payment of them. They were misapplied by the childrens' father, but that is a matter with which, in the ordinary case, trustees have nothing to do. They were not guardians of these children. They paid the money to the right party, and, having done so, they had nothing more to do with the application of it.

Then it is said that the discharge was not signed by the youngest son, who, at the date of it, was a boy of seven years of age. That is perfectly true. But the tutor of a pupil is by law empowered to grant a discharge for his ward, and therefore this statement amounts to this,—that the discharge was rightly granted by the party entitled in law to grant it.

Farther, the objectors complain that "payment was made to the objectors' father." Why not? He was their legal guardian. But if the money was properly paid to him, their administrator, who was in law entitled to receive it, and was misappropriated by him, that is a matter for which the objectors must call their father to account; but it is a matter with which the trustees, who made the payment properly, have no concern.

Then "Michael Waddell (the cautioner) has been sequestrated." Again, that is a matter with which the trustees have no concern, unless the objectors can take the case out of the ordinary rule.

The seventh article is a repetition of the averment that the money has been misappropriated.

Now all that is clear enough. But it is said that while the objectors have not stated anything more specific in support of their objections, the trustees themselves have, in their statements in defence, disclosed a different case upon which the objectors are entitled to found as against them, and they found particularly upon the 3d, 5th, and 6th statements for the trustees, as shewing that the actings of their father, as guardian, were so far crippled by pecuniary embarrassments, that he was not entitled to uplift these sums without judicial authority, and finding judicial caution for its proper application.

I have great doubts whether the objectors are entitled to maintain that plea under this record. But supposing they were, this being a statement of the trus-tees, the objectors, if they found upon it, must take it precisely as it is made They are not entitled to adopt it so far, and then qualify it as a statement of thei own. They are not founding on it as evidence corroborative of their own state ment, but as a separate and independent statement, on which a separate plea in law is to be rested. Taking the statement on that footing, therefore, what does i amount to? That the trustees knew that the affairs of this administrator-in-law were in some embarrassment. They did not know that he was bankrupt or sequestrate or even that he was insolvent, but only embarrassed. They imposed on him th duty of finding caution; and this statement is introduced for the purpose o explaining the reason of their adopting this extraordinary course. He found cau tion; and it is not alleged that, at the time this payment was made, the cautioner were insufficient. It is only said that the caution was not approved of by a court o law. I know of no authority in the law of Scotland which requires that such cau tion shall be judicial. It would have been wise, perhaps, for their own sake, ha the trustees obtained the sanction of the Court to their proceedings, so as to exclud all future challenge. But that would have exposed the estate to the expense of suc judicial proceedings, and I see no corresponding benefit that would then have be conferred upon it. But the trustees did not apply for such judicial sanction to the proceedings. They took upon themselves the responsibility of the cautioners bei sufficient; and it appears from the documents in process, that they did not do rashly. It was only after inquiry as to their sufficiency that they accepted the and their sufficiency at the time is not now disputed.

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But, again, it is said, that this loss was occasioned by a species of new trust created by the trustees, in respect of an arrangement by which the money was handed over to one of the cautioners as factor—now bankrupt—upon a footing which precluded both the children and the father from taking it out of his hands; and it is argued that the trustees, having been parties to such a transaction, are responsible for the result. Under this record it is impossible to listen to this plea. There is no statement nor plea which will enable one to approach it. There is not one word said about this factory in the objectors' statement of fact. It is the trustees who introduce the statement about it; and the objectors, so far from adopting that statement, close the record on this answer to it, that they do not know that a deed of factory was ever granted in favour of Michael Waddell. In that state of the record, the Court cannot listen to objections rested upon that ground. If the objectors have any case of that kind, it may or may not be still open to them. But under the present record, it is impossible, without setting the Judicature Act at defiance, to take up and decide that plea, which I therefore hold to be altogether out of the case.

Looking to the matter in this light, I entirely concur with the Lord Ordinary, that in so far as regards John Dumbreck, junior, the minor and his father, this discharge is effectual; but with regard to Charles Dumbreck, the pupil, I think that the Lord Ordinary is in error, and his finding as upon that branch of the case ought to be altered. The father, as tutor of the pupil son, had a legal title to uplift this money. His title of tutor was a good legal title for that purpose, and therefore what is the objection? He was in embarrassed circumstances. The only effect of that—assuming that we can look at it as part of the objectors' statement—was to impose upon him the obligation of finding caution. He complied with that obligation. He found caution which was at the time unobjectionable. The money has since been misapplied. That is a matter for which the trustees are not liable; and therefore I think that the interlocutor of the Lord Ordinary should be so far altered.

Lord Deas.—I have nothing to add to the grounds of judgment stated by Lord Curriehill. I go, however, entirely upon the limited nature of the averments in the record, which seem to me not to admit of the application of the law laid down by the Lord Ordinary.

His Lordship's attention does not seem to have been called to the state of that record, and consequently he has gone into matters not there set forth or relied on. Article 6th contains the whole averments made by the objector in support of the objections sustained by the interlocutor to the two payments therein mentioned. The statement that the father's administration was excluded by the trust-deed is admitted to be a mistake. There remain only the statement that the larger of the two sums was not paid direct to the father, but to his cautioner, Michael Waddell, who became bankrupt "lately,"—that is nearly ten years afterwards,—with a portion of it in his hands; and the statement that no part of the money was applied for behoof of the objectors, but that all which was paid over to the father was applied by him to his own purposes. In these statements, however, the good faith of the trustees is not impeached. The money paid on the father's discharge was obviously made to pass through Waddell's hands for the better protection of the objectors' interests, and the reverse is not alleged. The trustees' admissions in statements 3d and 6th, that the father had been unfortunate in business, and that his circumstances were in an unsatisfactory state (giving the objectors the full benefit of them), only go to show the prudence of paying through Waddell, and of taking his cautionary obligation, which is not said to have been insufficient or doubtful when granted. The period of division under the trust-deed had arrived, and the trustees were entitled to bring the trust to a close, and to pay the pupil's share upon the discharge of his administrator-in-law, unless they did so in *mala fide*, which is nowhere alleged. Had *mala fides* been averred and proved, I do not say I should have differed from the law laid down by the Lord Ordinary.

Lord President.—I concur, looking to the case on the record and the concluded proof. What other questions might have been raised otherwise, I do not inquire. It is right that I should state, however, that I am aware that Lord Ivory is not quite of that opinion. He is disposed to alter the interlocutor of the Lord Ordinary; but rather, as at present advised, to alter it in a different direction. He rather thinks he can see his way to sustaining the interlocutor as regards the pupil,

No. 110. thus drawing the distinction between the case of a pupil and the case of a minor. But we are all agreed upon this, that the two stand very much on the same footing as regards this record.

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LORD IVORY absent.

THE COURT pronounced the following interlocutor:—"In the question with John Dumbreck, junior, refuse the desire of the reclaiming note for the said John Dumbreck, junior, and alter the interlocutor of 17th January 1854, as reclaimed against by Stevenson's trustees, in so far as it did not find these trustees entitled to expenses in the question with John Dumbreck, junior: Farther, in the question of Charles Dumbreck, they refuse the desire of the reclaiming note for the said Charles Dumbreck, and alter the said interlocutor as prayed for in the reclaiming note for Stevenson's trustees: Repel the objections stated by the said Charles Dumbreck to the condescendence of the fund *in medio*, and decern: Find the said John Dumbreck, junior, and Charles Dumbreck, liable to the reclaimers, Stevenson's trustees, in the expenses incurred by them in reference to the objections lodged by the said John Dumbreck, junior, and Charles Dumbreck, to the said condescendence: Allow an account thereof to be given in; and remit the same, when lodged, to the Auditor to tax the same, and to report: Farther, except in so far as altered by this interlocutor, adhere to the interlocutor of 17th January 1854, and decern."

WOTHERSPOON & MACK, S.S.C.—DAVID MANSON, S.S.C.—Agents.

No. 111.

ALEXANDER MARJORIBANKS, Pursuer.—*Park.*
JAMES BORTHWICK AND OTHERS, Defenders.—*D. Mure.*

Process—Decree in absence—Reponing—13 & 14 *Vict. c.* 36, *sec.* 11.—A decree in respect of no defences, in a cause where the summons had been taken out to see, and which had been twice continued on motions by the defenders' counsel, is a decree not by default, but in absence, and the defender may be reponed against it at any time before extract.

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Ld. Handyside
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A SUMMONS was served on the defender in November 1851, and appeared in the calling lists in December, when appearance was entered, as was seen from the partibus, but no defences were lodged. When the case was enrolled in the printed roll on 13th January 1857, the defenders' counsel appeared, and got it continued till the 17th, when he again appeared, and got it continued till the 21st, when the following interlocutor was pronounced:—"In respect no defences have been lodged, Finds, decerns, and declares against the defenders, in terms of the conclusions of the summons."

The defenders, on 13th February, presented a reclaiming note, praying to be reponed, and allowed to give in defences.

The pursuer objected to the competency of reclaiming, on the ground that, under the recent Act, decrees by default became final if not reclaimed against within ten days, and the decree in question was one, not in absence, but by default. The marking on the partibus, and the appearance made by counsel, were conclusive on this point.[1]

The defenders admitting that if the decree were one by default, the reclaiming note was incompetent, contended that it was a decree in absence. There was no order standing against them which they had failed to obtemper, and any decree was to be treated as in absence till not only appearance had been made, but defences proponed.[2]

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[1] Bev. Forms of Process, p. 248; 13 & 14 Vict. c. 36, sec. 11; Arnold v. Winton, 11th March 1852, ante, vol. xiv. p. 768.

[2] Shand's Prac. p. 311; Young v. Mitchell, 10th February 1803, M. p. 12,178; A. of S. 11th July 1828, sec. 45-72; Scot. Un. Ins. Co. v. Calderwood, 8th July 1836, Sh. vol. xiv. p. 1114.

The Court advised with the Judges of the First Division; after which, No. 111.

Lord Justice-Clerk.—The Court, with the greatest possible difficulty, on the part of two of the Judges, receive the reclaiming note as against a decree in absence, on the defenders paying the whole expenses incurred since the date of calling.

Feb. 18, 1857. Gillespie v. Dods.

J. M. Macqueen, S.S.C.—Scott, Moncrieff, & Dalgety, W.S.—Agents.

Mrs Anne Gillespie or Wemess and Others, Pursuers.—*D. F. Inglis—Pyper.* No. 112.

Mrs Anna Gillespie or Dods and Henry Gordon Dickson, Defenders.—*Penney—Fraser.*

Process—Decree in absence—Bar—Personal exception.—Question, whether a decree in absence obtained against a defender, on a summons, which had been personally served on him, can be opened up by his representatives after his death? and *held* (affirming judgment of Lord Benholme), that the representatives of the defender were barred from opening up the decree by reduction, in respect that during the defender's life he had opportunities of challenging the decree, and did not do so, but, on the contrary, he, and (after his death) his representatives wrote letters on the footing of it being a valid and unchallengeable decree, and proposed a settlement of accounts on that footing.

This was an action of reduction brought in 1854 by the children of the late James Gillespie Gillespie, and by Mr Mackersy, his trust-disponee (under a private trust), of a decree in absence obtained in 1829 against Mr Gillespie by the present defenders, in name of an assignee, Mr Aitchison.

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Among the grounds of challenge was this, that Aitchison had no valid title to pursue the action, as in so far as it flowed from Mrs Dods (one of the defenders), her right had vested in her husband, and (as he was dead) had passed to his executors, who were not parties to the assignation.

The Lord Ordinary pronounced the following interlocutor:—"Finds, that in the year 1829 an action was raised by William Ker Aitchison, as trust-assignee of the present defenders, and of the late Mrs Elizabeth Gillespie or Dickson, against the nearest of kin of their then deceased brother, William Gillespie, libelling that the said deceased was at the time of his death indebted to his said sisters, Mrs Dods and Mrs Dickson, in the sum of L.140, being cash advanced by them to him for fitting him out for the Island of Jamaica, and for defraying the expense of his passage, and otherwise conform to a state of said debt, commencing on the 16th January, and ending on 1st February 1812, and for which advances the said William Gillespie granted a holograph acknowledgment in the shape of a promissory-note, which is recited in the summons, with interest since the date of the advance, and concluding for decree for the said advance with interest, against the said nearest of kin, as charged to enter to the said William Gillespie: Finds that one of the defenders called as nearest of kin in this action was the late James Gillespie Gillespie, the father of the present pursuers, Mrs Ann Gillespie or Wemess, and Miss Alice Jane Gillespie: Finds that this action proceeds upon a charge against the said James Gillespie to enter, and a citation against him as defender, both personally given: Finds that decree in absence was pronounced upon this summons, being the decree which is now sought to be reduced by the present pursuers: Finds that the said James Gillespie Gillespie survived till the year 1845; but that he made no attempt to impeach the said decree, or to dispute the truth of the statement on which it proceeded: Finds that, on the contrary, the said James Gillespie Gillespie, by his holograph letters dated 31st March and 8th April 1845, addressed to the defender, Mr Dickson, not only admitted the original constitution, but also the present subsistence of the debt, and acquiesced in the application of William Gillespie's share of Somerville's[1]

[1] [illegible] settlement of a Mr Somerville, W. Gillespie had right to a share in his [illegible], on his death, fell to his brothers and sisters.

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trust-estate in liquidation of it, expressly contemplating that in a few years from that date it would be extinguished from that source: Finds that after the death of James Gillespie Gillespie, and after such a lapse of time, the pursuers, his daughters' representatives, are not entitled to open up the said decree in absence: Finds that the pursuer, William Mackersy, in his character of trust-disponee of James Gillespie Gillespie, has no sufficient right or title to reduce the said decree independently of the other pursuers: Therefore repels the reasons of reduction, assoilzies the defenders from the whole conclusions of the summons, and decerns: Finds the defenders entitled to expenses," &c.*

Mr Dickson had, on 19th July 1841, written to Mr Mackersy:—"Mr William Gillespie was indebted to Mrs Dickson and her sister Mrs Dods in L.140, advanced to fit him out for the West Indies, &c., and interest since 1st February 1812, when he left this country, with L.9, 12s. 9½d. of expenses of process—for all which I hold a decree of constitution against his representatives, dated 30th June 1829." To this Mr Mackersy replied:—"With regard to your claim against the late Mr William Gillespie, I presume the same will now be extinguished by his share of Mr Somerville's succession, which, of course, would be applied by you in liquidation of the debt. I have made a rough calculation on the subject, and this seems to be the result, or nearly so."

In 1845, some correspondence passed between Mr J. G. Gillespie himself and Mr Dickson, to whom he had written about "my sixth share of William's share of his aunt's property, which you are fully aware is not cognizable by my trust-deed." In his reply, Mr Dickson said,—"You are of course aware that there is a preferable debt due to Mrs Dods and me by the representatives of Mr William Gillespie, of which a detailed statement was sent to your agents, Messrs Weir and Gardner, on 30th April last. From this state I observe that it will take at least 10 or 12 years before his share of the rents of Mr Somerville's trust-properties will admit of the debt being paid off." Mr Gillespie's answer is holograph, and contains this passage:—"With respect to the period at which this (William's) share becomes divisible amongst his representatives, it humbly strikes me you have made a

* "NOTE.—The advance of the two sisters to their brother, William Gillespie, as a family arrangement, was probably well known at or about the time, to James Gillespie Gillespie, the other brother. At all events it was distinctly brought under his notice by the judicial proceedings in 1829. These proceedings were intended for the very purpose of putting these advances upon a distinct footing. It is to be presumed that James Gillespie Gillespie would have defended the action had he not been cognisant of its justice. It appears from the general charge, No. 31, and the decreet of constitution, No. 13, that the charge and summons were both personally executed against him. At any time during his life, his oath might have been resorted to as a means of proof, had that been necessary.

"But it is plain that he never disputed the debt, and that he acquiesced in the mode of liquidating it, which it is the object of the present pursuers to dispute.

"The present reduction has been brought confessedly to aid their pleas in the process of multiplepoinding raised as to the distribution of Somerville's estate, in which they dispute the payments made by the trustees out of William Gillespie's share, in liquidation of his debt, constituted by the decree in absence. Whether these payments could be impeached even if the pursuers were successful in the present reduction, is a question not *hujus loci*. But the Lord Ordinary is of opinion that in justice and equity they are not now entitled to succeed in the reduction.

"The title of the pursuer, Mr Mackersy, cannot, it is thought, be maintained independently of the other pursuers for whose behoof he appears substantially to hold. Besides, the trust-deed under which he acts seems to have no application to the truster's interest in his brother William's estate. And, moreover, if it were necessary to go into it, Mr Mackersy's own letters, as well as James Gillespie Gillespie's, would probably afford a bar to his pursuing the present action."

slight mistake. By the state furnished me the matter stands thus :— . . . . . So that in 1849 the debt will be extinguished, and a trifling balance standing at the credit of the representatives." No. 112. — Feb. 18, 1857. Gillespie v. Dods.

The pursuers reclaimed. The object of the decree sought to be set aside in this action was to make the estate of a deceased brother attachable for a debt due to his sisters, a debt due by a bill which had long been prescribed. The decree had passed against another brother, James G. Gillespie, as one of his representatives, when 12 years of age, and it had passed in absence, yet the argument was maintained that the merits of the claim could not be looked into or the decree opened up by James's representatives, because he had been personally cited, and was now dead. If that were a sound defence, the doctrine went this length, that if a case were enrolled, and decree was allowed to go in absence, and if the party died, that decree would have all the effect of a decree *in foro*. The whole law of decrees in absence was peculiar to Scotland, but this was a new principle when applied to the circumstances here: the action of constitution was not directed against the debtor, but only against one of his representatives; there had been others equally entitled to defend, but all representatives were in a situation essentially different from that of the proper debtor; where he is the party, his absence leads to a presumption that he acknowledges the debt to be justly due, and if he appeared, the pursuer could put him to his oath; and therefore a decree in absence had the effect of inverting the relative position of the pursuer and defender. But when the party was a representative who could personally know nothing of the facts alleged against the deceased, these presumptions failed. It had not been alleged by the defenders that J. G. Gillespie, notwithstanding the personal service, had been aware of the decree at the time, and his acquiescence afterwards could not affect the heir's right. All the defenders did was to stand on the decree, not the merits of their case. There was nothing in the accounts or correspondence produced which shewed acquiescence in the decree: if there were any homologation, it applied only to the claim, not the decree. It was a doctrine of great hardship, which would exclude challenge within the prescriptive period, when the pursuers were prepared, as they offered to do here, to challenge the title of the pursuers of the original action, as well as their grounds of debt.[1]

The defenders replied, that the rule that a decree in absence could be opened up at any time within the prescriptive period was open to many exceptions. Where the decree proceeded upon a personal citation, and the party against whom it passed did not open it up during his life, it could never be opened up; because, by the death of the principal defender, the pursuer was deprived of the right to refer it to his oath; so, where there had been no personal citation, but the defender had, in a subsequent action, had an opportunity of challenging the decree which proceeded on an open account which was prescribed, and had not availed himself of it, that was held to bar his representatives from opening it up. The present case was stronger than either of these; not only had there been personal citation, but the correspondence shewed that James G. Gillespie, who lived for 16 years after it, and knew all about the circumstances, both of the debt and decree, and its liquidation, never seemed to have thought, although at one time in extreme poverty, of attempting to set it aside. Yet nine years after his death, the attempt was made to get rid of it by setting up a plea of prescription against a debt which had been acknowledged by all parties.[2]

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[1] Nicholson v. Macleod, 23d November 1810, F. C.

[2] Blair v. Com. Ag. in Sale of Kinloch, 23d July 1789, M. 12,196; M'Donald v. Com. Ag. in Sale of Kinloch, 4th February 1790, M. 12,198; Sutherland's Trustees v. Lockhart, 4th February 1790, M. 12,200; Dallas' Styles, 185; Campbell v. [illegible]'s Representatives, 5th December 1752, M. 9021.

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Gillespie v. Dods.

Lord Justice-Clerk.—This is an important case in point of principle, as well as in regard to the substantial justice between the parties.

Two of the sisters of this family of Gillespie had advanced, as is said, a sum of money to assist in the outfit of their brother *William* to go to Jamaica, in the year 1812, for which William granted a promissory-note. That seems not to be disputed. William died soon after. He was entitled to a share in the succession of a Mr Somerville, under the settlement of the latter, and his share fell to his brothers and sisters. I do not enter into the question, whether the share of one of the sisters had passed to her husband, and, on his death, to her children, for that point can arise only if we hold the present action is not barred by the facts to which I shall advert. The sisters wished to recover the sum advanced to William out of his share in the above succession, and a trust assignee (as they were also representatives) took proceedings against the next of kin of William, including those sisters, in ordinary form. One of the next of kin was their brother James Gillespie Gillespie, brother of William. Decree of constitution was obtained in June 1830 against him. In the action James Gillespie Gillespie was personally cited. He was living in Edinburgh, where one of his sisters was married in a highly respectable sphere of life. Of the whole matter, and of the proceedings, no one can doubt that he was perfectly cognizant, although he was young when the advance was made to his brother William. Out of the trust-funds which had belonged to William, and out of James's share of these, numerous payments were made to the extinction of the above debt after the decree of constitution, and, as will be seen, with the knowledge of James Gillespie Gillespie. By these payments the debt was paid off.

James Gillespie Gillespie, against whom this decree was taken, lived until 1845, and never attempted to dispute the validity of the decree or the payments made to extinction of this debt. He was, as I understand, in Scotland all that period of 16 years. But he was not undefended, nor were his interests not attended to. There are various deeds granted by him from 1824 downwards, which show that his attention was fully called to his affairs, and to his interest in the above succession. He states that his share in the succession of William's share was not conveyed by his trust-deed. How that may be we know not; but his statement on that point shows that he had his right in that succession most fully in view. And in 1829 his present agent, Mr Mackersy, took charge of his interests. In 1841 Mr Mackersy, acting for him, applied to Mr Dickson, the husband of one of these sisters, for an account of his intromissions as trustee and agent of Mr Somerville's trust-estate, which account he received, and which included the whole payments made as at that date to extinction of this decree. The answer of Mr Dickson is extremely important. Independently of the clear intimation afforded by the account of the payments made to extinction of this debt, this letter fully apprised Mr Mackersy, who is in truth now the party, of this decree of constitution. On the record it is actually denied that Mr Mackersy had any knowledge of this debt until referred to in the recent multiplepoinding. Mackersy's answer is also most important.

Then, in 1845, the late James Gillespie Gillespie, then in Greenock, writes to Mr Dickson a letter on the same subject, which, with the answer, is conclusive.

Such being the facts, nine years after the death of James Gillespie Gillespie, Mr Mackersy, as his acting trustee, although James Gillespie Gillespie had said his trust-deed did not embrace this claim, along with two daughters of James Gillespie Gillespie, who, I hope, have secured themselves as to the expenses of this litigation, by guarantee from Mr Mackersy, raised a reduction of the decree of constitution obtained in 1830 as in absence.

If constrained by any rule of law to sustain this action, it would be a striking illustration of that most anomalous principle in our law as to decrees in absence, which exists, I believe, in no other country. But the decree is safe from challenge. Without going further back than the case of Campbell in 1752, there was then fully established—probably older cases sanctioned the principle—a most salutary restraint on the attempt to open up decrees in absence, viz., that the decree had been acted upon, and real transactions had passed on the faith of it. That case was stronger than any later one, because the decree in absence was taken against an undefended pupil. But the intervening facts were held after the lapse of time, although far short of prescription, to bar the attempt to reduce. The principle on

which that case proceeded is well stated in the opinions of the consulted Judges in the case of Brown v. Sinclair, 9th March 1837. That case of Brown v. Sinclair was a very peculiar one, and the opinions show that there was no intention whatever to countenance the unqualified right to open a decree in absence, without reference to the equitable considerations which intervening facts reared up to support the decree. The plea stated in that case was in truth only the technical plea of a *title to exclude*. That was, indeed, repelled; but the right to open up the decree was not sustained. The facts, however, which followed the decree, were not admitted or clear on the record as in this case, and a proof was allowed. After the proof had been taken the case came again before the Court, 10th March 1841. The case was complicated in fact, and the rubric unhappily misses altogether the point that the case was a continuation of the old case as to a decree in absence. The Lord Ordinary found—(reads). The Court adhered, Lord Fullerton stating that the acquiescence following on the decree was to be looked to as affording evidence of the belief of the parties as to the justice of the decree.

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The principle established by this case and that of Campbell is surely a most just and reasonable view of the subject, and a most proper limitation of the right to open up a decree in absence. A person is personally cited to an action. He is on the spot. He has the full opportunity of judging whether he should resist that decree or not. He does not do so. The decree is acted on. He acquiesces in its execution. He dies without ever attempting to challenge it. And is it not most just to hold that such acquiescence arose from and proves his belief that the decree was well-founded, and that he knew that he had no ground on the merits, whether there was any defect in point of form or not, for attempting to reduce that decree? After a quarter of a century and more, it would unsettle all confidence in the security of rights secured by decree proceeding on personal citation, if an heir or executor could be allowed to open up such decree as matter of right.

The cases of Blair, Macdonald, and Sutherland, are exceedingly important. The effect of personal citation was taken to have been long fixed in the law, as giving a totally different character to a decree in absence from that which belongs to one in which the party was not cited. But the case of Sutherland further shews that even if there was no personal citation, the knowledge of the party, and transactions passing on the faith of it when his acquiescence could only be accounted for by knowledge that the decree was just, may bar the right to open up the decree.

But there is another principle, or a different way perhaps of viewing the principle, which I think it is very important to keep in view. The challenge is attempted to be taken up in this case, after the party had survived the decree for sixteen years, by executors, or a trustee, nine years after his death. Now, it does not at all follow, that when a party has an option to take up a right of challenge, say, or to acquiesce in a decree, or to renounce certain provisions if he had chosen, and to betake himself to legal claims, such option necessarily passes on to an executor. It is of the nature of such option (I so describe it from want of a better term) that the party should exercise his own will and pleasure, and be guided by his own feelings of justice, or kindness, or expediency, as to whether he should avail himself of his supposed right or not. That the option to do that which the party himself after long survivance did not, should pass to and be exercised by an executor many years after the principal's death, seems to me inconsistent with the proper character of such an option, and would, in many instances, allow such executor to go against the undoubted wishes and purpose of the party he represents. Formal renunciation of such a right of option is not necessary to prove that it was substantially waived, and intentionally not acted on. It is, therefore, in my judgment, a matter of great delicacy, after a party's death, and after, it may be, family arrangements or onerous transactions proceeding on the fact that he did not avail himself, and did not intend to avail himself of an option which he possessed, to allow an executor to take up that personal option as if it had been properly his right of option, and to proceed to measures which his predecessors a quarter of a century before might have attempted, but abstained from doing. In this Division of the Court, my former colleagues and myself applied this principle in a question as to the option to claim legitim, or to take the provisions contained in a father's settlement. The child, able to judge for himself, took the provisions in the settlement, but died; and the

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executors then proposed to renounce and to claim the legitim. We then held, that after the death of the other party, though there was no formal renunciation of the legitim, the option could not pass, regard being had to the circumstances, and be exercised by the next of kin of the deceased child. Some remarks were rather hastily made on this view of the matter in an after case, founded on the notion that as the right to legitim vests, so it necessarily passed to executors. That was a misapprehension of the point. We did not doubt the right to claim legitim originally; but, like any other right that might be claimed or not in the option of the party to whom it belonged, if the intention not to claim it was satisfactorily proved, we held that after his death the option did not pass to executors. Of course, in each case the circumstances are to be considered as evidence of what was deliberately done or forborne to be done, and the lapse of time is of importance as evidence of his purpose and intention.

I shall be slow, therefore, in any case in which the party having the option to challenge or claim, dies after long survivance, without an indication of any intention to challenge or put forward a claim, to admit the right of the executor to take up such option or personal right entire, and unrestrained or unaffected by his predecessor's conduct, and to assume the right to act as possibly his predecessor might have done a quarter of a century before. I do not say that any such right to challenge or claim is to be laid down in the abstract as so entirely and purely personal that in no case can it pass to a representative. Far from it. The circumstances must always be looked to. But there is indeed a great difference between a challenge by the original party within a reasonable time, and the attempt, after his long survivance and entire acquiescence, by an executor, to place himself at once in his right, and to claim the privileges of option which, a quarter of a century before, his predecessor might have enjoyed.

Lord Murray.—This is a case of great importance, which I have considered with much anxiety. The point is—whether the circumstances which took place are sufficient to exclude the right of challenge, or whether there is this right, and these circumstances are only to be matter of consideration afterwards. It appears to me that this Court have pronounced various judgments on equitable considerations, excluding the right of challenge. This makes such cases to be cases of circumstances, and the facts here have been gone over by your Lordship in the chair very fully, and they shew that this man, Gillespie, was quite cognizant of all his rights. Now that is a very important fact; and being clearly brought out, I do not think we should be excusable in subjecting the parties to a long discussion under this reduction. I think we are warranted in holding this action of reduction is inadmissible. I am far, however, from holding that in all cases mere personal service followed b[y] death of the party would exclude a reduction. In every case of this kind the Cou[rt] must take into view all the circumstances, and more especially this, whether th[e] decree, as here, has been actually carried into effect, and followed out by famil[y] arrangements. It would be very unjust if we were, after so long an acquiescenc[e], to reverse everything that has been done. I agree with your Lordship.

Lord Wood absent.

Lord Cowan.—I look upon this case as very important, both in itself and [in] point of precedent.

The effect of decrees in absence is philosophically, if not very practically, di[s]cussed by Lord Kames in one of his treatises; and to one principle stated by hi[m] a good deal of weight has been given in decisions of the Court; namely, that if [a] party is cited and does not choose to appear, he is to be held *pro confesso*, becau[se] his opponent, failing other proof, is entitled to the benefit of his evidence.

I do not propose to go into the authorities and precedents as to decrees [in] absence. They have been fully treated of and dealt with by Lord Brougham in t[he] case of Brown v. Sinclair, which was remitted by the House of Lords for t[he] opinion of the whole Court, and to which reference has been made. The ma[in] facts of the case we have to dispose of are—that there has been personal ci[ta]tion of a defender in an ordinary action; that decree has gone out in absen[ce] against him; that there was no reference to his oath prior to that decree bei[ng] taken; and that he died without attempting to open up the decree. In these ci[r]cumstances his representatives maintain that the decree having gone out in absen[ce] they are entitled to be *simpliciter* reponed, to the effect of at once getting into t[he]

merits of the original claim of debt. To this it is answered by the defenders, that wherever there has been *personal citation* of a defender, and he has died afterwards, that renders proceedings to set aside the decree at the instance of his representatives incompetent; and, in support of that view, reference has been made to the case of Blair and other decisions.

When there has been a judicial reference to oath, and the party, though personally cited to appear and depone, has failed to compear, and decree in absence is taken against him, this proposition on the part of the defenders may be true. It would be the greatest injustice to give representatives in such a case power to set aside the decree *pro confesso*, simply because of its having been in absence. But where no such peculiarity exists, I do not think it can be held that there is any incompetency in proceedings to set aside the decree.

The case of Nicholson v. Macleod in 1810, quoted to us, seems to me to be precisely in point, and to settle that a decree in absence, though proceeding on personal citation, may be opened up after the death of the debtor. The Lord President's opinion shows that there was no such absolute rule in the law of Scotland before 1810, as that founded on by the defenders. He may have gone rather far when he says that all the previous authorities apply to the case of a proper judicial reference to oath. This cannot be said of Blair's case, as reported; but it is possible that there may have been special circumstances in the case, not appearing from the report, which may possibly reconcile that decision with the observations ascribed to the eminent Judge to whom I have referred. At all events, that decision negatives the general plea of incompetency, for which the defenders so broadly contend.

On the other hand, the pursuers referred to a decision of Lord Curriehill, in which it was said he had recognised the doctrine contended for by them in an interlocutor, which was acquiesced in, viz., that every decree in absence is open to be set aside, and its grounds and warrants examined into, even after the death of the debtor. I have been furnished with a copy of the interlocutor, and of his Lordship's note, in which there is not a word tending to support that absolute proposition. There were two pleas stated in defence—1. That reduction was absolutely incompetent. 2. That the decree had been acted upon by the parties, and therefore could not be opened up. What his Lordship did was to repel the first plea, under reservation of the effect of the facts and circumstances tending to shew that the decree was acted on.

The true doctrine of the law seems to be, that while there is no incompetency in instituting such an action after the debtor's death, the decree in absence, if it has been acquiesced in and acted on by the debtor, will not be allowed to be opened up by his representatives. And on this point I consider the case of Brown v. Sinclair, in all its stages, both here and in the House of Lords, to be most instructive and important. Your Lordship in the chair has sufficiently adverted to that decision. On the one hand, I think the circumstance of personal service, while a very important element in support of this decree, when challenged by the representatives, is not conclusive against the competency of the reduction of it on the ground of its having been taken in absence: Such a case as that of Macleod may again occur. But, on the other hand, there may be additional circumstances tending to support the decree, or rather to raise a plea of personal objection against the party challenging it, which may be sufficient answer to the attempt to have it set aside.

Then what are the circumstances here on which the defenders rely as a good defence to this action of reduction?

Observe, this is a *concluded clause*, all further probation having been passed from by both parties; and therefore the merits, so far as these apply to the reduction of the decreet as in absence, and to the defences, are for disposal.

There was *personal* service. The party is dead, and his oath is no longer available.

The decree was *known* to the deceased.

The *debt* under it was the subject of correspondence between the creditors holding it and the deceased and his agent. It was obtained in 1829, and that correspondence is proved to have taken place in 1841 and 1845. There was no challenge till 1854, when brought in aid of claims on the trust-funds in a multiplepoinding.

Not only so, but *payments on account of the debt* have been legitimately made by

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the trustees, and to an extent supposed to have been enough for its extinction. Suppose the debt had been fully paid, could there have been *condictio indebiti*? And yet the very object of this action is *pro tanto* to the same effect, to get rid of the payments by the trustees, on the ground that there was no proper debt.

All these circumstances are conclusive to my mind in support of the defence against this reduction.

The view adopted by the Lord Ordinary seems to me well-founded, and I think this is as strong as any of the cases in its specialties, especially that of Lockhart, D. 12,200, in which the decree was refused to be opened up.

The Court adhered, and found additional expenses due.

William Mackersy, W.S.—Walter Duthie, W.S.—Agents.

No. 113.

The Union Bank of Scotland, Nominal Raisers and Pursuers. Matthew Connell and Others, Real Raisers and Advocators.— *D. F. Inglis—Pyper.*

Fergus Ferguson and Others, Claimants.—*Penney—E. S. Gordon.*

Process—Multiplepoinding—Competency—What is double distress—Is it pars judicis *to dismiss an action against which no objection to the competency is taken?*—An independent congregation subscribed a sum to build a chapel. The sum was deposited in bank in name of the pastor and two laymen, as trustees for the congregation. Dissensions divided the congregation into two parties, each of whom claimed the fund. A multiplepoinding was then raised to ascertain which party was entitled to the fund, and concluding alternatively that if the purpose for which it was subscribed could not be carried into effect, then to have it returned to the subscribers. No objection was taken to the competency of the action. The Lord Ordinary dismissed the action as incompetent;—*Opinion* (*per* Lord Deas), that it was not *pars judicis* to do so: but, on the point of law—*Held* (altering judgment of Lord Ordinary, *abs.* Lord Ivory), that the action was competent, there being competing claims such as in law amounted to double distress.

Feb. 19, 1857. — 1st Division. Lord Neaves. C.

Connell and Others were members of a congregation in Glasgow, calling themselves an Independent Church. The claimant, Fergus Ferguson, officiated as minister. The "Church" wanted to build a chapel "for themselves, and those with whom they might enter into communion;" and a sum of upwards of L.800 was subscribed for that purpose, and deposited with the Union Bank in Glasgow, in the name of Ferguson, the pastor, and two members of the congregation. The congregation split into two parties, each of whom claimed the fund as representing the original church. This action was then raised in name of the Bank by certain contributors to the fund, to ascertain to which section of the church the fund should belong to be applied to its original purpose, or alternatively, if that should be impossible, to have the subscriptions returned.

Article 4 of the pursuers' condescendence was as follows:—"In or about the month of May 1852, misunderstandings having arisen between the said pursuers and defenders, or among the defenders themselves, in regard to an alleged attempt having been made to exclude or cut off certain parties from the said church, and as to the management and disposal of said money, the defenders, Connell and others, for themselves, and others adhering to them on or about 15th of said month of May, protested against said exclusion, or attempted exclusion, and against the other pursuers and defenders interfering or intermeddling with said sum, in any manner of way, without their consent and sanction, at least to the extent to which they contributed, subscribed, or collected the same, or helped or assisted so to do. The purpose and object for which said sum was contributed or collected can never now be attained; and those who collected and contributed it differing as to its application, each is entitled to have his and her share restored and repaid."

Therefore the pursuers stated, "this action had been rendered necessary

for the purpose of ascertaining who were the parties entitled to said sum, or any part thereof, or in what manner and proportion it was to be divided." The action was raised in the Sheriff-court of Lanarkshire. No. 113. — Feb. 19, 1857. Connell v. Ferguson.

The real raisers, Law, Connell, and others, claimed the fund *in medio*, "they being the only adherents to the principles professed by the body or members of the church, and to which they adhered at and during the time the fund *in medio* was being collected, and it being collected solely for the purpose of providing a house for those holding such principles." And they pleaded, that Ferguson and his adherents no longer represented the church in question.

Ferguson and his adherents made no claim, but they pleaded;—That the fund *in medio*, consisting of gifts or contributions for the erection of a chapel for the church under Ferguson's charge, and there being still such a church, the same in doctrine, government, and discipline, the claimants, as trustees and holders of the fund, were entitled to apply the whole of it to this purpose. And they farther pleaded, that Connell and his party had voluntarily left the church, and had no cause to complain of the discipline; and not having themselves formed a church which they could pretend was the church for which the building fund was designed, they had no title to ask any portion of the fund either on the ground of injustice to themselves or otherwise.

The Sheriff-substitute (Smith) held, "that the expulsion was a mere matter of discipline, and not reviewable by a court of law,"—that the pursuers' averments "did not shew that the general body, who expelled Messrs Paul and Wright, departed from the principles of constitution of the congregation: Finds, therefore, that the object of the trust created in" favour of "Ferguson, &c., can still be carried out for behoof of the congregation, and that there is no reason for depriving them of the fund *in medio* lodged in bank in their names as trustees:" Therefore he preferred Ferguson, &c., to the fund *in medio*, and found the real raisers liable in expenses.

The Sheriff-depute (Alison) adhered to this interlocutor, which Connell and others advocated.

The Lord Ordinary, on 22d May 1855, pronounced the following interlocutor:—"Finds that the summons in the present process of multiplepoinding, which was brought by the advocators, Matthew Connell and others, as real raisers, in name of the Union Bank of Scotland, and the Rev. Fergus Ferguson and others, as nominal raisers thereof, sets forth as the subject in dispute and fund *in medio*, a sum of L.852, 19s. 5d. sterling, contained in a deposit-receipt by the said Union Bank, in favour of the said Rev. Fergus Ferguson and others, dated 3d September 1852; and that in the condescendence forming part of said summons it was stated, that this sum was contributed and collected under an agreement or arrangement between the pursuers and defenders, 'for the purpose, and with the view of building or purchasing a place of worship for themselves, and those with whom they might enter into communion.' And in the said condescendence it is further stated, that misunderstandings having arisen between the parties, the object for which the said sum was contributed or collected can never now be attained, and that the action had become necessary 'for the purpose of ascertaining and determining who are the parties entitled to said sum, or any part thereof, or in what manner or proportions it is to be divided between them,' which summons is directed against the said real raisers, and a variety of other parties, as pretending interest in the said sum: Finds that it was not admitted but denied by the nominal raisers, the said Fergus Ferguson and others, that the purpose and object for which the said money had been collected could not now be attained, and that no *habile* evidence was produced or [illegible] which the said allegation was or could be instantly verified: [illegible] the action, as a process of multiplepoinding for dividing and [illegible] fund which had been collected and deposited in bank for the [illegible] of purchasing or building a place of worship, was, in these

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circumstances, premature and incompetent: Finds farther, that the real raisers or advocators have not put on record any statements sufficient to import an immediate dissolution of the trust under which the said money was held, or of the purpose to which the same was applicable; and there is thus no sufficient allegation of double distress affecting the nominal raisers, to warrant the raising of the present action in their names: Therefore finds that the action was incompetent, and dismisses the same, and decerns: Finds the respondents entitled to expenses both in this Court and the inferior Court; allows an account thereof to be given in," &c.*

* "NOTE.—If the Lord Ordinary were to dispose of this case on the points embraced in the Sheriff's interlocutor under review, it would be necessary, in any view, to overturn a great deal that has been done in the Court below, where the proceedings have not been regularly conducted. The process is one of multiplepoinding, in which certain of the parties have been preferred to the fund *in medio* as claimants. But the Lord Ordinary cannot discover that the usual interlocutors were ever pronounced sustaining the process or ordering claims. The two claims which were lodged and revised are not in proper shape, as containing no proper demand or conclusions, so that it is difficult to tell what the advocators at least really want; and the litigation proceeded nearly in the same way as if it had been an ordinary action between the real and the nominal raisers. Finally, after a proof had been allowed, the order was recalled in respect of a judicial minute of admission by the defenders of the facts stated by the pursuers in record, 'and the pamphlets therein referred to and founded on,' though under a denial of motives and inferences. The pamphlets here mentioned consist of 'a narrative of the despotic expulsion of two deacons' from the church in question, with a relative protest and appeal, extending to 54 pages of close print, and a 'continuation of the narrative of the expulsion of about 100 members and nearly the half of the office-bearers' from the same church, and a second appeal, with an appendix. The Lord Ordinary understands that the minute of admission was intended to admit, not the publication of the pamphlets merely, but the facts set forth in them, and, indeed, the record itself. Article 14 of revised condescendence, No. 27 of process, is made up on the principle of holding these pamphlets as 'here insert.' If the forms of process required the Lord Ordinary in the first instance to examine the records of inferior Courts brought up by advocation, he would not have allowed such a record to stand; and it is impossible that any Court of Law that looks to correctness of procedure can found its judgment either upon the allegations or admissions of parties, made by a reference to such extraneous and irregular documents. But the Lord Ordinary thinks it unnecessary here to enter on what may be called the merits of the case, as he considers that the original action was unwarrantable and incompetent. It is admitted by the real raisers that a sum was here collected by certain parties for the purpose of building or buying a place of worship. That sum also, it is admitted, was deposited in bank, and the deposit-receipt, of which a copy is produced, bears to be in name of the nominal raiser, the Rev. Fergus Ferguson. *Prima facie*, therefore, there is here a trust constituted for a specific purpose, and it is not immaterial to notice that this purpose is the erection or acquisition of an heritable subject. Some of the subscribers allege that occurrences have taken place whereby that trust and its purposes are brought to an end, so that they are entitled to have the fund divided or distributed in some way or other among the subscribers, instead of its being devoted to its destined object. The parties insisting in this view seem not now to be very numerous, and it may be doubted whether they have good ground for supporting their plea. But be this as it may, the Lord Ordinary is clear that these discontented subscribers are not entitled, *per saltum*, to bring an action of multiplepoinding for the division of the fund, until it first be formally found and declared that the admitted object of the original subscription has failed so as to set the fund free for division. It would be highly inconvenient, in this incidental manner, to try the question whether the trust, which confessedly once existed, has been in any way brought to an end, and the responsibility of the holders of the fund thereby inverted and altered. A process of this kind, so brought, does not seem to be supported by the case of M'Ewan v. M'Gavin

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The real raisers reclaimed, and prayed the Court to sustain the competency of the action, against which they pleaded there was no plea on record. It had been acquiesced in by all parties, and a Judge was not entitled to interfere with the discretion of parties in this respect, and at his own hands dismiss the case. As to the objection on the merits, counsel had not been heard on it. The objection to his interlocutor was simply that there was no plea on record such as the Lord Ordinary had given effect to, and it was not now competent to add any such plea.[1]

Pleaded for Ferguson and others;—The only question was, whether it was *pars judicis* to deal with this question?—Was a Judge entitled to dismiss an action when the party against whom the action was directed did not object to its competency? It would be serious to hold that he was not. It was for the public interest that he should do so; for example, where parties combined to get a judgment in a form of action not recognised by law. The right of the Court so to interfere had been sustained in cases of less urgency than the present.[2] The argument for the real raisers truly was, that a multiplepoinding was competent wherever there were double claims. Until recently, it was only competent where there was double distress by diligence. That was characteristic of the action still. It was not sufficient that there was a sum of money to which there was more than one claimant.

Lord President.—I have great difficulty in this case. Upon the whole, how-

20th May 1831, 9 Shaw 622, which was referred to at the debate. The circumstances of that case, and the shape of the proceedings, were different. There was there some reason to say that the original purpose of the subscription had been fulfilled, so as to leave a surplus undisposed of, and the multiplepoinding was brought by the actual holder of the fund for his exoneration, in reference to conflicting claims made upon him; one of which was insisted in in the form of an action of count and reckoning. Nothing of that kind here exists. Moreover, it may be seriously doubted whether, when this fund was originally appropriated for investment in an heritable shape, there is not a defect of jurisdiction in the Sheriff-Court to entertain a process for putting an end in any way to such a trust or arrangement, under which the beneficial interests of those concerned are of an heritable character, inferring a right to have an heritable subject created and made over for their use. The Lord Ordinary thinks that the true course for the real raisers was to raise a declaratory action before the Court of Session, to have the trust and its purposes found to be extinguished, and the fund declared to be divisible. It is only, perhaps, another aspect of the same principle to say that there is here no double distress to justify the action. The holders of the fund in whose name it is raised, are not *de facto* exposed to any conflicting diligence or demand upon them. They seem to be themselves the trustees who are vested with the fund, and the only parties making a demand upon them are the real raisers. The question arises—whether the holders of the fund shall comply with that demand, or shall do their duty under the trust imposed upon them. It seems clear that they are not bound to pay any attention to the demands of the pursuers, who hold no diligence, decree or document against them, until they are liberated from their trust character and duties; and a process of multiplepoinding does not seem the proper way of attaining that object. Further, the conflict, such as it is, lies between the pecuniary claim of the real raisers and the liability of the trustees to apply the money to the purpose of procuring a place of worship. This seems not truly a case of double distress, such as is necessary to found an ordinary process of multiplepoinding. It may be added, in conclusion, that if these objections are well founded, it seems *pars judicis* to give effect to them."

[1] Crockatt v. Panmure, 8th June 1853, ante, vol. xv. p. 737; Ronaldson v. Johnston, 11th Dec. 1834, 13 S. 180; Crichton v. Stewart, 4th March 1836; Provan v. Provan, [illegible] Jan. 1840, ante, vol. ii. p. 300; Craigie v. Marshall, 25th Jan. 1850, ante, vol. [illegible] p. 523.

[2] [illegible], 27th May 1828, 6 S. 854; Bell's Legatees, 8th July 1822, 1 Sup. [illegible]

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ever, I think that the action is competent. A fund was subscribed for certain congregational purposes. Dissensions arose, and the fund was deposited in bank. Two parties claim it—the one of them adherents of, and the others seceders from, the original congregation. One party, Ferguson and others, plead that the other claimants left the church voluntarily; that the expulsion complained of was a mere matter of discipline, which it is incompetent to inquire into; and they deny that there is any intelligible statement of any violation of the principles or constitution of the church in the real raisers' claim.

The other party pleads that the claimants, Ferguson and others, having departed from the principles and constitution of the church, and having failed to abide by and walk up to those principles in form, discipline, and government, are no longer the church in question, and have forfeited all claim, not only to the fund in question, and every part thereof, but also to the church's other property and effects. The claimants Law and others say, that having abidden by these principles, they constitute the church, and are entitled to the fund, to apply it to the use for which it was originally intended.

There are thus two parties competing for the fund, in order to apply it to the purposes for which it was originally intended. I think that is a fit subject for a process of multiplepoinding. I do not think that the action can be thrown out as incompetent. I say nothing about the other questions which might arise here, because the only question now before us is the competency of the action; and upon that point I am for recalling this interlocutor.

Lord Curriehill.—Had this multiplepoinding been brought by the real raisers upon the footing that the object of building a church with this fund was at an end, I should have had considerable doubt about the competency; and, on the principle of the case of Ronaldson, I should have held that the preliminary question required to be defined before a multiplepoinding was competent. But although that question might be raised on one of the alternatives of these pleas, the first question raised is the competition between the two different parties for carrying out the original purpose of the subscribers; and in that competition each of them holds that the money is designed for that purpose; the only question being, which of them is to get it? Therefore there are competing claims; and competing claims such as in the sense of the law amount to double distress. I entirely concur.

Lord Deas.—The Lord Ordinary has sustained objections to the competency of the multiplepoinding which have not been stated in the record either in the inferior Court or in this Court. The first question appears to me to be whether we can entertain these objections? Now I observe that the summons (including in that term the original condescendence) afforded on the face of it sufficient materials for raising these objections to the competency if they were well founded. These objections ought, therefore, to have been stated as preliminary pleas when the actio[n] came into Court, now nearly seven years ago. But, although various preliminar[y] pleas (not now insisted in) were stated, the objections suggested in the Lord Ordi-nary's note were not stated. The record was closed and the case went to judgmen[t] on the merits, and then it was advocated to this Court, when a farther opportunit[y] was afforded, by the terms of the Judicature Act, for lodging additional pleas, bu[t] the record was again closed without any plea being stated against the competenc[y] of the action of multiplepoinding; and, in these circumstances, the question arise[s] whether it be *pars judicis* to dismiss the action as incompetent? I am humbly o[f] opinion that it is not. The general rule is that parties must state their own plea[s.] If there be a plea which occurs to the Court as necessary to be added, the Judica-ture Act authorises this to be done. This is not said to be a case for exercisin[g] that discretionary power, and accordingly it has not been exercised, nor is it pro-posed to be so. What has been done is to give effect to objections to the com-petency not put on record either in the inferior Court or this Court, precisely [as] if they had been on record. Now unquestionably there are cases in which it [is] *pars judicis* to give effect to an objection not stated. But these cases are excep-tional, and the exceptions rest on peculiar grounds. For example, if two parti[es] combine to try a speculative question which has not arisen and may never aris[e,] the Court may say that the public time is not to be wasted in discussing a[nd] deciding such a question. Again, if the Court has plainly no jurisdiction to t[ry] the question, the Court may refuse to pronounce or confirm a judgment whi[ch]

would be worthless. Or, if all parties interested are not in the field, the Court may refuse to proceed and to pronounce a judgment by which the rights of absent parties might be compromised,—as where the question relates to an heritable subject belonging to heirs-portioners or *pro indiviso* proprietors, which might be carried off from them by the judgment, so that those of them who were not called might have to become pursuers of a reduction;—or where the property belongs to a dissolved company, and a similar result might happen to the prejudice of partners not called. But there are no analogous grounds for holding the present case to be exceptional, nor any ground at all that I can discover which would not go to make it incumbent on the Court to give the same effect in cases generally to pleas not stated on the record as to pleas that are stated; than which I can conceive nothing more contrary to all wholesome and recognised rules of pleading. The objection to the form of action, which the Lord Ordinary has here taken up and sustained, must, to say the least of it, be admitted to be not only debateable but doubtful; seeing that his Lordship formed one opinion upon it and your Lordships have expressed another; so that the result of holding it *pars judicis* to take up such a plea, would be that, although the nominal raisers had intentionally (it may be) avoided stating it because they deemed it doubtful or hopeless, the Court must take it up and consider both sides of it for themselves, and then decide it. I cannot think that the objection here is of a kind which falls to be so dealt with. If indeed it could be said as suggested, rather than affirmed, in the note of the Lord Ordinary, that the action involved a competition of heritable rights, there might be some ground for giving effect to this plea as excluding the Sheriff's jurisdiction. But it is not pretended, and cannot be held, that such was the nature of this action. And, upon the whole, I am of opinion that the absence of any plea, such as the interlocutor gives effect to, is, of itself, a sufficient ground (and indeed the proper and legitimate ground) for recalling that interlocutor.

But I may add that, supposing the plea had been stated, I should have concurred with your Lordships in holding that it fell to be repelled. The object of the action is to try, alternatively, which of two parties has a right to direct the disposal of the fund *in medio*, as being the party adhering to the tenets of and forming the Regent Street Church Congregation of Glasgow, and, in the event of its being found that neither party has that right, or that the purpose of the subscription has failed, then to have the money paid back to the contributors. To the grounds upon which your Lordships think the action competent to try the first of these alternatives I have nothing to add. But I think it equally competent to try the second. Where parties join in a subscription to effect a particular object, and place the money subscribed in the hands of certain persons to carry out that object, I think the *quasi* trust, thereby created, is for the alternative purpose of either carrying out the object of the subscription, or, if that cannot be done, of paying back the money. There is no room for an action of reduction in such circumstances, as in the case of Ronaldson, and no necessity for a declarator, any more than if the alternative purpose had been expressed upon the face of the subscription paper. It would be most inexpedient to hold that, in every case of a subscription, of however trifling amount, —it might be to obtain a man's portrait, or to present him with a snuff-box, or for some still more trifling object, which came to be abandoned, or was found impracticable in consequence of his death or otherwise, no single subscriber could get back his money without an action of declarator in this Court, to have it found and declared that the object of the subscription had failed. I know no rule of law making such a course necessary, nor yet making it necessary for each subscriber to raise a separate action for, it may be, his half-crown or shilling, to which action the holder of the fund might naturally answer that he could not repay one of the subscribers without the consent of all. I think the appropriate action, in such a case, is a multiplepoinding, and that this action is even more clearly competent for its second (alternative) object than its first, although either, of course, is sufficient to entitle the action to proceed.

Lord Ivory absent.

The Court pronounced the following interlocutor:—"Recall the interlocutor reclaimed against, except in so far as it advocates the cause, and remit to the Lord Ordinary to proceed with the cause as

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shall appear to be just: Find the reclaimers entitled to the expenses of process since the date of the interlocutor reclaimed against: Allow an account thereof to be given in," &c.

ALEXANDER HAMILTON, W.S.—WILLIAM LORIMER, S.S.C.—Agents.

No. 114.

JAMES BARCLAY AND OTHERS, Pursuers and Respondents.
—*Macfarlane—Millar.*
ROBERT LAWRIE, Defender and Advocator.—*Penney—Fraser—A. B. Shand.*

Copartnery—How far a joint-stock company, after dissolution, subsists to the effect of winding up—Title of directors to sue.—A joint-stock company was managed by a board of trustees, who were empowered to fix the instalments payable by the partners on their shares. The contract of copartnery did not provide for the management and winding up in the event of a dissolution of the company, and did not contemplate the possibility of a deficiency in the then existing property or paid-up capital to pay the debts. The company having been dissolved, and there being such a deficiency, an action for payment of a call was brought against a shareholder by nine individuals, designing themselves "shareholders and surviving trustees, duly authorised by and representing the said company, and having power to wind up the affairs and discharge the debts of the company;"—*Held* (*abs.* Lord Ivory), that this not being an action for relief, the defender's debt was due not to the trustees, but to the company itself, and the company not being the pursuers of the action, the trustees had no title to sue.

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Ld. Benholme.
C.

THE following narrative is taken from the note appended by the Lord Ordinary to his interlocutor:—"The discussion of the validity of the pursuers' title in this case has involved the examination of the propriety or soundness of the legal maxim announced by certain high authorities,—that a company, although dissolved, still subsists in reference to winding up. The defender denies that this maxim is to any extent or in any sense well founded. The bearing of his argument in impeachment of the maxim in the present case, will appear from the following statement of facts:—

"By the contract of copartnery of the Glasgow Cemetery Company, the capital stock of the Company was fixed at L.20,000, divisible into 10,000 shares of L.2 each; of which 7s. 6d. was to be paid up, the shareholders becoming bound afterwards to contribute the remaining L.1, 12s. 6d. 'by such instalments and at such periods as the board of trustees for the Company after mentioned shall fix and require,' under certain restrictions as to the amount of each call, and the interval between each. The whole management of the affairs of the Company was entrusted to twelve of the partners designated as trustees, four of whom were annually to retire, and their places to be filled up by an election to take place at a meeting of the Company to be held in the month of March.

"Certain stated annual meetings, on fixed days, were appointed for stated purposes connected with the affairs of the Company, which meetings were to be intimated 'by advertisement in any two or more Glasgow newspapers, to be fixed by the trustees at least two days before the day of meeting.' And it was provided, that 'besides the said stated annual meetings, general meetings of the Company shall be held at any other times that the trustees for the time being may appoint; and it shall be in the power of any shareholders holding L.1000 sterling of stock among them, by written requisition, to require the chairman to call a meeting of the Company for the consideration of any particular matter, to be specified in such requisition, on receiving which the chairman shall be bound, within fourteen days thereafter, to call a meeting; and all such occasional meetings, whether called by the trustees, or by the chairman upon requisition, shall be intimated by adver-

tisement as aforesaid, which shall specify the purpose or purposes for which the meeting has been called; and the resolutions or instructions of the partners at such occasional meetings shall have the same force and effect as those passed at the stated meetings of the Company.' No. 114. — Feb. 19, 1857. Barclay v. Lawrie.

"By article 19th it was provided, that it should be in the power of the partners at any time, at a meeting called and intimated by circulars as well as advertisements, by the vote of partners holding two-thirds of the shares of the capital stock, to dissolve the Company.

"The only provision for the management, in the event of dissolution, being this:—'And in the event of a dissolution being agreed upon as aforesaid, the cemetery or cemeteries belonging at the time to the Company, and all other property they may possess, shall be sold and disposed of in such manner, and after such advertisement, as may be agreed upon, either by said meeting or by the trustees, in the event of the meeting devolving the matter upon them; and the price, after discharging all debts and expenses, shall be divided among the partners according to their interests in the stock.'

"It is to be remarked, that in this clause there is no provision for the appointment of any person or persons generally to wind up the affairs of the dissolved Company, and apparently no contemplation of the possibility of a deficiency in the then existing property or paid-up capital to pay the debts.

"Nor was this deficiency in the provisions of the contract fully supplied by what took place at the meeting of 1st November 1848, at which the Company was dissolved. The minute of that meeting bears—'Mr Cunningham, the secretary, laid on the table the advertisements calling the meeting. Thereafter read report of the directors to the meeting, and which is engrossed on the subsequent page.

"'Whereupon it was moved that the Company ought to be dissolved, and instructions given to the trustees to bring the heritable property to sale by public roup or private bargain, in terms of section 19th of the contract of copartnery; and on a sale being effected, to discharge the Company's debts, and hand to the shareholders state, showing how the ultimate realisation of the estate stands, and with instructions to the trustees to divide the surplus without calling any farther meeting. Which motion having been carried unanimously by two-thirds of the shareholders present, either by themselves or by proxies, and the trustees directed forthwith to bring the heritable property to sale, and a vote of thanks given to the chairman for his conduct in the chair, the meeting broke up.' It seems evident that by this meeting the Company was dissolved without any special power being conferred upon any one effectually to wind up the affairs of the Company, in case it should turn out (which was the case) that its heritable property, when disposed of, was insufficient to pay the debts.

"The present action was raised by nine individuals, designing themselves 'Shareholders and Surviving Trustees of the Glasgow Cemetery Company, duly authorised by and representing the said Company, and having power to wind up the affairs and discharge the debts of the Company,' against the defender, as a partner of the Company, to the extent of 100 shares. It concluded against him for payment of a call of 5s., said to have been duly made on 1st February 1848, being some months before the dissolution of the Company, and also of an additional contribution of 15s., imposed by the pursuers on 30th June 1850 (after the Company was dissolved), in order to liquidate the debts of the Company.

"The only meeting mentioned in the summons, or in the record as originally closed, at which the pursuers were invested with the powers pretended by them, was that of 1st November 1848, being the meeting for dissolution; as to which, the following statement was contained in the summons and original record:—'At a meeting of the shareholders held on 1st November 1848, the Company was dissolved, and the trustees authorised to sell the

No. 114. heritable property, and wind up the affairs, and discharge the debts of the Company.' It appears, however, that although not mentioned in the closed record, copies of the minutes of two subsequent meetings had been put into process; and it was argued by the pursuers that their title was aided, if not completely supported, by the proceedings of those meetings. After an obstinate struggle between the parties, the Sheriff allowed the record to be opened up, to the effect of allowing the pursuers to set out the contents of these minutes. These alleged meetings took place on the 23d May and 4th July 1849.

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"At the latter of these dates, the minutes bear that the Commercial Bank had made an urgent claim for the immediate payment of a debt due by the Company to them of about L.3350. It was stated that an opinion had been obtained, recommending that a statement of the liabilities of the Company should be made up, and a demand made upon all the solvent shareholders for an amount proportioned to the number of shares held by each; and failing payment within a specified time, that an action should be raised against the defaulters. The minutes of the meeting concluded as follows:—'Several of the gentlemen having expressed their opinions, it was ultimately agreed to remit this matter to the trustees, with full power to them to act as they shall deem most expedient for the interests of all concerned; and the secretary was instructed to prepare and lay before an early meeting of the trustees the statement above suggested, with a list of the solvent partners, and an allocation of the proportion payable by each.'

"Had there been no objections to the constitution of this meeting, it might probably be held sufficient to support the pursuers' title in the present action. But it is observed by the defender, that this meeting was attended only by six parties—viz. the secretary and solicitor of the Company, and four of the trustees; that it was called merely by advertisement in terms of the contract, and not by circular; and that the advertisement had not sufficiently disclosed the object of the meeting.

"It was argued by the defender, that after the Company was dissolved, i was incompetent to call a meeting of the shareholders for such an importan business as this, merely by advertisement, the provision of the contract fo calling general meetings of the Company in this way having been supersede by the dissolution; and it was maintained that due notice of the speci objects of the meeting ought to have been given by circular to every share holder interested.

"It was propounded as a general position, that by the dissolution of company, the ordinary management by directors or trustees to be annuall elected could no longer be maintained, even to the effect of winding up th affairs of the Company; that the provisions of the contract as to the callin of general meetings were in every particular inapplicable to the circumstanc of the dissolved Company, and that the shareholders, in regard to the windin up, were subject to none of those arrangements as to combined action whic the contract might contain in reference to the business of the subsistin Company.

"On the other hand, it was argued by the pursuers, that although whe the contract itself provided for a special mode of winding up the conce upon a dissolution, by the nomination or election of managers for that pu pose, this would supersede and put an end to the authority and functions the ordinary directors of the Company as a subsisting company, yet whe the contract contained no such provision, the office-bearers of the Compa must necessarily have power to wind up their affairs upon a dissolutic unless that authority was superseded by a general meeting of the sha holders.

"It was said, that although the Company is dissolved as to the carryi on of its business, the contract still subsists; and its provisions as to t

calling of general meetings, their constitution and functions, must still be obligatory upon the partners, in so far as the winding up is concerned." No. 114. — Feb. 19, 1857. Barclay v. Lawrie.

The Lord Ordinary, on 28th November 1854, pronounced the following interlocutor:—"In respect that the discussion as to the validity of the pursuers' title involves questions of general importance upon which no recent judgment of the Court has been pronounced, Reports this branch of the case to the Lords of the First Division." *

At advising,—

LORD PRESIDENT.—I do not think this action can be sustained. I do not go much on the irregularity of the election, but it appears to me that neither under the minutes nor under the contract had the pursuers authority conferred on them to insist in such an action as the present. This is not an action at the instance of the Company. It is an action in the case of a dissolved company, with a view to winding up its affairs, and is brought by certain persons said to be trustees. It is difficult to say that the regulations provide for the course to be adopted in winding up; but, at any rate, the powers contained in the contract must be exercised in the way appointed. Here the call is larger than that authorised by the contract, which neither confers power to impose it nor to sue in such an action as the present. I am for altering the interlocutors of the Sheriff.

LORD CURRIEHILL.—This summons concludes that the defender, as a shareholder of the Glasgow Cemetery Company, should be decerned to make payment of two sums—(1) of L.25, as a call of 5s. per share upon 100 shares of that Company held by him; and (2) L.75, as a contribution or allocation of 15s. on each of these shares. The defender is called upon to pay these sums as being portions of the stock of the Company, which the defender is bound to pay without any accounting whatever. But although these sums are claimed from him as being debts owing by him to the Company itself, this action is sued at the instance, not of the Company, but of seven individuals describing themselves as "shareholders and surviving trustees of the Glasgow Cemetery Company, duly authorised by and representing the said Company, and having power to wind up the affairs and discharge the debts of the Company." The defender objects to the title of these persons to sue the present action, and the only question before us at present is, whether or not that objection is well founded?

A party sued for payment of an alleged debt, and objecting to the title of those who sue him, must discuss such an objection on the assumption that the claim sued for is, on its merits, well founded. But even assuming that the alleged debts sued for are owing by the defender, the party who would be creditor therein would be the Company itself. And, by the law of Scotland, which differs in this respect from the law of England, even a private company so far partakes of the character of a corporation as to be a separate person in law, and to be capable of sustaining the relation of creditor or debtor in relation, not only to third parties, but likewise to the partners of the company themselves. It has likewise been established that such a company, even when it is denominated by a descriptive name,—such as the Sea Insurance Company of Scotland, or the West of Scotland Malleable Iron Company, or the like, has a good title to sue or defend, by its social firm, some of its partners being conjoined with it in the suit. Even, therefore, assuming the defender to have been owing the sums sued for to the Company, the Company itself, as the creditor, is the party at whose instance, with some of its partners, the action ought to have

* NOTE.—(After the above narrative):—

"The Lord Ordinary shall only say, that he has not been satisfied of the utter unsoundness of the maxim announced by Mr Bell in his Commentaries (ii. p. 635), that 'partnership subsists after dissolution for the purpose of winding up the concern.' Although altogether defunct as to carrying on business, it does not seem to follow that the Company may not be considered as still existing to the limited effect of getting in its assets and paying its debts. Nor does he see any good reason why the provisions of the contract in reference to the joint action of the shareholders should not subsist until their joint interests arising out of that contract have been finally disposed of and arranged."

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been instituted. But this is not the case; and the Company not being a pursuer of this action, I think that this is an insurmountable objection to the suit.

The seven individuals at whose instance the action is instituted describe themselves as suing in three different characters. The first is that of shareholders of the Company. But seven individual partners of a company have no title to sue one of their co-partners to pay a debt which he is alleged to be owing, not to themselves, but to the company. The case might have been different if this had been an action of relief at the instance of these individuals, setting forth that they had made over advances, or incurred liabilities on behalf of the Company, and concluding that the defender, as one of its partners, should relieve them of a rateable share of such over advances or liabilities. But this is not an action of that description.

Secondly, the pursuers describe themselves as trustees of the Company. But this does not mean that the Company, the creditor in the alleged debts, had assigned these debts to the pursuers as trustees for its behoof. The denomination of trustees is assumed by them as being merely equivalent to directors or managers of the Company. And, even assuming that such were truly their position, this would not render competent such an action at the instance of themselves individually, because the *jus exigendi* is not in them in that character.

And, in the third place, they represent themselves as being authorised by the Company, and empowered to wind up its affairs and discharge its debts. I do not think that they have succeeded in shewing that such authority and power have been conferred upon them by the Company. But it is not necessary to go into a critical examination of the minutes on which they found as conferring upon them such authority and power, because these minutes, besides being insufficient for that purpose, would, even according to the statement of the pursuers, amount only to a commission or mandate to the pursuers to wind up the affairs and discharge the debts of the Company; or, in other words, would place the Company and themselves in the relative position of principal and agent. But an agent, who is merely commissioned to collect, sue for, and discharge his constituents' debts, without having these debts assigned to him in trust for his constituent, has not the *jus exigendi* vested in his own person; and any suits which he may institute against the debtors can proceed only in the name of his constituents, the proper creditors in the debts. This is clearly the case while the Company is subsisting and carrying on business, and the case is the same even although the Company has ceased to carry on business, and subsists only to the effect of winding up its affairs.—*Vide* Baird v. Buchanan, 21st February 1855, D. xvii. 461.

On these grounds, I think that the pursuers have no title to sue this action, and that, therefore, it ought to be dismissed.

Lord Deas.—Two questions occur for decision in this case, both of them quite special—the one depending on the terms of the minutes of meetings of the dissolved Company, and relative advertisements—the other on the terms of the contract of copartnery.

The question under the minutes is—whether a title was thereby conferred on the trustees or directors to sue for calls, supposing they had it not by the contract? Now the only minute which can be pretended to have had this effect is the minute of 4th July 1849. But it is unnecessary to discuss the import of this minute, because it is quite clear that the advertisement calling the meeting did not specify amongst its purposes the making of or suing for calls, and still less the authorizing of the trustees or directors to sue for calls; but, on the contrary, set forth the whole objects of the meeting to be to receive a report as to the position of the company's affairs, and give further instructions as to the disposal of the property. Now the contract expressly provides (art. 11)—that all occasional meetings (such as this was) shall be intimated by advertisement, "which shall specify the purpose or purposes for which the meeting has been called." And, assuming the contract to remain in force, the meeting, obviously, could not bind absent partners in a matter as to which the terms of the contract had not been complied with.

As to the power of suing, said to be conferred upon the trustees or directors, under articles 3 and 8 of the contract (which alone contain anything beyond the general power of management conferred by article 5), I think it unnecessary to

consider very minutely whether the terms of these articles do imply a power to sue **No. 114.**
or not, because I am of opinion that whatever the powers thereby conferred were, —
these are limited, by the very conception of the articles themselves, to the endur- **Feb. 20, 1857.**
ance of the Company as a going concern. They might not have been so limited, **Morison and Haldane.**
and then the general question pointed at by the Lord Ordinary might have arisen. But I think they are so limited, and consequently that no general question does or can arise. For example, in article 8, the power to make calls is, obviously, for the purpose of buying and laying out grounds, building tombs, and otherwise enabling the trustees (subject to instructions of general meetings) to manage the affairs of the Company as a going concern. And then, in article 3, the power to do diligence for calls is coupled with the option of declaring defaulters to be no longer partners of the Company, which could never be intended to apply after dissolution, when there is a deficiency, and the trustees might be too glad to relieve each other or their friends for further liability from loss. The partners might, of course, limit the powers of the trustees in reference to calls to the endurance of the Company as a going concern; and I think they have done so here—very possibly not intentionally, but from not having contemplated that the speculation might happen to result in loss—a contingency, indeed, not seemingly in view in any part of this contract, although there are provisions made for dissolution upon the opposite assumption of there being a surplus to divide.

LORD IVORY absent.

THE COURT pronounced the following interlocutor:—"Advocate the cause, Alter the interlocutor of the Sheriff complained of: Find that the pursuers of the action before the Sheriff had and have no title to insist in the action as laid: Therefore sustain the defence against the title to sue and insist in the action, dismiss the action, and decern: Find the pursuers of the action, and respondents in the advocation, liable to the defenders in the action, and advocators in expenses, both in this Court and in the Inferior Court; Allow an account thereof to be given in," &c.

JOHN WALLS, S.S.C.—ALEXANDER CASSELS, W.S.—Agents.

Mrs MACKENZIE OR MORISON, AND ROBERT HALDANE, W.S. (Tutors of **No. 115.**
Miss C. H. A. D. Morison), Petitioners.—*D. F. Inglis—Heriot.*

Judicial Factor—Tutors nominate.—Powers granted to tutors-nominate of a child three years old to grant a lease of a farm for nineteen years, where it was clearly for the advantage of the estate to do so (*dub.* Lord Deas, *abs.* Lord Ivory).

THE petitioners were tutors nominated by the late Mr Morison of **Feb. 20, 1857.**
Saughton, to his only child, Catharine Morison, now three years old. The —
estate was strictly entailed. It contained a number of farms, the leases of **1ST DIVISION. Ld. Mackenzie L.**
which would expire during Miss Morison's pupillarity. The lease of one of them expired at Martinmas next, and this application was made by the tutors for authority to grant a lease of that farm for 19 years.

A report was produced by Mr Dickson of Saughton Mains, to the effect that none of the farms could be advantageously let on leases of shorter duration; and, if let for a shorter period, it would have the effect not only of greatly reducing the rent, but would tend to the disadvantage of the pupil and her estate, by retarding the improvement of the lands.

On 27th January 1857, the Lord Ordinary pronounced the following interlocutor:—"Appoints the petitioners to put in a minute referring to the authorities upon which this application is founded; and remits to Mr Dickson, farmer, Saughton Mains, to report as to the propriety of granting a lease of the farm for nine years, the period of the pupil's reaching puberty, and what effect such a lease would have upon the rent."

Mr Dickson reported that, in his opinion, "it would not be advisable or

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judicious to let the farm for a period of nine years, as in the present state of the farm a considerable outlay is required to be made by the tenant in drainage and fences, in order to render the farm so productive as to enable him to pay a fair rent for it, and no tenant is expected to drain and fence on so short a lease as nine years. Therefore the Reporter considers that if this farm is let on a lease of nine years, the rent to be obtained for it will be from L.70 to L.80 a-year less than if it is let on a lease of the ordinary duration of 19 years."

The petitioners in their minute referred to the following authorities, where the Court had granted similar powers to tutors-nominate:—Mrs Forbes or Carnegy, 22d December 1838, ante, vol. i. p. 355; Dame Amelia Halket and others, petitioners, 24th November 1857, ante, vol. x. p. 146; Tutors of Archibald A. Spiers, 11th July 1848, ante, vol. x. p. 1474.

The petitioners likewise referred to the following authorities, where similar powers had been granted to factors *loco tutoris*, tutors-at-law, and others, who, the petitioners submitted, did not occupy so favourable a position as tutors-nominate:—Ker, 24th January 1839, F. C., 14,451; Shepherd, 10th July 1841, F. C., 16,1288; Mackenzie, 26th January 1842; Shepherd, 12th December 1843; Ball, 6th July 1837; A B, 27th May 1841, F. C., 16,959; Shepherd, 23d November 1844; Brown, 11th December 1846, ante, vol. ix. p. 250; Thriepland, 7th June 1848, ante, vol. x. p. 1234; Lindsay, 13th December 1855, ante, vol. xviii. p. 205; Kincaid, 5th July 1856, ante, vol. xviii. p. 1208; Fraser, 2, 124: 2, 299.

The Lord Ordinary reported the case.

Lord President.—I think there is precedent enough, as well as principle, for this proceeding. The circumstances of this case are strong. The amount of loss to the estate, in the event of the lease being limited to nine years, will be very great. There is no benefit to be derived by so limiting the duration of the lease. In these circumstances it is very clear that a fair rent cannot be obtained unless this power is granted;—which practically comes to be a power only for the ordinary management of the estate. I do not say that that would give a tutor-nominate power to grant such a lease of himself, for the propriety of doing so depends on different circumstances. But it is here the kind of management which is best for this estate, and, in all these circumstances, I think we ought to grant the powers prayed for.

Lord Curriehill.—I have never had any doubt that it is competent for this Court to grant the special power which is prayed for, although we must exercise that power only if we be satisfied that the interest of the pupils requires us to do so. The competency of granting such an application is settled by authority, as appears from the series of decisions quoted in the minute. I am satisfied that this Court has granted similar powers in numerous other cases; and that, if these have not been reported, this is just because the granting of such powers, when the interest of the wards has required this to be done, has become a matter of established usage. And, although I think that it is now too late to go back upon the question of competency, I concur with your Lordship in holding that the competency has been settled by these authorities upon sound principle. In Scotland, as in every other civilized country, the law carefully provides for the interests of those who are in the helpless state of pupillarity. It does so by conferring powers, to a certain extent, for administering their estates, and for disposing of their persons, upon those who are their tutors, either as fathers or as nominees of deceased fathers, or by service as tutors-at-law, or grants of tutory-dative. But it does not stop there. It authorises the Supreme Court, in the exercise of its *nobile officium*, to make further provisions for the interests of such parties when circumstances require its interference. When they are left without tutors of any kind, this Court appoints factors to them, with powers of administration similar, in many respects, to those which the law confers upon tutors. If such tutors, or such factors, abuse or neglect these powers, this Court has authority to interfere for the protection of the pupils, whether it be their persons or their estates which require such protection. So much is this the case, that this Court may even remove pupils from the custody

their parents, when such an extreme proceeding is found to be necessary for the interests of the former. And when the limited powers which the law itself confers upon tutors, or the usual powers which this Court confers upon factors *loco tutoris*, appointed by itself, are not sufficient to enable them to protect the interests of the wards from impending loss or injury, this Court has authority to confer upon these guardians such additional powers as may be sufficient for that purpose. The Court's authority in these matters, as it is sufficient to enable it to delegate such powers to even such factors appointed by itself in place of tutors, is, *a fortiori*, sufficient to enable it to delegate such powers to tutors themselves. And, accordingly, this has been done in the series of cases mentioned in the minute, and, indeed, has become matter of common usage.

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In the present case, the inquiries which have been made under the direction of the Lord Ordinary, establish that the interest of the pupil requires that we should grant the special powers prayed for. A new lease of the farm in question must be granted. The tutor, in the exercise of only those powers which he has in virtue of his office, cannot grant it for a longer period of endurance than about nine years. In the existing state of this farm, a lease of it limited to that short period would be maladministration of the property, according to sound principles of rural economy, which are applicable to such cases, and would be very detrimental to the interests of the ward. And, hence, these interests require that the Court, in the exercise of its authority, should empower the tutor to extend the period of endurance of this lease.

Lord Deas.—This is an application by tutors-nominate. There is a great difference between granting special powers to such tutors and to factors *loco tutoris* and others who are officers of this Court. The latter are at all times amenable to our jurisdiction, and their cautioners are liable if what is done be ultimately found wrong. But tutors-nominate find no caution. On obtaining special powers they walk away, and we have no farther control over them. The cases cited of our own officers are not in point. In the three other cases cited (which were all in this Division), the distinction does not seem to have been under notice. I am not sure that the other Division follow the same course. A power to let for nineteen years may be different from a power to sell or borrow—coming so much nearer an act of ordinary administration. But I should prefer that Lord Ivory (who stated a doubt last day) were present, or that we should consult the other Division.

Lord Ivory absent.

The Court pronounced the following interlocutor:—"The Lords, on the report of Lord Mackenzie, grant warrant to and authorise the petitioners, as tutors for the said Catharine Henrietta Adamina Duncan Morison, to let the lands or farm of Fincraigs and Pitmossie, referred to in the petition, at a suitable rent on a lease to endure for nineteen years, as prayed for, and decern."

Robert Haldane, W.S.—Agent.

Mrs Jessie Priestnell or Mackenzie, and Curator, Pursuers.—*Patton* —*Campbell*. No. 116.

John Hutcheson and Others, Defenders.—*D. F. Inglis*—*Ross*.

Process — *Reduction* — *Relevancy of averments* — *Force and fear* — *Fraud* — *Essential Error*—*Proof before answer*. — A husband, by antenuptial contract of marriage, conveyed certain heritable property to his wife in liferent, renouncing his *jus mariti* and right of administration. Having been unfortunate in business, he became largely indebted to a bank, and obtained his wife's concurrence to a disposition of the property liferented by her. In a reduction by her of the disposition, on the ground of force and fear, fraud, and essential error, she averred that her husband came hurriedly into her bedroom, when she was unwell, and told her that the bank threatened him with diligence and ruin unless she consented to grant the deed; and, on her refusal, peremptorily repeated that she must sign it without anybody knowing of it, otherwise, to avoid imprisonment, he would flee the country, and leave her and her family to do as they best might: that, at this juncture, the bank agent came with the deed prepared: that, without reading it, or having it explained

No. 116. to her, she was compelled to sign it, and without time given for deliberation or reflection. *Held* (affirming judgment of Lord Benholme, *abs.* Lord Ivory) that the averments were insufficient to support the conclusions of force and fear and of fraud, but (altering his judgment) that, as regards the averments of essential error, proof before answer should be allowed.

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1st Division. Ld. Benholme. C.

Mrs Jessie Priestnell or Mackenzie, the pursuer of this action, was the wife of Hugh Mackenzie, manufacturer in Paisley, and liferentrix by antenuptial contract of marriage of certain heritable subjects which belonged to her husband, but from which his *jus mariti* and right of administration were, by the marriage-contract, excluded. She was infeft in these subjects for her liferent use. The sasine contained the clause of renunciation by Mr Mackenzie of his *jus mariti* and right of administration, and also the declaration that the subjects should not be affectable by his debts or deeds, or the diligence of his creditors. She now brought a reduction of a disposition granted by her of these subjects to the Bank of Scotland, and of other deeds following thereon, by which the defender Mr Brough acquired the property from the bank, on the ground of force and fear, fraud, and essential error. The subjects had been sold by the bank by public roup, and purchased by Brough, who was now infeft in them.

The pursuer stated, that at the date of her marriage her husband was solvent and prosperous, but that afterwards, in October 1854, the firm of which he was a partner got into embarrassed circumstances, and were deeply involved in debt. The Bank of Scotland was then largely in advance to them. The condescendence then proceeded as follows:—"*Cond.* 5. Mr Mackenzie and his said company not having the means wherewith to liquidate the balance due to the Bank of Scotland, the said John Hutcheson, as agent for the Bank, contrary to the good faith of the said antenuptial contract, insisted that he should get the pursuer to concur with him for her foresaid right of liferent, in granting to the bank a security over the said property, and threatened him and the company with diligence and ruin unless this was done. Mr Mackenzie was very averse to involve his wife in his difficulties; but being pressed by Mr Hutcheson, on the part of the bank, he, in an evil hour, acceded to his requirements. *Cond.* 6. The bank having, through Mr Mackenzie, obtained the titles to the foresaid property, including the instrument of sasine following upon the said antenuptial contract, they, by their law-agent in Paisley, prepared the absolute disposition of the said property now produced, bearing to be granted by the pursuer and her said husband, and purporting to convey to the said John Hutcheson the absolute right to the said property, including the pursuer's liferent. *Cond.* 7. Neither the draft of this disposition nor the principal was authorised, seen, or considered by the pursuer, or any one acting on her behalf. Neither the bank nor their said agent, nor her husband, consulted her as to the preparation or execution thereof. All these parties were acting against her, for the purpose of extorting from her without any consideration the foresaid antenuptial provision. Even at the time of executing the said disposition, instead of employing a professional man to see that it was regularly and properly executed of the pursuer's freewill and consent, the bank, and their agent Mr Hutcheson, employed and constrained Mr Mackenzie to concuss the pursuer to execute it without informing her of the circumstances. *Cond.* 8. Accordingly, on the forenoon of the 26th of October 1854, without any previous intimation, Mr Mackenzie came hurriedly into the bedroom where the pursuer was at the time, and told her that she must prepare immediately to sign a paper or deed for Mr Hutcheson, or the said bank, which, he said, was coming for her signature. She refused, being wholly ignorant of its nature; and asked what sort of paper or deed it was to which her signature could be necessary. Mr Mackenzie represented to her that it was a bond over the property in question for several hundreds of pounds

which he owed the bank, but was unable at the time to pay. She still refused, whereupon he told her peremptorily that she must sign it; that he was completely at the mercy of Mr Hutcheson, who would imprison and ruin him if it was not signed. He also said, that if it was not signed by her he would immediately flee the country, leaving her and the family to do as they best might. The pursuer was not well at the time. She had been ill for a fortnight. She had a family of three young children, who would be involved in their father's ruin. She was taken by surprise, and was greatly alarmed and excited. She asked for a little time to consult some of her friends; but Mr Mackenzie would not hear of this. He said the matter was instant; that nobody must know anything about it, and that there was no use of resistance or delay, for the deed must be signed. At this juncture Mr J. R. M'Arthur, and a clerk in the office of the defender Mr Hutcheson, came to the house with the deed. This was notified to the pursuer. There was no time given for deliberation or reflection. The pursuer was compelled, *vi et metu*, to go and sign the deed in presence of the two last mentioned parties, who brought it. *Cond.* 9. When she signed the deed she had not read it, nor heard it read or explained; nor did she know anything about the contents of it,—neither did her husband know the contents of it. The representation that it was a bond for several hundred pounds was false; and the other representations with respect to her husband's imprisonment or flight from the country, and which the pursuer believed at the time, were made use of to compel her to sign the deed. *Cond.* 10. The deed which was so signed by the pursuer is the disposition in favour of Mr Hutcheson, first called for. It has never been ratified by the pursuer, the parties who obtained it being well aware that the pursuer could not make the declaration or affidavit which the ratification by a wife contains. *Cond.* 11. The said disposition falsely bears to have been granted in consideration of the sum of L.1000 sterling instantly paid by Mr Hutcheson to Mr Mackenzie. No such payment was made; and that sum was quite inadequate to the value of the property. The deed was granted by Mr Mackenzie, it is now alleged by the defenders, as a security to the bank for debt; but if so, it was for prior debt contracted by the company of which he was a partner. The pursuer herself received nothing for signing the deed. It was extorted from her at the instance of Mr Hutcheson, as agent, and for behoof of the Bank of Scotland, without giving her any consideration whatever."

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In these circumstances, the pursuer concluded for reduction of the disposition, and of articles of roup, and other proceedings which had followed thereupon.

The disposition was absolute in its form. It bore to be granted by the husband as taking burden on him for his wife for all right, title, and interest she had or could claim in and to the subjects by liferent, infeftment, or otherwise, and by the wife herself, for her own right and interest, with consent of her husband.

The averments of the defenders, so far as essential, are embodied in the opinion of Lord Deas.

The Lord Ordinary, on 20th January 1857, pronounced the following interlocutor:—"Finds that the pursuer's record does not contain a statement sufficient to support the grounds of reduction, or relevant to be admitted to probation; Therefore, assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses," &c. *

* "NOTE.—Three grounds of reduction were insisted on at the debate. 1. Force and fear were alleged as sufficient to annul the conveyance executed by the pursuer; the statements on this head are contained in the 8th article of the condescendence.

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The pursuers reclaimed. The plea of fraud was departed from.

At advising,—

Lord Deas.—This action is brought by Mrs Mackenzie to reduce a disposition granted by her and her husband on 26th October 1854, in favour of the Bank of Scotland, with the infeftment which followed upon it, and certain articles and minutes of roup and relative disposition and sasine, whereby the subjects, which had been disponed to the bank, were acquired from the bank by the other defender Mr Brough. The disposition to the bank was absolute in its form, as for a price of L.1000 instantly paid to the husband. It bore to be granted by the husband, as taking burden on him for the wife, for all right, title, and interest she had or could claim in and to the subjects, by liferent infeftment, or otherwise, and by the wife herself, for her own right and interest, with consent of her husband. It now appears that the subjects had been the property of the husband, and that, by

The general averment embraced in the last sentence of this article must be under stood as explained by the details by which it is preceded.

"After the best consideration the Lord Ordinary can give to these details, h does not think they amount to such force or fear as to interfere with the consent o the pursuer, and so to annul the deed she was induced to execute. The represen tations made to her by her husband as to the power of the bank, as his creditor, t imprison his person, and ruin his credit by the diligence of the law, and the alter native of his flying the country to avoid imprisonment, are not alleged to have bee false. A strong motive was thus pressed upon her to execute the deed. Fear the consequences of her refusal, no doubt, induced her to comply. But these co sequences are not alleged to have been misrepresented. They were steps which tl creditor was by law entitled to take against her husband, and which would lead his incarceration or flight. They were steps which the husband could not preve He merely disclosed to her a danger which, as to him, was inevitable, unless s interfered to avert it.

"The authorities in our law upon this subject are happily very few. The do trine is very generally expressed by our text writers. Nor does the civil law gi much assistance upon the subject, as it appears to have varied from time to time.

"That the reduction on the ground of force and fear operates to annul the de even against onerous third parties, suggests the necessity of the extortion being such a character as substantially to interfere with the freewill of the party, and to exclude the consent which the law holds to be necessary to the due execution any deed.

"In the case of a married woman, the sex and peculiar relation of the party, doubt, render a smaller amount of violence or fear sufficient to annul the deed th in the case of a man. But, on the other hand, it seems clear that mere reveren *maritalis* is not sufficient to annul a deed executed under its influence. The w may think it her duty to obey her husband,—to sacrifice her own pecuniary in rests to benefit him. But in the very performance of what she considers her du she makes a choice,—she exercises her volition, and it cannot be said that sh overpowered either by force or such fear as interferes with her freewill.

"2. The second ground of reduction is that of fraud; but as that does not se to be pointed against the defenders by any distinct averment, it is unnecessary enlarge upon it.

"3. A plea of essential error has been added to the record, in the hope of giv that character to some of the statements on record. The Lord Ordinary does however, find anything in the record to sustain the plea. The pursuer was certa aware that the deed she was asked to sign constituted a sacrifice of her own rig She was told by her husband it was to afford a security for his debt which he co not pay. And it is not denied on the record that this is its true character, altho it is said (art. 11) that it was for prior debt contracted by the company of whic was a partner.

"It is not alleged that she was misled by the apparent absolute nature of the veyance. It is not said she ever believed it to be an actual sale. Indeed, alleged that she knew not the actual contents of the deed, but only what her band told her about it."

antenuptial contract of marriage, he had conveyed them to the wife in liferent, for her liferent use only, renouncing his *jus mariti* and right of administration, and all other rights competent to him by law in consequence of the marriage, in relation to these subjects, declaring them not to be affectable by his debts or deeds, nor by the diligence of his creditors. The husband had thus retained the fee, but the liferent stood vested, as a separate marriage provision, in the wife. It now farther appears by the mutual admissions of parties, that the disposition, although absolute in its form, had truly been intended as a security for the debt of the husband, or of him and his partner Mr M'Arthur, then trading under the firm of M'Arthur and Co. But no back bond or back letter had been granted, and the parties differ as to the precise object of the security. The pursuer Mrs Mackenzie says (cond. art. 11), "it was for a prior debt contracted by the company of which he" (her husband) "was a partner." The defenders say it was understood and agreed upon between their agent Mr Hutcheson and Mr Mackenzie and his partner, "that Mr Hutcheson should hold them" (*i.e.*, the subjects) "in security of whatever might be overdrawn by M'Arthur and Co. on their cash-account, and of their general obligations to the bank." The defenders further say (stat. 6), that, at the date of the disposition, M'Arthur and Company's cash-credit with the bank had been overdrawn to an amount, including interest, of L.2138, 17s.; that the balance afterwards rose to L.5145, 16s. 9d., besides interest; and that, when the firm stopped payment in February 1855, the balance amounted, with interest, to L.2819, 14s. 8d. The only other security which the bank appears to have held for these overdrafts, was a disposition in the same absolute form, at the nominal price of L.800, granted by Mr M'Arthur, the only other partner of M'Arthur and Co., of certain subjects belonging to him. Whether these subjects have been sold, or what they have realized, is not stated, nor is it material to the present question. The subjects which had been conveyed by Mr Mackenzie and his wife were, however, sold by the bank, by public roup, to the defender Mr Brough, at the price of L.1580, and a disposition granted to him on which he is infeft. The pursuer admits that the overdrafts at the date of the disposition to the bank were not less, at all events, than the amount stated by the defenders, and that the overdrafts at the close of the account exceeded L.2000.

In these circumstances, and upon the strength of certain averments to be immediately noticed, three grounds of reduction were insisted in by the Lord Ordinary.—*1st*, Force and fear; *2d*, Fraud; and, *3d*, Error *in essentialibus*. The Lord Ordinary found that the pursuer's statements were not relevant to support any of these grounds of reduction. The ground of fraud has been abandoned at the bar, and no further notice need be taken of it. There remains the two grounds —*1st*, of force and fear; and, *2d*, of essential error.

Although, translating the language of the Roman law, we couple together force and fear as one ground of reduction, the act of force is truly, as Lord Stair observes (i. 9, 8), only one means of inducing fear, the true ground of reduction being *extortion*, through the influence of fear, induced in the various ways, of which he gives instances, partly from the civil law and partly from our own law, —such as the fear of torture, fear of infamy, fear of danger to life, and so on. It would be very difficult, and it is not here at all necessary, either by definition or description, to point out all the means by which, and which alone, such fear may be induced, on the part of a married woman, as the law will recognise as sufficient to void her solemn deed. Certain it is, on the one hand, that it is not every sort of fear—or rather it is not the fear of consequences of every sort, which will void such a deed; and, on the other hand, that fear of particular consequences may be sufficient in the case of a married woman, though of full capacity, which would not be sufficient in the case of a man of full capacity, and that these consequences need not necessarily be injury to herself, either in her person or character, but may be injury to her husband or to her children, the fear for whose safety may be stronger even than the fear for her own. But while I state these propositions in a general form, I do not attempt to define or describe what must be the nature of the consequences feared, in order to render them relevant to support reduction of the deed. It is not necessary to do so; and it is safer and sufficient, after seeing what is here actually averred, to proceed to inquire, whether, in any view of the law, what is so averred can be regarded as sufficient to annul this deed?

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Now what is averred by the pursuer is substantially this:—That Mr Mackenzie and his partner, trading under the firm of M'Arthur and Company, became embarrassed in their circumstances, and largely indebted to the bank, on a cash-credit account;—that the bank insisted with Mr Mackenzie that he should get the pursuer to concur with him, for her liferent interest, in granting a security to the bank over the subjects comprehended in her antenuptial contract of marriage, "and threatened him and the company with diligence and ruin unless this were done;" —that the bank prepared the security in the form of an absolute disposition;—that on the forenoon of 26th October 1854, when she was not well, having been ill for a fortnight, Mr Mackenzie came hurriedly into her bedroom and told her, and afterwards repeated peremptorily, in the face of her refusal, that she must, without anybody knowing of it, sign the deed which was about to be brought, and which he described as a bond over the property for several hundred pounds, as otherwise he would be completely at the mercy of the bank, who would imprison and ruin him; and that, if the deed was not signed, he would immediately flee the country (obviously meaning to avoid imprisonment), leaving her and her family, which consisted of three young children, to do as they best might:—that at this juncture Mr M'Arthur and a bank clerk (who were the instrumentary witnesses) came to the house with the deed, and this being notified to her, she went into the room where they were (it is not said accompanied by her husband), and signed the deed in their presence—having had no previous notice of the nature of the deed, and not being made aware otherwise than has been already stated, of its object or contents, by its being read over to her or otherwise.

Now, laying out of view for the present, any specialty in consequence of the deed being in the form of an absolute disposition in place of a bond and disposition in security,—a specialty which affects, I think, solely the separate plea of error in *essentialibus*,—all that is here stated amounts truly to nothing more than this,—that the threat of imprisonment (which was quite a lawful threat) had been used against the husband if the debt should not be paid, or this security granted;—that he told his wife, quite truly, that this threat had been used, the consequence of which, if acted on, would be to ruin him; that, rather than be imprisoned, he would immediately flee the country, leaving her and the children (not, however, to starve, for she would, in that event, have had her liferent entire),—and that she being taken by surprise, and excited and alarmed by these consequences, correctly enough depicted to her, went into the room where the instrumentary witnesses were, and there, without further objection (so far as appears from her statements), signed the deed in their presence. The not reading over the deed goes for nothing, under this branch of the argument, in the absence of any charge of fraud. And as to the surprise, it is only material in so far as it may account for the operation of weaker grounds of fear than might otherwise be deemed sufficient. But, still the grounds of fear must be such as the law recognizes as relevant to void a solemn written deed; and here the only fear alleged is fear of consequences, which it was quite lawful for the bank to hold out, and equally lawful for the husband to communicate to his wife, as well as to tell her what he himself might thereupon feel constrained to do, in order to avoid imprisonment and gain a livelihood; and when the wife, to avoid the consequences thus impending, agreed to sign the deed, it would be more correct to say that she acted from affection than that she acted from fear; and although affection may no doubt induce fear for the person who is its object, yet if the fear so induced be merely the fear of (or in other words, the desire to avoid) such consequences as are stated here, all which might have ensued without illegality on the part of anybody, this is not the sort of fear which we can hold relevant to void a formal and delivered deed. The bank threatened nothing which was unlawful, and the husband held out nothing which was unlawful, for he only said he would be constrained to leave the country, which might be a very natural course for him to take to avoid imprisonment, and seek a livelihood, and was very different from the case put (upon which I give no opinion) of a threat by the husband to commit suicide, or some other violent and unlawful act. In a reduction on the ground of force and fear, I hold it necessary to specify the things said and done in such a way as to enable the Court to judge whether they really amount to force and fear in the eye of law, very much as in a case of fraud it must be specifically stated in what the alleged fraud consists. Here, I think, the sp[illegible]

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fication, in place of supporting, destroys the charge; and on this point, therefore, I concur with the Lord Ordinary.

There remains the ground of essential error. And here arises, I think, a question of considerable delicacy, in reference to which I had rather avoid, in the meantime, either expressly sustaining the relevancy, or holding that the pursuer's averments are so plainly irrelevant as to lead at once to the dismissal of the action. If it were absolutely necessary to take the one course or the other, I should, of course, be ready, whether in the same direction or not, to decide the relevancy of this ground of reduction as well as the other upon which I have already expressed my opinion. But there is a middle course, which we do not often take, but which may be quite competently taken, where there is a strong expediency in favour of it, and which I should propose to your Lordships to take here, and that is to allow a proof before answer. If the pursuer shall fail in proving her material averments, we shall be saved the necessity of deciding a delicate and novel question in the unsatisfactory and hypothetical form of a question of relevancy. And if, on the other hand, she shall succeed in proving these averments, we shall be in the safer and more satisfactory position of deciding upon a real case, and, consequently, run less risk of creating misapprehension in regard to the law, or dealing in the dark with the rights of the parties.

I suggest this course to your Lordships the more readily, because, it appears to me, that, even if the relevancy were to be sustained, this would be a case in the decision of which the legal inferences to be drawn from the particular facts proved would require greatly more consideration than is likely to be required in order to come to a conclusion as to what the facts proved are. It is not a case, therefore, in the extrication of which the aid of a jury is likely to be, by any means, so useful as where the difficulty lies mainly in ascertaining disputed questions of fact, or in drawing inferences which are more matter of discretion than matter of law. Nor can much time be lost, or unnecessary expense incurred, in taking what, looking to the nature of the averments, we plainly see must be a very limited proof, and a proof at the close of which a judgment, final in this Supreme Court, may be at once pronounced. In this particular case, therefore, I should suggest to your Lordships, what I admit to be an exceptional course,—to allow a proof before answer of the facts averred, in so far as they bear upon the question of essential error: and as this course, if adopted, will leave the relevancy of these averments open for future consideration, I forbear, in the meantime, from indicating any opinion whatever, upon that question of relevancy, either as it affects the bank or the purchaser, or upon what it may or may not be material for either party to prove.

Lord Curriehill.—I entirely concur.

Lord President.—The case is very delicate on that last branch of it. I have given it every consideration, and think it better fitted for the consideration of the Court than for a jury; and, therefore, I entirely concur in the opinion of Lord Deas.

Lord Ivory absent.

The Court pronounced the following interlocutor:—"Recall the interlocutor submitted to review: Find that the plea of fraud is no longer insisted in, and that no relevant averments are made in support of the plea founded on force and fear: Therefore, Repel the reasons of reduction, and assoilzie the defenders from the conclusions of the action, so far as these are founded upon fraud and upon force and fear, and decern: And in so far as the action is laid upon the ground of error *in essentialibus*, before answer, and under reservation of all pleas of parties, Allow the parties respectively a proof of their averments, so far as bearing upon that ground of reduction; Grant diligence, &c., and appoint the commission and diligence to be reported *quam primum*; Further, they reserve all questions of expenses."

John Martin, W.S.—Davidson & Syme, W.S.—Agents.

No. 117. JAMES ROBERTSON (M'Pherson's Assignee), Pursuer.—*Christison—Pattison.*

Feb. 20, 1857. Robertson v. Adam. JAMES GRAHAM ADAM AND OTHERS, Defenders.—*Macfarlane—Gifford.*

Title to Sue—Transaction—Bankruptcy.—Held (affirming judgment of Lord Neaves, and in conformity with Crichton v. Bell, 25th June 1833), that a purchase by private sale, from the trustee and commissioners, of a debt forming part of a sequestrated estate, does not give a good title to sue the debtor.

1ST DIVISION. Lord Neaves. C.

THIS action was directed against the defenders, ten in number, as members of the provisional committee of a projected railway company in 1845, called the Lanark, Stirling, and Clackmannan Counties Junction Railway; and the action concluded for payment by them of an account of L.121, 15s. 6d., with interest since October 1846, incurred by them to John Stephen, who had been employed as surveyor and engineer of the proposed line. The pursuer's condescendence set forth, that after the account was incurred to Stephen, his estates were sequestrated, and John M'Pherson, writer in Glasgow, was appointed his trustee; that, by this sequestration, the account due by the defenders to Stephen became vested in M'Pherson as his trustee; and that in June 1854, M'Pherson, with consent of the commissioners, conveyed to Robertson, the pursuer, the account due by the defenders to Stephen and to M'Pherson, as his trustee, with full power to him to sue for, uplift, and discharge the same. The assignation was produced.

The defenders, while disputing their liability, pleaded, that the pursuer had no title to sue; and upon that point the Lord Ordinary, on 22d May 1855, pronounced the following interlocutor:—"Sustains the defences against the pursuer's title to pursue: Dismisses the action, and decerns: Finds the defenders entitled to expenses," &c.*

* "NOTE.—The Lord Ordinary cannot distinguish the present case from that of Crichton v. Bell and Gillon, 25th June 1833, 11 Shaw, 781, where it was held that a purchase by private sale, from the trustee and commissioners, of a debt forming part of a sequestrated estate, did not give a good title to sue the debtor even although the creditors had approved of the transaction. That case occurred under the former Bankrupt Act; but although its provisions on this subject are not expressed precisely in the same terms as those of the Act now in force, there seems to be no such difference between them as to authorise a different decision here. By the former Act, sect. 34, the creditors were, at the first meeting after the bankrupt's examination, to 'give directions to the trustee for the recovery and disposal of the bankrupt's estate,' which the trustee was to follow; and, by sect. 41, the trustee was generally directed 'to recover and convert into money, in the speediest and most effectual manner, the whole estate under his management and power.' By the present Act, sect. 61, it is enacted, that the 'trustee shall manage, realise and recover the estate' belonging 'to the bankrupt wherever situated, and convert the same into money according to the directions given by the creditors at any meeting, and if no such directions are given, he shall do so with the advice of the commissioners.' By the former Act, sect. 56, it was enacted, 'That if, at the expiration of one year and an half from the date of the sequestration, any of the personal effects of the bankrupt, or any debts, whether heritable or moveable, due to him, remain still unrecovered, it shall be in the power of four-fifths of the creditors in number and value, convened at any general meeting called for the purpose after one advertisement, two weeks previous to the meeting, in the Edinburgh and London Gazettes, to direct that such remaining debts and effects, and also any contingent or future interest which the creditors at large may have in dividend deposited in bank, or lent out as aforesaid, be sold off by public auction upon two months' previous notice published in the Edinburgh and London Gazettes, the sale either to be in whole or in lots as a majority in value of the creditors shall direct. By the present Act, sect. 112, it is enacted, 'That if, on the lapse of twelve months from the date of sequestration, it shall appear to the trustee and commissioners

The pursuer reclaimed. At advising,— No. 117.

LORD PRESIDENT.—The case of Crichton v. Bell is as close a precedent as one case can be a precedent for another. Feb. 21, 1857. Mackay.

LORD CURRIEHILL.—I concur.

LORD DEAS.—I concur. The policy of both acts in this respect appears to me to be the same.

LORD PRESIDENT.—The Lord Ordinary's note shews the principle of that.

THE COURT adhered, with additional expenses.

JAMES BELL, S.S.C.—WEBSTER & RENNY, W.S.—DAVID WIGHT, W.S.—INGLIS & LESLIE, W.S. —MORTON, WHITEHEAD, & GREIG, W.S.—Agents.

CHARLES MACKAY AND OTHERS (Burke's Curators), Petitioners.—*Patton.* No. 118.

Judicial factor — Curator—Exoneration — Process.—The Court will not, as a matter of course, grant exoneration to a curator,—the ward concurring,—but will grant warrant for delivery of the bond of caution.

THE petitioners were the curators of Francis Burke, who attained majority in August 1856. They now presented this application for exoneration and discharge, and to have their bond of caution delivered up. Burke concurred in the application. He had examined and approved of the whole curatorial accounts, and had also executed a formal discharge in the petitioners' favour, —which discharge was now produced. The accounts had not been examined and approved of by the Accountant of Court. Feb. 21, 1857. 1st Division. Ld Mackenzie. L.

Patton, for the petitioners.—We propose to follow the course adopted in the case of Rollo.[1] We withdraw the prayer for exoneration.

LORD PRESIDENT.—Having that precedent, we shall grant the prayer as restricted.

THE COURT pronounced the following interlocutor:—"The Lords allow the prayer of the petition to be restricted at the bar: and, in terms of the restricted prayer, grant warrant to and ordain the

expedient to sell the heritable or moveable estates not disposed of, and any interest which the creditors have in the outstanding debts and consigned dividends, they shall fix a day for holding a meeting of the creditors to take the same into consideration, and the trustee, besides advertising the same in the Edinburgh Gazette, shall, fourteen days before the day appointed, send by post to each creditor claiming on the estate a notice of the time and place of the meeting, with a valuation of the estate and effects, and a list of the outstanding debts and of the consigned dividends, and if three-fourths of the creditors in value assembled at the meeting shall decide in favour of a sale, in whole or in lots, the trustee shall cause the same to be sold by auction, after notice thereof published at least once in the Edinburgh Gazette one month previous to the sale, and in such other newspapers as the creditors at the meeting shall appoint.'

"Under both of these Acts, as illustrated by the case of Crichton, it must, it is thought, be held that the statutory direction given to the trustee to recover and realise the moveable estate does not authorise him to dispose of outstanding debts at his own hand, or with the mere aid of the commissioners. The natural mode, indeed, of realising an outstanding debt is to recover it from the debtor, and the assignation of it to a third party at an under value, such as here took place, does not seem to be an act of legitimate or ordinary administration. The disposal of outstanding debts by way of sale seems, under both of the satutes, to be guarded by special provisions, requiring first, that a certain time shall elapse, and next, that the sale shall be by auction, the only safe way, perhaps, by which the value of such a subject can be ascertained.

"Looking, then, both to precedent and principle, the Lord Ordinary thinks that the pursuer in this case has not validly acquired the alleged debt which is the subject of [illegible] and, consequently, that he has no title to pursue."

[1] Rollo and Others, 8th July 1852, ante, vol. xiv. p. 990.

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Report of Accountant in Morrison's Factory.

Accountant of Court, or other custodier, to deliver up the bond of caution of the curators of the said Francis Burke, referred to in the petition, and decern."

HOPE & MACKAY, W.S.—Agents.

No. 119.

THE ACCOUNTANT OF COURT.— *Watson.*
PATRICK MORRISON (Wilson's factor), Respondent.—*Patton.*

Judicial factor—Statute 12 & 13 *Vict. cap.* 51 (*Pupils Protection Act.*)—There are three classes of administrators to which the Pupils Protection Act applies,—a factor *loco tutoris*, factor *loco absentis*, and *curator bonis*;—*Held* (*abs.* Lord Ivory), that an appointment of a judicial factor, in terms of an application praying for an appointment of a judicial factor, and not for any of the classes mentioned in the statute, does not fall within the operation of the Act.

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1ST DIVISION.
Ld. Mackenzie L.

PATRICK MORRISON was appointed, in November 1856, judicial factor on the estate of Robert Wilson, an aged person both deaf and blind, and unable to manage his affairs. The case now came before the Court on the following report by the Accountant of Court: — "A difficulty has arisen as to whether this is an appointment falling within the Pupils Protection Act, and the Accountant is therefore under the necessity of reporting to the Court, in order that the difficulty may be removed.

"The Pupils Protection Act (12 & 13 Vict. cap. 51) is entitled 'An Act for the better protection of the property of pupils, absent persons, and persons under mental incapacity in Scotland.'

"Mr Wilson does not labour under direct mental incapacity, but under the loss of the use of the organs of sight and hearing, and these defects may be said to affect the use of his mental capacity, and to prevent him from exercising it in the administration of his affairs.

"The interpretation clause of the Act, however, is broader, and places under its provisions the estates of persons who are 'under some incapacity for the time to manage their own estates,' which is undoubtedly the case of Mr Wilson. But the term, 'judicial factor,' is not any one of the specific appointments named in the Pupils Protection Act. These are described as factor *loco tutoris*, factor *loco absentis*, and *curator bonis*; and the term 'judicial factor,' in the various sections of the Act, is held to mean either one or other of these appointments,—only used, however, as a general term for convenience, and to save repetition. There are, as the Court are aware, many judicial factors who are not under this statute; but the Accountant feels difficulty in holding this appointment to be one of these, and he is unwilling to take the responsibility of deciding that it is solely on the ground of the title of the appointment, when the circumstances of the case appear to point to an opposite conclusion.

"Should the Court, therefore, be of opinion that Mr Wilson's estate falls under the management provided by the Pupils Protection Act, it humbly appears to the Accountant that the appointment ought to have been *curator bonis*; and if so, it may be the pleasure of the Court still to direct the term of the appointment to be so altered."

Patton.—The present application is unnecessary.[1] The preamble of the Pupils Protection Act sets forth the same *species facti* as the Act of Sederunt of 1730, and was evidently introduced to amend the procedure under the former Act of Sederunt in regard to appointments on the ground of mental incapacity.

Watson, for the Accountant.—The Accountant cannot hold, of his own

[1] Mark, petitioner, 14th June 1845, ante, vol. vii. p. 882; A. S. 13th February 1730.

authority, that a judicial factor means anything but the three different kinds of factors in the interpretation clause. No. 119.

Feb. 21, 1857. Ritchie v. Ritchie.

LORD PRESIDENT.—The Act was undoubtedly intended to apply to all those persons who are administrators for others, but I think also that the Act contemplated that all such persons would be comprehended under the particular description there mentioned of factors *loco tutoris*, factors *loco absentis*, and *curators bonis*. It rather appears to me that one of these classes would have been the more proper appointment here, and so have brought this case, beyond all question, within the operation of the Act. I do not know of any other class of administrators which the Act intended to comprehend which may not be found under one or other of these three classes.

The error, if there is one, consisted in not praying for the appointment of a *curator bonis*. Questions of difficulty might arise whether a judicial factor fell under any and which of these classes of administrators mentioned in the statute; and I think that to hold that this appointment, even in a limited sense, fell under the Pupils Protection Act, would be dangerous, and calculated to throw this very useful statute into confusion. Parties ought to be more careful as to the nature of the appointment they pray for. All that we can do is to hold that, as the appointment stands, it does not fall under the operation of the statute, and allow parties to put it right; which they can only do by now asking for what they should have asked for at first,—the appointment of a *curator bonis*.

LORD CURRIEHILL.—I have nothing to add.

LORD DEAS.—I give no opinion as to whether the appointment be good. I have some doubts of that, on grounds which I will not go into, as the risk lies with parties themselves if they do not choose to put the matter into a right shape by applying for the appointment of a *curator bonis*.

LORD IVORY absent.

THE COURT pronounced the following interlocutor:—"The Lords having heard counsel in this case, on the report of the Accountant—Hold that, as the appointment stands at presennt,—that is, as judicial factor in terms of an application praying for the appointment of a judicial factor, and not for any of the classes mentioned in the statute,—the appointment is not one falling within the Pupils Protection Act; reserving right to apply for the appointment of a *curator bonis*."

JOHN YULE, W.S.—Agent.

No. 120.

MRS LOUISA GEORGIANA RICKETTS OR RITCHIE, Pursuer.—*Pattison*.
JOHN RITCHIE, Defender.—*D. F. Inglis—Aitken*.

Process—Proof.—In the course of a conjunct proof in a divorce, the loss of a letter was sought to be proved by the pursuer, who adduced two witnesses, one of whom had received the letter, and the other had delivered it;—*Held*, that although the pursuer might have directed more searching inquiry for it, yet it being sufficiently proved that neither the pursuer nor her friends were in possession of it, secondary evidence of its contents was admissible.

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IN the course of a conjunct proof in an action of divorce, it appeared that the defender Ritchie had lodged for sometime at Holyrood Abbey. It was averred that he had there been guilty of adulterous practices. A person of the name of Fulton, who also resided there, was examined, and stated that he was acquainted with the defender—that he remembered Ritchie being apprehended and put in jail—that he (Fulton) afterwards received several letters from him, one of which he produced and identified; and he deponed, —"I think, in one letter that I received from Mr Ritchie, there was a letter enclosed addressed to Mr Wilson. I gave the letter to Wilson, and I remembered his reading it to me and Mr Finlayson in Finlayson's house, at the counter. I do not think that Wilson gave me back that letter. I have

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not that letter now, nor do I remember ever seeing it after it was so read by Wilson. Mr Ritchie was in prison at the time when I received that letter.—Here the deponent having withdrawn, the agent for the pursuer stated, that, having proved the loss of the letter in question by the evidence of James M'Allan Wilson and the deponent Mr Fulton, he now proposed to examine the witness Fulton as to the contents of the said letter. The agent for the defender objected to the proposed examination in regard to the contents of the letter in question, because the loss of it has not been satisfactorily proved; and because, at all events, it is incompetent to prove its contents by parole testimony. The commissioner, in respect that it is sufficiently proved that the letter in question has been searched for by the witnesses Wilson and Fulton, without having been found, and that there is no reason to believe that its disappearance has arisen from any fault on the part of the pursuer or her agents, in whose possession it never seems to have been—Finds that it is competent to adduce secondary evidence as to the general terms or contents of the said letter, which is not founded on as an obligation, and therefore does not require an action of proving the tenor, in order to establish the nature of its contents: Therefore, repels the objection. Against which deliverance the agent for the defender appealed."

The Lord Ordinary dismissed the appeal.*

The defender reclaimed.

Lord President.—There is no other person suggested in whose possession this letter could be. Each of the witnesses swears positively that he does not have it. It will not do to come piecemeal here on every objection of this kind.

The Court adhered, with additional expenses.

Richard Arthur, S.S.C.—J. M. Macqueen, S.S.C.—Agents.

No. 121.

Ranald George Macdonald of Clanranald, Petitioner.—*Dundas —A. B. Shand.*

Donald Lindsay, Respondent.—*D. F. Inglis—Baillie.*

Entail—The consents to a disentail of trust-funds may be conditional—Statutes 11 & 12 *Vict. cap.* 36, *sects.* 4 *and* 43; *and* 16 & 17 *Vict. cap.* 94 (*Entail Amendment Act.*)—*Held* (*abs.* Lord Ivory) that the Court can authorise a surrender by a trustee of the free estate held in trust for the purpose of being entailed, after all prior claims on the trust-estate are provided for,—on the conditional consents of the three next heirs that any arrangement for the ultimate disposal of the money shall be sanctioned by the Court.

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1st Division.
Ld. Mackenzie
C.

By deed of entail dated 8th March 1810, Clanranald conveyed the whole of his estates in the county of Inverness to himself in liferent and the heirs whatsoever of his body in fee, whom failing, to the other heirs of tailzie therein mentioned. The deed was fenced by the usual prohibitory, irritant, and resolutive clauses, but the granter reserved full power to revoke and alter the same in all respects. On 8th June 1811, Clanranald executed a trust-disposition in favour of certain parties, of whom the late Robert Brown, Esquire, chamberlain to the Duke of Hamilton, was the last survivor, whereby he conveyed to them his whole estates in trust for behoof of the creditors of his grandfather, his father, and himself, at the date of the trust-deed. That

* "Note.—The appeal on page 92 of the pursuer's proof is the only one about which the Lord Ordinary has felt any difficulty. The pursuer might have made more special requisition, and directed more searching inquiry for the letters than she has done; but still the fact that it is not in the possession of either Wilson or Fulton seems sufficiently made out, and it was never in the hands of the pursuer or her friends; and, therefore, on the whole matter, the evidence of its contents appears to have been rightly admitted by the commissioner."

trust-deed contained a declaration, that it was granted without prejudice to the deed of entail before-mentioned, except in so far as the trust-estate might be sold or burdened by the trustees under the powers entrusted to them. The trustees afterwards completed their title to the trust-estates, entered upon the management of them, and sold the whole of them, with the exception of two small islands, and certain superiorities, to be afterwards noticed.

By contract of marriage, dated February 1812, entered into by Clanranald upon his marriage with Lady Caroline Anne Edgcumbe, daughter of the Earl of Mount-Edgcumbe, to which the trustees under the deed of 1811 were, *inter alios*, parties, he bound himself to infeft Lord Suffield, and certain other parties, in his whole estates, in security of the sum of L.20,000, as a provision for the children of the marriage (in certain circumstances which have occurred), other than the one entitled to succeed to the estate. The original trustees named in the contract are all dead, and the claim is now vested in the present Earl of Mount-Edgcumbe, Sir James Forrest of Comiston, Bart., and William Alexander, Esq., W.S., as trustees assumed under the powers granted in the contract.

Clanranald also, with consent of the trustees for his creditors, and subject to the trust purposes, and the provision of L.20,000, disponed the whole of his estates, or such part of them as should remain unsold after the trust purposes were accomplished, to himself, and the heirs-male of the marriage, and the heirs whatsoever of their bodies, the eldest heir-female succeeding without division; whom failing, to the heirs-male of his body by any subsequent marriage, and the heirs whatsoever of their bodies, the eldest heir-female always succeeding without division; whom failing, to certain other heirs and substitutes therein mentioned; whom all failing, to the heirs specified in the deed of entail of 8th March 1810, but always under the whole conditions, &c. therein contained; and declaring that these conditions should apply to himself as well as to the heirs called to the succession, so that the lands and estates might at all events be secured to the heirs called by the contract of marriage. Clanranald farther renounced, so far as regarded the heirs called by the contract of marriage, the power of alteration reserved to him by the deed of entail of 1810. He was duly infeft in Feb. 1817, in the whole estates conveyed by the contract of marriage, in virtue of a precept of sasine therein contained, but under the conditions therein mentioned.

There were one son and five daughters born of this marriage, which was dissolved several years ago by the death of Lady Caroline; and Clanranald had no issue of his subsequent marriages.

Clanranald contracted various debts subsequent to the date of the trust-deed in 1811, and, among others, one of L.5000 to Messrs Herries, Farquhar, and Co., bankers in London, and another of L.2200 to Mr J. H. Burnett, now Sir James H. Burnett, Baronet. In the year 1832, Herries, Farquhar, and Company raised an action against Clanranald; Mr Brown, the then only surviving trustee under the trust-deed of 1811; and the late Marquess of Lothian, &c., the trustees at that time for the younger children under the contract of marriage,—containing conclusions for having it found that the children were not onerous creditors under the contract, so as to enable them to compete with the pursuers as creditors of their father upon the residue of the trust-funds; and, by a supplementary action, Ranald John Macdonald (now a captain in the Royal Navy), Clanranald's only son, was made a party to the suit.

In March 1833, the Court pronounced a judgment, by which they decerned against Clanranald personally, in terms of the libel; but *quoad ultra* they found in effect,—

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1st, That the trustees for the younger children were creditors for the provision of L.20,000, and were preferable to the pursuers.

2d, That Mr Brown, the surviving trustee, was bound to denude of such part of the lands as remained unsold, and of such part of the price of the lands sold as should remain after satisfying the trust purposes, in such manner as to secure the succession thereto to the heir-male of the marriage; whom failing, to the other heirs called by the marriage-contract; and that the pursuers (Messrs Herries, Farquhar, and Co.), as creditors of Clanranald, were not entitled to do any diligence against the lands, or the prices thereof, so as to affect the interests of the heir or heirs under the marriage-contract; and,

Lastly, That the pursuers should be entitled to do all competent diligence against Clanranald himself, and his life interest in the residue of the trust-estate, in virtue of the decree pronounced against him in the action.

As already mentioned, the trustees under the deed of 1811 sold the whole of the estates, with the exception of two small islands, Tirrim and Risgay, and certain mid-superiorities of parts of the estates, with the feu-duties and casualties attached thereto; and, after discharging the whole debts due under the trust, a considerable balance of the price remained in the hands of the trustee, which, along with the unsold lands, fell to be applied under the provisions of the contract of marriage.

In the year 1839, Mr Brown, the surviving trustee, raised an action of multiplepoinding and exoneration before the Court of Session, with the view of procuring the authority of the Court for distributing and applying the residue of the trust-funds in his hands, and subsequently obtaining his exoneration.

Various claims were lodged in that process, and, in March 1841, Lord Cuninghame, Ordinary, pronounced an interlocutor finding Mr Brown entitled to be discharged of the trust so soon as the debts contracted by the petitioner prior to the date of the trust-deed were paid, or otherwise provided for; and, with reference to the claims of the several parties on the fund for division, his Lordship,—

1st, Sustained the claim of the trustees for the younger children for the provision of L.20,000, subject to the right of Clanranald or his creditors to the income thereof during his life.

2d, In respect of its being admitted that there would be a free balance of L.17,000, or thereby, after all the trust debts and the provision of L.20,000 to the children had been paid, he sustained the claim preferred by Captain Ranald John Macdonald, as heir-male of the marriage, to the fee or capital of the surplus, and of the estates which might be purchased therewith.

3d, He found that the balance must be invested in the purchase of land to be entailed, by a deed of entail to be executed by Mr Brown, or by such other party as the Court might appoint, and at the sight of the Court, in terms of the provision in the contract of marriage, in favour of Clanranald, and the heirs and substitutes in their order called by the marriage contract, reserving every claim of liferent interest or otherwise competent to Clanranald and his creditors in debts contracted subsequent to the date of the trust-deed, on the surplus fund or land to be purchased therewith.

Sometime afterwards, the estates of Clanranald were sequestrated under the Bankrupt Statute, and, on 15th March 1844, Mr Samuel Clerk, accountant in Edinburgh, was confirmed trustee on the sequestrated estate, and lodged a claim in that character in the multiplepoinding. A joint minute was afterwards put into process for Mr Brown, Mr Clerk, and Captain Ranald John Macdonald, heir-male of the marriage, whereby it was, *inter alia*, agreed,—

1st, That the capital of the trust funds should be held to amount to L.37,696, 10s. 5d., and that these, together with the two islands and the

mid-superiorities before mentioned, should be made over by Mr Brown to a judicial factor to be nominated by the Court for executing the trust. No. 121.

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That the person to be so nominated should, out of the annual interest or income of the capital, pay, — (1.) The cost and charges of management; (2.) The interest of such debts as might be found to form a burden on the capital; (3.) The interest of the debts of L.5000 due to Messrs Herries, Farquhar, and Company, and of L.2200 due to Sir James Horne Burnett, and the premiums of assurance on two policies effected on Clanranald's life, for securing payment of these debts respectively; and, (4.) That the free balance of the income arising from the trust funds should be paid over to Mr Clerk for behoof of Clanranald's creditors in the sequestration.

3d, That, upon the death of Clanranald, the capital of the trust funds should, in the first place, be applied in payment of the provision of L.20,000 to the younger children, and the remainder, with the islands and superiorities, should be made over in favour of Captain Ranald John Macdonald, and the other heirs and substitutes under the provisions of the marriage contract.

Clanranald made no appearance in this process, and he was no party to the joint minute.

Upon advising this joint minute, the Court, on 20th July 1850, appointed Mr Donald Lindsay, accountant in Edinburgh, to be judicial factor on the trust estate, and declared that the obligation to execute the entail was thereby laid upon him,—and Mr Brown afterwards conveyed the whole to him, by a deed dated 6th December 1850, and he was infeft thereon conform to instrument of sasine in his favour, recorded in the General Register of Sasines at Edinburgh 29th May 1851. Since the date of that conveyance, Mr Lindsay has been in the management of the whole trust, and has applied the yearly produce in the manner agreed upon by the joint minute before mentioned.

Matters remained in this situation until the end of the year 1855, when articles of agreement, in the English form, dated 22d December 1855, were entered into between Clanranald, of the first part, the three heirs of entail next in succession, entitled to succeed Clanranald under the entail provided to be made in terms of the marriage contract, of the second part, and Viscount Valletort and the Honourable George Henry Edgcumbe, of the third part,—whereby, after narrating the proceedings before mentioned, it was agreed that an application should be made, under the Entail Amendment Acts, praying the Court to grant warrant and authority to Mr Donald Lindsay, as judicial factor,—

1st, To execute, with concurrence of Clanranald, a disposition and deed of entail of the islands of Tirrim and of Risgay, and of the mid-superiorities before mentioned, in terms of the provisions of the contract of marriage.

2d, To make payment, out of the capital of the trust-funds, of the debts of L.5000 and L.2200, to Messrs Herries, Farquhar, and Company, and Sir James Horne Burnett, Baronet, respectively, and all interest due thereon, the creditors assigning their debts, and the policies of assurance effected for their security, to Lord Valletort and Mr Edgcumbe, in trust, for the purposes specified in the articles of agreement.

3d, To make payment to Mr Samuel Clerk, as trustee in the sequestration, of such sum as, with the other funds realised by him, might enable him to pay all the creditors ranked in the sequestration in full, with interest.

4th, To make payment out of the trust funds of the whole cost and expenses to be incurred in the matter; and—

Lastly, To make over the whole residue and remainder of the trust funds to Lord Valletort and Mr Edgcumbe, in trust, for the purposes expressed in the articles of agreement.

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In terms of that agreement, Clanranald presented a petition to the Court on 31st January 1856, setting forth in detail the whole of the above proceedings, and praying for warrant upon Mr Lindsay in terms of the deed of agreement, and for service and intimation, all in terms of the Acts 11th & 12th Victoria, chap. 36, and 16th & 17th Victoria, chap. 94.

On 10th March 1856, answers were lodged for Mr Donald Lindsay, the judicial factor, objecting to the prayer of the petition being granted, on the ground that there was no provision in the statutes for the acquisition of trust money or the conveyance of land subject to conditions, or subject to an arrangement for the ultimate disposal of such money or land to be sanctioned and authorised by the Court, and that the consents contemplated in the Act were only unconditional ones; that the Court could only authorise an unconditional disentail or surrender by a trustee of the free estate held in trust for the purpose of being entailed, or for the purchase of land to be entailed, after all prior claims on the trust-estate were provided for or discharged; that any disentail, while the preferable claims mentioned in the petition existed, could only take place upon such private arrangement with the trustee, or with the claimants on the trust-estate, as should be equivalent to a discharge of these claims so far as the trust was concerned; and that the Court could not entertain any such arrangements as formed the subject of the petition, as part of the proceedings under the statute.*

The Court, on 14th June 1856, without then disposing of the competency, remitted to the Lord Ordinary to inquire into the circumstances, and report. His Lordship remitted to Mr John Whitefoord Mackenzie, whose report contained the summary of the whole proceedings above given. Mr Mackenzie also stated that three minutes,—one for Messrs Herries, Farquhar, and Company, and Sir James H. Burnett,—one for Mr Clerk,—and the third for the trustees for the younger children and others, being the whole creditors entitled to the debts mentioned in Clanranald's affidavit,—had been lodged, stating that they were satisfied with the provision that had been made for their security, and consenting, so far as they were interested, to the prayer of the petition being granted.

Along with the minute for Mr Clerk, there was put into process a state of debts ranked in Clanranald's sequestration, signed for the trustee, and for Clanranald and his son, shewing the balance still to be provided for, and an award by Mr Lindsay, fixing the amount at L.1829, 19s. 5d. as on 30th June 1856.

As to the question of competency raised by the judicial factor, Mr Mackenzie stated that, "from the pleas set forth in the judicial factor's answers to the petition, it would appear he means to maintain that, before any application under the statutes 11th and 12th Vict., c. 36, and 16th and 17th Vict., c. 94, could be competently made, the matter as to the execution of the entail should have been settled otherwise, and arrangements made with the judicial factor for satisfying the creditors, while the application under the statutes should have been confined to obtaining an order for payment to Clanranald of the balance of the trust-funds, (L.17,000 or thereby,) which is directed to be invested in land,—and that without any condition whatever; all conditions, according to his view, being incompetent in the circumstances of this case.

* Section 43 of the statute enacts—"And where any money or other property, real or personal, has been, or shall be, invested in trust for the purpose of purchasing lands to be entailed, or where any lands are or shall be directed to be entailed, but the direction has not been carried into effect, such trust money or other property, and such lands, though still unentailed, may be dealt with under this Act in all respects as such lands might have been dealt with if entailed in terms of such trust or directions."

"The statute 11th and 12th Vict. certainly does contemplate cases in which consents may be given under conditions, limitations, and restrictions, and unless the Court shall be of opinion that consents must be unconditional in all cases, except those specially mentioned, the present may be held to be one where effect should be given to such conditions, as they are evidently for the benefit of, and consented to by, all parties having interest in the matter. No. 121. — Feb. 21, 1857. Macdonald v. Lindsay.

"It may perhaps be maintained that, strictly speaking, the prayer for an order upon the judicial factor to execute an entail of the islands of Tirrin and Risgay, and of the superiorities, can scarcely be held as falling directly under the provisions of the statutes in question, which mean to provide for disentailing alone, and that the more correct way of proceeding would have been to have made a separate application to the Court, praying them to ordain the judicial factor to execute such an entail.

"Had this been done, it does not appear that any valid objection could have been stated against such a demand, as Clanranald was no party to any arrangement for postponing the execution of the entail till after his death, and those parties who contemplated this at the date of the joint minute in the multiplepoinding have now concurred in asking the Court to grant the present application.

"If, however, the Court shall hold that the heirs are entitled to adject conditions to their consents, and all the consents in this case being given under a stipulation that an entail of the islands and superiorities before mentioned shall be executed, the objection to the competency of this part of the petition may perhaps be held as obviated."

The Lord Ordinary reported the case. To-day it was advised.

Lord President.—The proposal made by the petitioner is, that these lands and feu-duties and mid-superiorities shall be entailed, and that the rest of the fund shall be applied to certain purposes mentioned, and the parties who would have been consenters to a disentail are consenters to this application of the funds. Therefore, the case is in this position, that part of the estate consists of funds, and part of it consists of land, and all of these are proposed to be entailed. Under section 43 it is competent to apply funds not yet entailed in the same way that would have been competent to deal with entailed land. Part of the land under the entail might have been sold for the accomplishment of certain purposes, and sold under such conditions as the parties chose to attach to their consent. Now, I think that under this clause all that applies to money as well as to land. Unless the conditions were such as to startle us, we cannot look to them. Now, what are the conditions attached? They are, in the first place, to secure the interest of the parties entitled to L.20,000, which was part of the trust-funds, but is not part of the entail. Then, as to the L.12,000, the condition attached is, that that sum shall be applied towards the payment of certain debts, and there is to be the purchase of a certain reversion. All parties consent to that. The conditions are very simple and very reasonable, and I dare say the consents could not have been got in any other way. There is no incompetency in this, and there is no such complication as to render any other mode of proceeding necessary, or to compel us to say to the parties, you must arrange all this among yourselves. It was suggested that the matter of the execution of the entail should have been settled otherwise, and arrangements made with the judicial factor for satisfying the creditors, while the application under the statutes should have been confined to obtaining an order for payment to Clanranald of the balance of the trust-funds, and let him apply it as he pleases. But I do not think so; and upon the whole, I am of opinion that this is a competent proceeding. I see no good objection to it. But there are other points behind, which we must remit to the Lord Ordinary, if your Lordships concur in that view of the competency.

Lord Curriehill.—I take the same view of the case, and there is only one point on which I have the slightest hesitation. I have no doubt at all that the petitioner is in the predicament set forth in the Act as the party in whose favour an

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entail can be insisted to be made. These islands are part of the original estate, and the money arises out of the sale of lands which were directed to be entailed. It was in consequence of the marriage-contract following the original deed of entail and the trust-deed that they have been sold. But still the residue of the funds that have been produced by that sale are still the subject of the same trust, so that I have no doubt at all that this money falls under the directions to entail in the trust which existed prior to 1848, and under which Clanranald is institute. So far as I can see, he has not done anything to preclude himself from insisting that he shall be put into this position, so that he shall have all the powers of an heir of entail in possession, or what is as good, of an institute. I have no doubt at all about that, nor in giving effect to these conditions here attached to the consents, because they are conditions in favour of creditors who have claims on this estate, whose interests the Act of Parliament requires us to have in view. My only hesitation is as to the construction of section 43. But, upon the whole, I think it is quite in conformity with the main object of the Act to give effect to a sale; and, therefore, I quite agree.

Lord Deas.—The leading objection to the prayer of this petition is, that the case does not fall under sections 4 and 43 of the Entail Amendment Act, but exclusively under sections 3 and 27; and consequently, that no consents can competently be received except such as are unconditional. Now, I give no opinion as to whether consents under sections 3 and 27 must be unconditional or not; because I am of opinion that sections 4 and 43 are applicable to the present case. It has been explained by the Lord Ordinary,—and the accuracy of the explanation has not been called in question,—that the trust for executing the entails was constituted by the marriage-contract and relative trust-deed, which are dated and came into operation, in 1811 and 1812, and that the judicial factor is now in the position of having to carry out that trust. Now, we decided in the case of Dickson, 8th June 1855, that, in questions under the Entail Amendment Act, the date when the trust-deed, authorising the entail, came into operation, is to be held the date of the entail, and the person entitled to be heir of entail, whether lucratively or not, is to be held the heir of entail in possession. Consequently, the entail here must be held to have been executed as far back as 1812, and the heir of entail for the time to have been, since then, the heir in possession. This brings the petitioner within the category of heirs of entail described in sections 3 and 4 of the statute, and leaves only the question whether the effect of the latter part of section 43 be to place the trust-funds here in the same position with an entailed estate, and, consequently, under the provisions of section 4? I am of opinion that the enactment in section 43 has this effect. The words are absolute and unqualified. To read the enactment as the objectors propose to read it, you must supply nearly as many words as the enactment itself consists of. There is no authority for that, or for construing the words of such an enactment otherwise than according to their natural meaning. Nor could the object of the statute be otherwise carried out. Upon the whole, therefore, I concur with your Lordships that the prayer of this petition may be granted.

Lord Ivory absent.

The Court pronounced the following interlocutor:—The Lords, on report of Lord Mackenzie, Ordinary, &c., on the motion of the petitioner, consented to by Mr Lindsay through his counsel at the bar,—Allow the petition, No. 1 of process, to be amended by inserting the word "January" after the words "dated 17th," as one of the dates of the contract of marriage mentioned on the margin of the second page of the petition, and by introducing on the thirteenth page of the petition the concluding portion of the 43d section of the statute 11 & 12 Vict. cap. 36, as founded on by the petitioner; and these amendments on the petition having been made at the bar, and the counsel for the parties having been heard on the objections to the competency of the application not formerly disposed of, they repel the objections to the competency of the said petition, and find that the same is competent under the statute founded on: Further, they

interpone the authority of the Court: Grant warrant and authority to the said Donald Lindsay in *hoc statu* to pay, apply, convey, and make over the residue and remainder of the trust-funds and estate under his charge and management as judicial factor thereon, in manner, to the persons, and for the purposes mentioned and set forth in the articles of agreement, all as set forth in the said petition and procedure, to the following extent, viz., Grant warrant and authority to the said Donald Lindsay, as judicial factor foresaid, in the first place, to execute, with consent and concurrence of the petitioner, a disposition and deed of entail of the Island of Tirrin and of the island of Risgay, and the mid-superiorities of part of the lands and estate of Clanranald, with the feu-duties and casualties attached thereto, all as mentioned and prayed for in the said petition;—in the second place, to make payment out of the capital of the said trust-funds of the debts of L.5000 and L.2200 due to Messrs Herries, Farquhar, and Company, and James Horne Burnett, now Sir James Horne Burnett, Baronet, respectively, with interest due thereon, and till payment, upon their executing the necessary assignations in favour of Viscount Valetort and the Honourable George Henry Edgcumbe, and the survivor of them, and their successors in office, in trust, for the purposes specified in the said articles of agreement, as prayed for in the said petition;—and in the third place, to make payment out of the capital of the said trust-funds to Samuel Clerk, mentioned in the petition as trustee on the petitioner's sequestrated estate, of the sum of L.1829, 19s. 5d., as on 30th June 1856, with the difference betwixt bank interest on the balance in the hands of the trustee (L.1270, 9s. 3d.) and interest at the rate of 4 per cent on L.2326, 14s. 5d., from the said 30th June 1856 till payment of the debts and interest: Further, they remit to the Lord Ordinary to see these measures carried out, to ascertain the expenses payable out of the trust-fund under the agreement of 22d December 1855, and to report; and the Lords decern *ad interim* in terms of this interlocutor."

No. 121. — Feb. 21, 1857. Ewen v. Turnbull's Trustees.

J. W. & J. H. Mackenzie, W.S.—Todd, Murray, & Jameson, W.S.—Agents.

No. 122.

HENRY EWEN, Pursuer.—*D. F. Inglis—Gifford.*
JOHN TURNBULL'S TRUSTEES, Defenders.—*Sol.-Gen. Maitland—Penney—Pattison.*

Process—Jury trial—Issues—Reparation.—A tanner, who occupied a tenement on a water lead, raised against a dyer occupying a superior tenement, a process of declarator, interdict, and damages, alleging great increase of pollution by discharge of dye-stuffs, &c. Form of issues adjusted to try the question, under which *held* that the defenders might prove acquiescence.

Held, that the defender was not entitled to put in issue whether other tenants higher up the stream had increased the amount of pollution.

River.—Both leases contained the same clause, conferring the use of water under certain restrictions. *Question*, whether this inferred abandonment of rights at common-law, or whether it was to be held as in fortification of them.

Feb. 21, 1857. — 2d Division. Ld Handyside. I.

HENRY EWEN, a tanner in Hawick, in 1855 raised this action of declarator, interdict, and damages, against the trustees of the deceased John Turnbull, a dyer. The interdict sought was to have the defenders "interdicted from carrying on all manufactures or operations whereby the water of the said mill lead may be injured or rendered impure and unfit for the use of the pursuer's manufactory or work for skinning and tanning; and, in particular, the defenders ought and should be interdicted and prohibited, by decree foresaid, from discharging or emptying dye-stuffs, scouring residuum, ...th, or any other foul, dirty, or discoloured and deleterious liquid, matter,

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or substance, from their dye works, dye vats, or other receptacles on their premises, into the said mill-lead or dam, dirty or dyed goods, yarn, wool, stockings, or other manufactures, or articles in the progress of being dyed or manufactured; or from doing any other act, deed, or thing whereby the purity of the water of the said mill-lead or dam, flowing from the defenders' premises, to and through the premises of the pursuer, may be destroyed or injured, or in any other way rendered unfit for or prejudicial to the pursuer's manufactory and work of skinning and tanning as aforesaid.

Ewen alleged that he had in 1846 succeeded, under a disposition, his father, who had been the original tenant of one of the lots when first laid off in 1803, from which date to his death he had carried on the tanning trade, and that, from about 1830 downwards, John Turnbull and his successors had gradually been increasing dye works, which they carried on so as latterly to have rendered the water quite unfit for tanning, and the pursuer and his father had frequently complained. The defenders, on the other hand, alleged that the pursuer and his father had acquiesced in all the changes in their operations; and, farther, that the pursuer had acquired his rights only in 1851, and that by singular title, and so had no right to complain.

The other circumstances of the case, and pleas stated in defence, are thus stated by the Lord Ordinary in his note:—"The principal points argued at the debate were—(1st) The title of the pursuer to maintain this action under its declaratory and subordinate conclusions; and (2d), What is the true construction to be put on the clause in the lease of the defender, as regards the nature and extent of the obligation it imposes upon him towards the pursuer.

"The defender disputed the pursuer's title, on the ground that his right was that of mere tenancy—(1st plea)—and it was contended, that the Duke of Buccleuch, the landlord, had the only title to sue—(3d plea,) the parties each hold building leases of the endurance of ninety-nine years, granted by the Duke under the authority of the statute 10 Geo. III. The leases of both parties contain, *in ipsissimis verbis*, a clause of use of water in a mill-lead passing by or through the subjects leased, but that under certain conditions and restrictions, securing that the use taken shall not be prejudicial to manufactories or works above and below. The pursuer has on his subject a tannery and skinnery, and the defenders' subjects have upon them a dye work. The complaint is, that the defenders' present mode of use of the water is prejudicial to the pursuer's work.

"The defender did not profess to support, by any authority, the incompe tency of an action of declarator by a tenant, under such a lease, in order t vindicate and establish the mutual obligations on the lessees of the conte minous subjects, and the Lord Ordinary is not aware of any principle whic should disallow to the tenant the right to raise this declarator. He ha therefore sustained the pursuer's title, and repelled the pleas, so far a directed against its sufficiency.

"Upon the second point, the defender opposed the pursuer's motion t have an issue, although asked only before answer, and argued, that th clause common to their respective leases did not support the action. Th clause is as follows—'The said' (each lessee) 'binds and obliges himself an his foresaids' . . . . 'to uphold the banks of the miln dams withi the bounds of his foresaid lot or area, at such a height as to preve the water from overflowing, as well as to keep the bottom thereof clean, an to concur with his Grace's other tenants, who have the use of the water, i cleaning the same within the foresaid lot or area, so far as consistent wi the carrying on of any manufactory or work already established upon it, b shall not be at liberty to divert any part of the water from its ordina course, nor to erect any building or work which shall obstruct the free pa

sage of it, so as to be prejudicial to, or to render the water unfit for, No. 122.
any other work previously established either above or below the said area.' —
"The allegation of the pursuer is, that the water is so used by the Feb. 21, 1857. Ewen v.
defender as to be made prejudicial to, and be rendered unfit for the uses of Turnbull's
the pursuer's works lower down. The defender contends, that the limitation Trustees.
imposed is only against diversion, or obstruction of the free passage of the water by the erection of a building or work, and which obstruction is the mode prohibited by which the water is to become prejudicial to, or be rendered unfit for other works. Were it necessary at this time to construe the clause in the abstract, the Lord Ordinary cannot say he should feel much difficulty in disregarding the construction of the defender. But the Lord Ordinary does not think that any finding is called for at this stage. He conceives that the whole facts of the case must be investigated, and an issue is the proper mode for ascertaining them—under which issue the Judge at the trial will give such directions on the construction of the clause, as applied to the facts, as well as on the other pleas on the merits, which may be necessary or required. The Lord Ordinary has therefore allowed the pursuer to lodge a draft issue on the whole cause, but under the qualification of being before answer."

The following are the terms of the interlocutor to which this note was appended:—"Sustains the pursuer's title to maintain this action; repels the first and third pleas in law for the defenders; and, before farther answer, allows the pursuer to lodge a draft of the issue which he proposes for trial of the cause."

The defenders reclaimed, praying for absolvitor.

Issues were lodged by both parties.

The following was proposed by the pursuer:—

"It being admitted that the subjects, of which the pursuer and defenders respectively are lessees, are part of the new glebe of Hawick, and that a mill-lead or artificial run of water flows through or past the properties of the pursuer and defenders respectively, the property of the pursuer being farther down the said mill-lead than that of the defenders;—

"Whether, for some years prior to 25th September 1855, the defenders and the said John Turnbull wrongfully, and to the loss, hurt, and injury of the pursuer, were in the practice of discharging dye-stuffs, scouring residuum, filth, or foul and deleterious liquids or substances, into the said mill-lead, whereby the water thereof was polluted, and rendered unfit for, or prejudicial to, the pursuer's trade of a skinner and tanner, carried on in his said premises?

"Damages laid at L.1000."

The defenders, on the other hand, contending that the right maintained was purely artificial, and not at common law, proposed that the clause in the lease should be prefixed as an admission, and farther proposed the following counter issues:—

"Or, Whether the predecessors and authors of the pursuer acquiesced in the use made of the said miln-lead and water thereof by the defenders and their predecessors?

"Whether the pursuer acquired right to his said lease and subjects in or about the year 1851? and whether, at that time, the operations of the defenders complained of, were carried on to as great, or nearly as great an extent, as at the commencement of the present action?

"Whether, during the possession of the pursuer's said subjects by his predecessors and authors as a skinning and tanning work, or during a considerable part of said time, parties other than the defenders, having premises upon the said miln-lead, situated above those of the pursuer and defenders, were in the practice of using the said miln-lead and the water thereof for dyeing and scouring operations, and for manufacturing purposes, and of dis-

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charging into the same, dye-stuffs, scouring residuum, filth, or other foul liquids or substances, whereby the water of the said miln-lead was polluted to the same, or nearly to same extent, as complained of? And whether the predecessors and authors of the pursuer acquiesced in the said use of the said miln-lead and water thereof?"

Lord Justice-Clerk.—I have carefully considered this case, with reference to its specialties, and with the recollection of a variety of cases in which questions of this nature have occurred. I think the issue proposed by the pursuer is the issue to try the cause, and under it the whole defence of the defender is open in reply to that issue.

In the first place, I am of opinion that we cannot compel the pursuer to take the issue proposed by the defender, with reference to the class of obligations imposed by the lease on the different parties, and on the defender, in regard to what they are to do as to this stream. The Duke of Buccleuch may or may not have imposed sufficient obligations on his feuars. They are bound to attend to these. It does not follow, however, that these obligations towards inferior heritors are limited by any such clause. I lay aside the question, whether this is a proper stream, or a portion of the river diverted. It is a stream in which each of these parties, upper and lower, have a clear interest and right.

It is very true that manufactures have from the first been allowed, and no party could complain that it had been rendered unfit for domestic use; for it is clear that there was no obligation to furnish water fit for those purposes, and that it was not intended to be preserved in that condition. I need not consider what might arise as to such a case, because it is not within the objects of the action.

But because the stream may have been intended to be employed in manufactures, it by no means follows that any party may begin to increase the pollution to the extent of injuring the lower tenant so as to destroy the manufacture he has hitherto carried on. And, therefore, independently of the obligation in the lease, he is entitled, at common law, to complain of any additional pollution. It may be that the landlord would have been responsible for that, as he might have been in the case of Hamilton of Barnes, and Dunn. What is alleged is an additional pollution which he has not sanctioned. The landlord here has not joined with his tenant in this defence, otherwise there might have been separate liability against him. Under the terms of the issue proposed by the pursuer, he must make out his averment, that for some years prior to the raising of the action, the defenders did pollute this stream more than they had done previously. If they, the defenders, make out that there was no injury to the works that was appreciable—that the water was just as unfit for the skinning trade before as now—the defence is complete. If the party fails to prove increase for some years, he does not prevail. As to the first counter issue, I observe that in it no period is set forth to which the acquiescence is to be applied by which it is to be contended that the pursuer lost his right. This issue proceeds on the very notion that there was an increase, but one which was acquiesced in. Now acquiescence in the pollution of the water to the extent to which it existed before that increase will be of no avail; and it is unnecessary to put in issue subsequent acquiescence, as the defender will be entitled to the full benefit of that in answer to the pursuer's case.

Then we come to the issue as to the state of the operations in 1851, when th pursuer acquired right to the subjects; but if this party, relying on the gener repute of the stream, comes there in 1851, he is still entitled to complain if the has been any recent increase, because, on its repute, he was entitled to rely upon i being fit for the purpose for which he desired to use it. Then as to the next issu it is exactly the answer upon the facts on the whole case. Why, if two or thr other manufacturers have increased the pollution, that does the defender no goo but merely entitles the pursuer to proceed against each in detail. This point ca out on Lord Gillies's ruling in a fishing case. This Court and the House of Lor held that the fact of the existence of dykes higher up the river where the salm could be stopped, was no defence to an action for removing a lower one, as t pursuer might take steps separately against each individually, if he pleased.

I see no ground of defence which will not be open to this party under the iss proposed by the pursuer.

LORD MURRAY concurred. No. 122.

LORD WOOD was absent.

LORD COWAN.—I have no objection to the course proposed. As to the issues proposed by the defender, it seems to me quite clear that acquiescence is not so stated, as matter of fact in the record, as to give rise to a separate issue; and as to the next issue, although the pursuer himself acquired right only in 1851, he succeeded to his father; and the son is entitled to urge all the pleas which the father could have competently done. Then as to the third issue proposed, every matter it embraces of any moment will be open for the defence, in answer to the pursuer's issue. It is the terms of that issue that create the only difficulty. Both parties hold under the same superior, and with the same clause in their leases, and this relative position may affect their mutual rights and obligations. All I wish to guard against is this, that, by sanctioning a general issue in the terms proposed, we do not foreclose the defender from founding at the trial on the fact that such a clause exists in the other leases as well as in his own. I think the titles of the parties may possibly enter into the question between the parties under the issue; and if the terms are such as leave all this open, I agree in the course suggested by your Lordship. Feb. 24, 1857. Cameron v. Smith.

The pursuer's issue was approved of.

THOMAS DUNN, S.S.C.—JOHN RUTHERFURD, W.S.—Agents.

JOHN CAMERON, Pursuer.—*D. F. Inglis—Millar.* No. 123.
WILLIAM SMITH, Defender.—*Logan.*

Sheriff-court — 16 & 17 *Vict., cap.* 80, *sect.* 22—*Competency of advocation.*—Section 22 of the recent Sheriff-court Act, cutting off the right of review when the value does not exceed L.25, applies to causes in dependence before the passing of the Act.—Where an action contains a money conclusion under L.25, and an alternative one *ad factum præstandum*, and where the Sheriff has decerned in terms of the money conclusion, the defender cannot advocate on the ground that the action is *ad factum præstandum*, when there was clearly no importance attachable to specific performance.

AT a sale of John Cameron's cattle, William M'Pherson purchased two cows, one at L.8, the other at L.7, 6s. Being on a journey to the south, he did not settle for the price, but left the cows in the seller's hands till he should return and do so. Some time after, William Smith, the defender, called on the pursuer, and told him that M'Pherson had agreed to pass his purchase to him if he was satisfied with the cows; and, after looking at them, he left without saying whether he had made up his mind about them or not. A few days afterwards, he sent for them, and they were delivered. M'Pherson then returned, but he did not pay for the cows; and it was alleged that Smith had never paid him for them; and, M'Pherson being insolvent, Cameron raised against Smith the present action, concluding to have him ordained to redeliver to the pursuer, in the like good order and condition as when they were removed, two cows, the property of the pursuer; or otherwise, to make payment to the pursuer of the sum of L.15, 6s. sterling, being the price of said two cows, with the legal interest thereof." Feb. 24, 1857. 2D DIVISION. Sheriff of Banffshire. R.

The Sheriff-substitute (Gordon) pronounced this interlocutor:—"Decerns against the defender for the sum of L.15, 6s. sterling, with interest thereon from 30th April 1853: Finds the defender liable in expenses." To which, on appeal, the Sheriff-depute (Currie) adhered, except that he modified the expenses. Smith then presented a note of advocation, which was taken in, under the recent Act, to the Second Division, who pronounced the following interlocutor:—"16*th January* 1857.—The Lords having heard counsel, on the plea that this advocation is incompetent under the 22d section of the Act 16 & 17 Victoria, cap. 80, in respect of the general importance of the question as to the construction and application of the said sec-

No. 123. tion, Appoint the said question to be argued before the Judges of this Division present at the argument with the Judges of the First Division."

Feb. 24, 1857. Cameron v. Smith.

At the argument, it was contended;—That the main purpose of the statute founded on in exclusion of the advocation was to introduce new regulations for the conduct of business, and in the forms of procedure in the Sheriff-court, although some other provisions, as those in section 22, were also introduced. It was very right that the former class of provisions should at once take effect in that court, but the case was quite different in regard to the other class, which could not be held to apply to existing processes. Least of all could any limitation of the right of review, which could only be taken away by express statute, be held to apply to existing processes which might be ripe for judgment. As for the words "pronounced or to be pronounced," they were a mere repetition of the same thing, and the one was as possibly future as the other. To have excluded the right to advocate, the words must have been "already pronounced." The right of appeal was a constitutional privilege, which could not be taken away by implication, or by anything short of positive statute. Cases had already been decided which shewed it was not the opinion of the Court that all the clauses of the Act applied to subsisting actions.[1]

Lord President.—I hold the clause of the statute does apply to this case although commenced before the Act passed. Its intention was to enact a prohibition which should take effect on the 1st of November in that year.

The other Judges concurred.

The Court then pronounced the following interlocutor:—"*13th Februar* 1857.—Find, in conformity with the opinion of all the Judges who hear the case argued, that the 22d section of the Act 16 & 17 Victoria, cap. 8(applies to and must regulate all advocations brought after the date whe the statute was to take effect, whether the cause so attempted to be adv cated was in dependence before the said date or not."

It was then maintained that the advocation was not struck at by the ne Act, as its value was to be judged of not by the judgments of the Sheril but by the conclusions of the libel, one of which was *ad factum præstandu* and therefore the value could not be fixed. The actual price of the co was no criterion, as had been fixed in a case on all fours with the present

Lord Justice-Clerk.—I only dispose of this case upon the particular ci cumstances that arise in it. I cannot say that on the terms of the conclusio of the summons this is really a separate conclusion. The summons concludes f the sum of L.15—The price of these two cows is thus fixed, so far as the pursuer concerned. That is, the money value of his conclusion is fixed at L.15 by the pu suer himself. Then comes the question, what could this action resolve into t the price of the cows? Did the defender become liable for the cows or their pri by taking them away, or did he merely act as a drover employed to do so by t actual purchaser? If the defender incurred any liability to the pursuer, he beca liable for the price of these cattle, and nothing more. The conclusion, therefo for delivery of the cattle was not the real and substantial conclusion. The co clusion for money is the real ground of action, and is not to be overcome, or consequences overruled, by throwing in an alternative conclusion for delivery of t subjects.

I wish to reserve, as not arising in this case, my opinion on the question wheth where decree is given for delivery only, advocation might not be competent. I also, I will not say that because the petitioner's conclusion is for a small sum

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[1] Ladies Mary and Essex Ker, November 21, 1811, F. C.; Hazeel v. Kidd, 1: December 1855, ante, vol. xviii. p. 265.

[2] Cooper v. Bow, 18th December 1823, Sh. vol. ii. p. 511; See Lord Cringlet Note in new edition.

money, the conclusion *ad factum prœstandum*, where there is a particular object in acquiring the *ipsissima corpora* of what is claimed, may be barred from advocation because only a small sum of money is claimed. No. 123.

Feb. 24, 1857. Rhind v. Commercial Bank of Scotland.

LORD MURRAY.—On reading the conclusions of the summons, L.15 is the statement of the value of these cows. The original conclusion is in a manner passed from, and this is the real and substantial conclusion of the action, that the defender be decerned to pay the price of these cows.

LORD COWAN.—I have no doubt; the only question is, do the terms of the conclusions of this summons fix the value of the cows? If the defender had paid L.15, 6s. the action would have been put out of Court. There are cases where it is a matter of great importance to procure delivery of the actual thing, for recovery of which, as its primary object, the action has been brought. I do not say what would be my opinion in such a case, but I think that the present is clearly a case to be decided on consideration of the money value sought by the pursuer. The explanation given by Lord Cringletie of the case of Cooper is very important.

THE COURT pronounced the following interlocutor:—"The Lords having heard counsel on the question which remains after the interlocutor of 13th February instant, viz., whether the advocation can be sustained by the advocator resorting to the conclusion for delivery of the cows in question, Find that no specialties occur in this case to entitle the advocator to maintain the competency of the advocation on that conclusion: Find the advocator liable in expenses, and modify the same," &c.

SHEPHERD, GRANT, & CUTHBERTSON, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

No. 124.

JOHN RHIND, Pursuer.—*Sol.-Gen. Maitland—Mark Napier.*
THE COMMERCIAL BANK OF SCOTLAND, Defenders.—*D. F. Inglis—D. Mackenzie.*

Writ—Res mercatoria—Bank Pass-book.—Held (altering judgment of Lord Ardmillan, *abs.* Lord Wood), that an entry in a pass-book to the credit of a depositor, duly initialed by the officers of the bank, being *in re mercatoria*, is a probative writ as against the bank.

Feb. 24, 1857. 2D DIVISION. Ld. Ardmillan

JOHN RHIND, a farmer near Invergordon, had a cash account with the branch of the Commercial Bank there. Having drawn a cheque for L.50, which was dishonoured by the Bank, he raised this action against it, concluding for payment of L.66, 8s. 10d., which he alleged to be the balance due to him on his account; and he produced his pass-book, with the entries initialed by the officers of the Bank.

The Bank admitted the entries to be in the handwriting alleged, but said that by mistake a certain sum of L.80 had been entered twice over to the pursuer's credit, and that truly the pursuer was due L.13, 11s. 2d.

The entries to the pursuer's credit on the last page of his pass-book were as follows:—

"1855.			Forward, .	L.467	2	6
June	5.	Eighty pounds, . .	A. M. G. MacG.	80	0	0
		Eleven pounds, . .	A. M. G. MacG.	11	0	0
	6.	Eighty pounds, . .	A. M. G. MacG.	80	0	0
	19.	Twenty pounds, . .	A. M. G. MacG.	20	0	0
July	12.	Twenty-five pounds & 10d.,	A. M. G. MacG.	25	0	10"

The pursuer and defenders each gave a most minute account of what had passed between them about the time of these entries. The pursuer said he was in daily expectation of receiving from a Mr Williamson of Calrossie, near Tain, L.80, by an order through the post-office at Invergordon; and

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as he lived at some distance from the post-office, he mentioned to Mr M'Gregor, the accountant, and also to Mr Gauld, a clerk in the office, that he expected this remittance, and requested one of them to inquire at the post-office for the letter, to open it, and to place the amount to his credit. On the morning of the 5th June 1855, he had occasion to attend a market, and, on his way there, stopped at the Bank in Invergordon, and handed across the counter L.80 in bank notes, the size of which he specified, with the "paid-in slip" usual when money is paid, along with the pass-book, into which the amount was entered to the pursuer's credit, and the pass-book then returned to him. In the evening, when returning home, the pursuer called at the Bank a second time, and discounted a bill for L.11, 10s., which he had received at the market as the price of a cow sold by him. L.11, being the proceeds of the bill, was placed to his credit; that amount being, at the same time, entered in his pass-book as usual. On the following day, being the 6th of June, the pursuer happened to be again in the Bank, and was then informed that the order in his favour from Tain for L.80 had been received. The order was handed across the counter for the pursuer's indorsation, and the whole amount was regularly entered in his pass-book of that date.

The defenders denied the alleged payment of L.80 on the morning of the 5th June; but admitted that Mr Gauld had gone to the post-office in the evening, after the cash transactions for the day had been balanced, and got a letter to the pursuer from Mr Williamson, enclosing a remittance of L.80; and that on the same evening, after receipt of the letter, the pursuer had discounted the L.11, 10s. bill, as he alleged; and they said these two sums were then, on the 5th June 1855, and under that date, entered by the accountant in the pursuer's pass-book, the L.80 being entered first, and the L.11 last in order. In the scroll cash-book of the said Bank, these two sums are entered both under date the 6th of June, as received from the pursuer, or to his credit. In the Bank ledger, containing the pursuer's account with the Bank, the L.11 is entered first, and the L.80 last in order, to the pursuer's credit, both under date of 6th June 1855, because they had been paid into the Bank on the evening of the preceding day, after the cash had been balanced for that day.

The pursuer pleaded that the pass-book afforded sufficient evidence of his claim against the Bank, and could not be cut down otherways than *scripto vel juramento;* and that by producing it, he had discharged all the *onus probandi* which lay upon him.

The defenders pleaded, that in the circumstances the Bank pass-book did not afford sufficient evidence to substantiate the pursuer's claim; that the *onus* of proving his claim still lay upon him; and, at all events, that they were entitled to prove their averments *prout de jure.*

The Lord Ordinary pronounced the following interlocutor:—"Finds that this action has been instituted to enforce payment of an alleged balance, arising on an account-current with the defenders; that, in order to bring out such balance, the pursuer takes credit for two sums of L.80, said to have been paid into his account; and that the pass-book, No. 5 of process, has been produced by the pursuer to support the averments on which the action rests: Finds that the said pass-book is not *per se* probative and conclusive of the truth of the pursuer's averments, although it is a competent and important adminicle of evidence in support thereof: Finds that the grounds of action not being conclusively instructed by the mere production of the pass-book, the pursuer must support his claim, and the facts of the case must be investigated: Therefore repels the third plea in law for the pursuer; and appoints the pursuer to lodge such issues as he proposes within ten days,

and the defenders to lodge counter issues by the box-day in the vacation, if so advised: Reserves all questions of expenses." *

The pursuer reclaimed. The pass-book afforded *prima facie* evidence of the debt. Banks were merchants, and signature of bank officials was the signature of the bank. He was, in fact, in possession of a holograph acknowledgment of his alleged debtor, which could not be redargued by parole proof, nor could it be set aside without reduction.[1]

The defenders were quite willing to repeat a reduction, if their defence could not be admitted *ope exceptionis*. Substantial justice demanded that the Bank's averments, which truly amounted to a charge of fraud against the pursuer, should be admitted to probation. But the *onus* lay on the pursuer; these entries could not be dealt with as receipts, or as anything more than informal jottings. There was no decision of the Court granting the privileges of writs *in re mercatoria* to entries in a pass-book, without being docqueted and signed by both parties, and they were not readily to be attached to any new class of documents. But assuming that these entries were equivalent to two receipts, surely the Bank were entitled to prove that they had both been granted for the same sum of money.[2]

* "NOTE.—The Lord Ordinary does not think that the pursuer is entitled to stand on this pass-book as conclusive proof of his claim, and excluding all inquiry into the facts.

"Apart from all agreement or explanation, the entries in the pass-book are not, *sua natura*, necessarily probative; and the defenders' averments of fact, and particularly of error in one of these entries, in support of which they refer to the regular books of the Bank, and offer proof *prout de jure*, cannot, *in hoc statu*, be held as irrelevant.

"The pursuer, who alleges that he personally paid in both sums, is a competent witness; his own books may afford confirmation of his statements, or the reverse. The practice in regard to paid-in slips—the manner in which the pursuer spent the 5th June, as bearing on his averment of two separate visits to the Bank on that day—may all be important subjects of inquiry in the investigation which is necessary to get at the truth of the case.

"There has been no settlement or docqueting of accounts. There is no document necessarily and conclusively probative. The pass-book is admitted only under explanation, and subject to the defenders' denial of its correctness in regard to the disputed sum; and the Lord Ordinary has not been referred to any authority for the proposition maintained by the pursuer—that, under such circumstances, the pass-book must be taken *pro veritate*, and all investigation shut out. In the absence of direct authority applicable to the facts, the Lord Ordinary cannot hold the investigation which the defenders crave to be here excluded. An error is alleged by the Bank, and an explanation, not, perhaps, very satisfactory, but not impossible, is offered. Suppose it had been on the other side—suppose that the pursuer alleged he had paid in L.80, and only L.60 had been entered in the pass-book, while the paid-in slip supported the averment that L.80 had really been paid—could inquiry have been excluded? Suppose L.80 had been entered in the pass-book, and L.60 had appeared on the relative paid-in slip, could inquiry have been excluded? It is thought that except where the document founded on is in itself probative and conclusive, there is no rule of law to preclude an investigation into the facts where error is alleged; and since the pursuer, himself personally cognisant of the whole truth, is now a competent witness, the justice and equity of opening the door to inquiry is more abundantly manifest."

[1] Bell's Com. i. 324. The legal effect of such a document is fixed.—Tait on Evidence, p. 332; Brand v. Tenants of Riccarton, 21st June 1711, M. p. 12,336; Wilson v. Kay, 26th Feb. 1787, Mor. Dict. p. 12,353; Macfarlane v. Watt, 15th Feb. 1826, also 5th July 1828, Sh. vi. pp. 556.

[2] Cooper v. Young, 28th Nov. 1849, ante, vol. xii. p. 190; Johnston v. Grant, 28th Feb. 1844, ante, vol. vi. p. 875; British Linen Company v. Thomson, 25th Jan. 1853, ante, vol. xv. p. 314; Shaw v. Picton, M. Term 1825, B. & C. vol. iv. p. 715.

No. 124. At advising,—

Feb. 24, 1857. Rhind v. Commercial Bank of Scotland.

Lord Justice-Clerk.—In practical application this is perhaps the most important question that has ever come before the Court, and it is also one of much importance, although of no difficulty in point of principle.

The admitted facts are sufficient for the immediate decision of the case. These facts are few and simple.

The pursuer has for some years transacted business with the establishment of the Commercial Bank at Invergordon, lodging money and drawing out on the account so created. The "pursuer was, as usual, supplied with a pass-book." Such is the admission. The bank agent is Mr Andrew Munro; the accountant is George M'Gregor. The pass-book goes back to the year 1851. When money is paid into the bank, the receipt given (and it is the only voucher given), to the pursuer, is an acknowledgment written by the bank in the pass-book, which is returned to the pursuer then or soon after, as suits the convenience of parties. That receipt bears the date of the payment of the money into the bank—the sum is written in words and in figures—both written by an officer of the bank—and then it is signed and authenticated by initials by both the bank agent and the accountant in separate columns. The only rational account of the signatures of both being adhibited is to prevent mistake; and whether *de facto* the agent satisfies himself that the money has been paid in by personal presence or immediate report, or by examination of the bank books, this is very clear, that to the mind of the customer the double signature—not only the accountant's, but also that of the head officer,—is a direct representation that the latter has satisfied himself of the accuracy of the entry by the other, who probably will in general receive the money, and that the head officer therefore can issue the pass-book as a voucher of an actual deposit. What is done is not to adhibit, so far as this pass-book shows the course of procedure, the subscription of another clerk or party present, but the subscription, if at hand, of the agent, the head officer and manager of the branch agency. Then the sum so entered as deposited is written out fully in words, not in figures, and the pass-book, with such an entry so signed, is then given back to the party. Upon this principle the course of dealing with this party proceeded since the year 1851. He had no other voucher or acknowledgment from the bank as to any money deposited with them. But he was safe. The voucher is complete. The entry in the pass-book is the holograph acknowledgment of the bank. Nor is there any difference whatever in legal effect between this holograph acknowledgment, and what is termed a deposit or other receipt. The one is as complete, as a voucher, as the other, and its express declaration is, as to all substantial matters, as explicit and definite as in the case of a full receipt.

That it is signed by initials is of no importance in point of law. For, 1st, The initials are acknowledged to be those of the accountant and agent. 2d, That is the form of authenticating the vouchers given by the bank to the pursuer for a course of years, and cannot be disowned by them. 3d, Most complete and conclusive *rei interventus* followed during their course of dealing on this mode of subscription, and even two other deposits are made after the entry which is disputed. 4th, But the signature by initials to a holograph writing in *re mercatoria*, is by the law of Scotland quite sufficient, although not attested.

We had been surprised that no authority had been quoted on that point, although the cases are numerous, both as to regular deeds and as to writings in *re mercatoria*. The initials being acknowledged, the authentication of the voucher against the bank is complete.—*Vide* on this point Dickson on Evidence. The entry is not the less holograph writing of the bank that it is written by one officer, although signed by two. That point has occurred even where two separate parties, with adverse interests, had subscribed one writing—signed by both. But here the entry by an officer duly authorized, and acting within his competency and course of duty, is the proper holograph writing of the establishment. That it is also signed by another is for the protection of the bank, on the one hand, and as an additional assurance and representation, on the other hand, of the accuracy of the voucher.

In addition to this we have the course of dealing with this particular party, and the fact that, as he received in no instance any other voucher, so, on the other hand, the bank acknowledged the deposits, and, as the pass-book shows, he drew out the sums severally vouched by these entries.

In this state of facts, the bank dispute one of these entries when the pursuer comes to claim the balance remaining due to him on the faith of these entries, after deducting the sums he has drawn out. I may here notice the attempt of the bank altogether to destroy and render useless the entries so signed by the officers in the pass-book, by trying to change the character of the book. It was said, This is only an account—a copy of an account from our books; accordingly, you are not claiming the L.80 vouched by this entry, but the balance of an account. This is quite futile. Of course the sums drawn out must be stated against the sums paid in, and the balance alone can be pursued for; but it is the balance arising from taking the entry in question, as well as all the others, in their proper character as vouchers for the deposit of the sums. The sums stated as drawn out are only the entries of the bank's statements, and the orders or cheques must be produced as the proper vouchers. But the other side of the pass-book is not limited to *contra* entries in an account. It consists of a series of separate receipts or acknowledgments, vouching, and being the only vouchers of, the sums deposited, and is exactly of the same character and effect as if a series of full receipts were written in the book when each sum had been paid in. If the pass-book had ever been intended to be merely a copy of the account in the bank books, and to be no receipt-book in favour of the depositor, why should the entries of the monies paid in by him be signed in so formal a manner by two officers of the bank, in order to be bank receipts in his favour? The effect of these entries cannot then be got rid of in this shorthand and easy way, viz. of treating it as a mere account-current, or copy of one. And, indeed, the argument of the bank on this head was quite inconsistent, for they gave up the doctrine of the Lord Ordinary, that the whole onus of proving the deposit was on the pursuer, and only contended in result that they ought to be admitted to prove in defence their averments against the receipt. But on that condition of the argument the acknowledgement is admitted to be good and effectual as a receipt until disproved; and, of course, the notion of the pass-book being merely the copy of an account at once falls to the ground. The finding in the interlocutor, which threw the whole burden of proving the deposit in support of this entry, taken as a mere adminicle of evidence, was indeed most startling; but it is unnecessary now to make any remarks on a point abandoned by the Bank. The origin of this notion of the pass-book being merely the copy of an account, is taken, I see, from the English notions as to a pass-book, which, as I shall explain, is in truth only an account, and contains no signed entries as to deposits.

Then we are brought to the effect of this holograph receipt delivered by the Bank, in an action for payment of the sum due to the pursuer, whether claiming that sum, or the amount remaining due, giving effect to that and other entries.

It may be a very important consideration in other proceedings, in regard to the character of such a voucher, what shall be the effect of such an acknowledgment if produced and shown to a third party, as proving the depositor's credit at the Bank, and as the foundation on which an onerous transaction was completed. No doubt there another onerous party is brought in; but if effectual to entitle him to rely upon the sum or sums so vouched being at the time in the bank, it might not be immaterial to consider whether such result (if the true result of the entries) would not proceed wholly on the character of the writings as deposit-receipts.

But merely glancing at that point, it is unnecessary to take it into consideration in the present action for payment.

It is now admitted that the depositor is not, in the first instance, under any burden of supporting the acknowledgment by proof of the payment. Then, on what principle is effect to be given to the voucher to that extent? Plainly on the ground that it is a voucher or receipt for the deposit of money; and if so, then the question is merely, whether it is a complete and sufficient voucher, in the simple action to enforce payment. Now, as I have said, it has every requisite for such; and it was delivered as complete and binding.

Then the principle on which all banking is carried on is, that the Bank acknowledges that they have at the credit of their customers the sums for which they have granted their receipts, and that they are to honour orders on his account to such amount. On the faith of such being the result all banking business proceeds.

But the defenders contend that such receipts are binding on them to the effect

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of enforcing payment in the first instance; because they undertake, in defence, to show by their own books, and the evidence of their own officers—that is, of themselves—that they made a mistake in writing out that acknowledgment, and that they did not receive any such sum. Collusion between the pursuers and any of their officers they do not pretend. Neither do they allege any fraud or false representation or deception practised on their officers, whereby they or either of them were induced and misled into making this entry. They simply propose, in the way I have mentioned, *ope exceptionis*, to resist payment. Whether they would contend that such a plea would be good against a third party bringing an order, onerously obtained, for an amount due according to the tenor and result of the vouchers in the pass-book, we have not heard.

But in the actual case, as between a customer and the Bank, the latter are precluded by their own writ from resisting payment on any such defence as that stated on this record. I hold the document to be a complete acknowledgment that they hold for the pursuer, and must pay the money so vouched as received and held by them for him; against which writ by themselves, of so important and emphatic a character, it is not competent for them to plead, *ope exceptionis*, their own mistake, and to refer to their own books, and the evidence of their own officers, to prove mistakes. Whether, contrary to the law of England on this very point, and contrary to our law, the Bank can refer to their own books in any other proceedings, I need not at present consider.

The result is, that in this action they must pay in terms of their receipt.

I may add, that any such defence is, in my opinion, even less competent against such entries made in a pass-book—when the whole comes on each occasion under the sight and review of both the officers, and their attention is called both to each entry, and also to the state of the account—than it would be as to a single and separate deposit-receipt, as to which I can understand a case of mistake being more plausibly averred than in regard to separate acknowledgments written in a pass-book, the whole entries in which can at all times be examined; and, indeed, each time any money is drawn out, the attention of the officers ought and must be directed to the state of the balance according to all the entries. Two entries of deposits are made after the one averred to be a mistake, before it is pretended that such mistake was discovered,—one on the 19th of June, the other on the 12th July—while sums are drawn out and entered in the pass-book by the Bank on seven occasions up to the 21st July. The matter might have gone to the end of the year, or to the balancing of the bank books.

It is unnecessary at present to consider whether the non-accounting to the Bank of the money acknowledged may not be either the mistake or the dishonesty of the officer, rather than the more remarkable sort of mistake in both officers signing the receipt for payment; or whether the evidence of the Bank themselves, by their own book, or by their own officers, can be, in any form, available against their own regular writ.

In this action they must pay. But I would reserve to the Bank to institute any action they may be advised to adopt for cutting down or setting aside, in any form, the receipt in question, with the defences against the same, and reserving to the Bank, in the event of success, to seek restitution of the sum, for which at present decree must be given; or the Bank may, if they choose, refer to oath.

Of course, if they had produced a plain written acknowledgment by the pursuer that he had not paid in the sum in question, his action would have been at an end.

In conclusion, I have only to add, that I was not able to understand what character and effect the defenders ascribed to the holograph entry in the pass-book, when they abandoned the broad ground taken by the Lord Ordinary, that the *onus* of proving the payment in support of that entry lay on the pursuer. When that ground is laid aside, then the writing must be looked to in reference to its import. Now, it is an express acknowledgment, duly authenticated, of money received by the Bank and held for the pursuer. It is their writ to that effect. And then, on the clearest principles of law, they must cut down that writ. Until they do so it is effectual.

The Bank are judges of their own interest, and if they wish, distrusting the accuracy of their branch agencies, to make out that they are only due the sums

admitted in their own books, and to shake themselves free of all the receipts in all their pass-books, they may in one sense have an interest, as it was said, to raise this question. But I doubt whether other banks will thank them for stirring such a point, unless, indeed, it leads depositors to resort to the banks which admit the validity of the receipts in the pass-books. We have understood that in England, of late years, they have been trying to introduce the Scotch principles of banking. In this instance the defenders seem to have got some glimmering views of the practice in the English banks in regard to pass-books, and to wish to take the origin and character of their pass-books, without being aware of the effect in England even of the unsigned entries in such pass-boks of monies paid into the bank.

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Lord Murray.—I entirely agree with your Lordship in thinking that this is one of the most important cases that has occurred since I sat here.

The first point here is the pass-book, of which we have a printed excerpt. That is admitted to be the book of the Bank delivered by them as a pass-book. Secondly, the sums paid in are written in words, and there is also a column in which they are in figures. Now I never saw sums written in words except where they are intended to be receipts. Thirdly, they are initialed by the Bank officials. Fourthly, there is no allegation on the part of the Bank that there was any forgery or fraud committed in regard to this book. Well, these are the facts. There is only one point on which parties differ, and that is as to a sum of L.80 duly entered there, and entered in words. The Bank say it was never received at all: they allege no dishonesty, but a mistake. Well, what is the law in regard to such documents? It is well stated by Mr Bell in his Commentaries, third edition, published in 1819, p. 305. He there says that mercantile writs are privileged, and in the fifth edition he says, subscription by initials or a mark is enough. There can be no dispute that this is the law of Scotland, and has been so ever since 1624, if we may trust the case of Ramsay v. Hay, reported by Durie, of 17th July of that year. (Mor. Dict., 16,245.) It will not be denied that this is a very common kind of transaction, not a day passing without some hundreds of such entries being made. Now that being the case, I wonder at the Bank stirring the question;—of course the Bank know their own interest best, but I should not like to deal with a bank if they dispute a receipt signed by their own officers, and say it was a mistake, and they are not bound by it. Many very large sums are sent up by clerks and servants, and when the book is brought back, signed by initials, everything is considered right. I think the law is clear. It is stated by Bell, and is confirmed by the practice of the country for a very long period; and, in truth, the practice secures every efficiency consistent with extreme despatch. I consider this entry just as good a receipt as a bond or bill. There may be grounds for setting it aside, but as it stands it seems to me as good a receipt as any other, and is as much entitled to efficacy.

In these circumstances, I am at no loss what decision we ought to give, and I entirely agree with your Lordship. I think the Court have no choice left but to give effect to this document.

Lord Wood absent.

Lord Cowan.—The Lord Ordinary has found that the document produced by the pursuer is a mere adminicle of evidence in support of his claim; that it is not proof by writ of the debt claimed, requiring to be redargued by writ or oath; but that he is bound to take a general issue of resting-owing, leaving the defenders, if they choose, to take a counter issue.

I cannot acquiesce in that view of the pursuer's legal position under this record.

The action, although concluding for a balance of account, resolves into a special claim on the part of the pursuer for a sum of L.80, paid into the Bank on the 6th June 1856; and the whole averments and pleas in the record relate to the verity of that claim. In support of it reference is made to the entry in his pass-book of that date, in the handwriting of the accountant of the Bank, of L.80, placed to the credit of the pursuer, and to which are adhibited the subscriptions, by initials, both of the accountant and of the agent of the Bank. This entry occurs in a pass-book, which has been current between the pursuer and the Bank since 1851. A multitude of similar entries are contained in the book, which bears to have been periodically balanced, but not docqueted, in October of each year.

The genuineness of the entry is not disputed. On the contrary, the subscription

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of the Bank officials by initials is admitted; and the defence is rested on the entry in the pass-book having been made by mistake. It is alleged to have been a double entry of a sum of L.80, entered as received on the 5th June 1855; and various statements are made to show at once the probability of this alleged mistake, and the fraud attempted to be practised by the pursuer, in standing upon the receipt of the Bank officials as establishing the truthfulness of his claim.

This defence it was proposed at the hearing to establish by proof under an issue to be taken by the defenders. It was allowed that the *onus* at least lay upon them, the interlocutor to that extent being admittedly erroneous. But I concur with your Lordships in holding that such an issue ought not to be given under this record, and that the case stated is competent only by way of reduction.

Had it been proposed to support the defence by repeating a reduction *in initio litis*, there might have been room for allowing the investigation to proceed under the reduction as the leading process. But no such action has even yet been raised, and although the summons was brought into Court in October 1855, it is only at the last stage of these proceedings that the proposal is made, that this action should be sisted to enable the Bank to set aside the written evidence of the pursuer's claim by reductive process. I am very clear that this proposal ought not to be acceded to, and that the pursuer is entitled to have the effect of the entry in his pass-book now disposed of by the Court.

On the important question as to the legal import and effect of this pass-book entry, I cannot view it otherwise than as in all respects tantamount to a written acknowledgment of the sum having been received by the Bank in deposit, and for which they must account when demanded. The words can bear no other construction than what imports an acknowledgment of debt under the hands of the bank officials—equally effectual as the more formal deposit-receipt given to customers who have no pass-book.

The full subscriptions of the agent and accountant are not annexed to the entry; but their initials are admitted; and that this is the usual mode adopted by them for instructing such receipts by the Bank is not only not disputed, but is shown beyond contradiction by this very pass-book. That initials, in such circumstances, are equivalent to full subscription cannot be doubted. There are many decisions to that effect; and it was no part of the argument of the defenders to dispute that proposition.

What is contended for is, that this is not a formal acknowledgment of a loan of money, entitled to effect as such, but a mere jotting or memorandum, not affording *per se* evidence of the money having been received, but requiring to be supported *aliunde*. The answer to this appears to me conclusive, that this writing —for it is the written acknowledgment of the payment, and the only one received by the Bank customer—is a privileged writ as in *re mercatoria*.

It was said that this character of such entries, initialed though they be by the officials of the bank, has never received the sanction of express decision. I do not think it has ever previously been disputed. This may account for the absence of express decision. But if the doctrine of privileged writ, on account of the matter about which it is granted being in *re mercatoria*, is to be recognised at all, it appears to me to apply here. Mr Bell treats of the subject in these terms.—Bell's Com. i. 325.

It seems to me that these entries in pass-books are in every respect equivalent to deposit-receipts. Some of the customers of banks have not numerous transactions, and they take separate receipts; others have so many that in place of formal receipts they have current pass-books; but the same principles are applicable to both classes of vouchers. The deposit-receipt is not probative under the Act 1681, any more than the pass-book, and they may just as well be disputed on the ground of mistake. All receipts in the pass-book are vouched by the bank officers, and the customers are entitled to rely on them as no less effectual than the more formal but no less improbative deposit-receipt.

The defence is not that the sum has been paid. It is against the constitution of the claim altogether, on the ground that the entry is a mistake, and that the receipt is nothing. It is this which gives its great importance to the case. Is this pass-book receipt to be dealt with as evidence of a payment to the Bank till it is

redargued *habili modo*? That is the only question we have to decide; and no other principle can be applied to it than if the payment had been vouched by a deposit-receipt. No. 124.

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The distinction taken is, that the entries in pass-books are only one side of the account between the Bank and their customer, while deposit-receipts are evidence of specific payments. To this there are two answers. 1. In one sense this may be so, but the entries in the pass-book are all vouched in writing, and the customer is entitled to rely on them as evidence of the sums paid in by him to the bank. And as to the other side of the account, the entries there are supported by vouchers, which will receive their legitimate effect when produced at the periodical settlement and interchange of vouchers. But, 2. This plea is inapplicable to the pleadings in the case. The defence is not payment or counter entries in account. The objection is to the constitution of the claim altogether.

Had written evidence against this entry been recovered, or proposed to be recovered, that would have been another case; but are we to hold this receipt not entitled to any effect? I think it clear, that in the absence of written evidence, or of an offer to prove it a mistake by the oath of the pursuer, the pass-book must be taken *hoc statu* as good evidence of the debt. I express no opinion on the relevancy of the statements here made to reduce this receipt. There may be grounds or not; I would only say, if there be such grounds, either on the head of essential error or fraud, that is a matter which can only be brought before us in a reduction.

Lord Justice-Clerk.—I may state that, in the preface to the fourth edition of Mr Bell's Commentaries, he expresses his obligation to my father, the late President. It so happened, that during the preparation of this edition Mr Bell was staying for a month with him, and they went over every page of the work, and every statement has their joint authority.

The Court pronounced the following interlocutor :—"Alter the interlocutor complained of: Find, in point of law, that the claim insisted on in this action is legally and sufficiently proved, and must be given effect to in this action: Find that no defence relevant to be proponed in this action has been stated on record: Therefore, repel the defences: Find that the defenders are liable in payment of the sum concluded for in this action; and therefore decern against the defenders for payment of the sum of L.66, 8s. 10d. sterling, with interest due thereon, in terms of the conclusions of the summons: Find the defenders liable in expenses," &c.

William Steele, S.S.C.—John A. Campbell, C.S.—Agents.

Caledonian Railway Company, Pursuers.—*D. F. Inglis—Patton.* No. 125.
Sir Norman Macdonald Lockhart, Bart., and Others, Defenders.
—*G. G. Bell—Marshall.*

Arbitration—Submission—Statute 8 *Vict. c.* 19, *sec.* 35.—A submission was entered into between an heir of entail and a railway company to assess the value of land required for railway purposes—to fix the intersectional and other damage to land—to determine the sum of money for injury to the amenity of the mansion-house—the value of wood and the construction of various works. The submission proceeded on the narrative of the Lands Clauses Consolidation (Scotland) Act, and contained a declaration that the arbiter should conduct the proceedings "in strict conformity with the rules and regulations under the provisions and conditions specified in the foresaid Act, and of the Acts 8 & 9 Vict. cap. 17 and cap. 33." The statute provides (sec. 24) that a submission under the Act shall not fall by the death of either of the parties; and (sec. 35) that if decree is not pronounced within three months from the date of the submission, "the question of compensation shall be settled by the verdict of a jury." Decree was not pronounced within the statutory period, and the submission was prorogated by joint minute to the day of [illegible]. The heir of entail died before a final award had been pronounced, and the railway company applied for interdict against the submission being pro-

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ceeded with, on the ground that the above minute rendered it no longer a statutory but a common law submission, which therefore fell by the death of either of the parties. The note was refused. The submission was proceeded with, and interim and final decrees pronounced. In a reduction of these decrees at the instance of the railway company;—*Held* (1.) that the judgment in the Bill-chamber was not *res judicata* in an action of reduction; (2.) that the submission was statutory in so far as it was to be conducted according to the statutory procedure; but that in so far as the parties had themselves modified the provision, limiting its endurance to three months, it was a submission at common law, embodying some though not all of the statutory provisions. Therefore, that it did not fall by the death of one of the parties, and was not reducible by reason of the proceedings not being conducted in strict conformity with the statute—(*diss.* Lord Deas).

Opinion, that the submission was statutory; and *Observed*, that the minute of prorogation left it in doubt whether it was intended to constitute a common law submission, adopting some of the provisions of the statute, or to engraft certain common law provisions upon an existing statutory submission, and also to what extent the common law was to regulate and to what extent the statute, which was a sufficient reason for holding that neither the one thing nor the other had been effectually done.

1st Division. Ld. Handyside C.

The late Sir Norman Macdonald Lockhart of Carnwath, Lee, and Covington, died in 1849. This action was directed by the Caledonian Railway Company against the present Sir Norman Macdonald Lockhart, the heir of entail in possession of the estates of Carnwath, Lee, and Covington, and also against the trustees and executors of the late Baronet. It concluded for reduction of two decreets-arbitral, pronounced in an arbitration entered into between the late Sir Norman Macdonald Lockhart and the pursuers to Lavid Low, Professor of Agriculture in the University of Edinburgh.

The first article of the pursuer's revised condescendence was as follows—The line of the Caledonian Railway passes through and intersects the lands and estates of Carnwath, Lee, and Covington, in the county of Lanark which belonged to the late Sir Norman Macdonald Lockhart, Baronet; and in order to the formation of the Railway and works connected therewith, it became necessary for the pursuers to acquire certain portions of these estates. They accordingly, in terms of the provisions of the Lands Clauses Consolidation (Scotland) Act 1845, and in the manner thereby prescribed gave notice to the said deceased Sir Norman Macdonald Lockhart, the the heir of entail in possession, of their intention to take and acquire certain portions of the said lands and estates, as particularly described in the notice and relative plans delivered to him, for the purposes of the Caledonian Railway Act. And they further required from him the particulars of his interest in the said lands so to be taken, and of the claims made by him in respect thereof.

Article second was as follows:—In obedience to this requisition, the late Sir Norman gave in a claim detailing the compensation claimed by him in respect of the taking of the said lands, and for the damage done by severance, with other claims. The pursuers having declined to pay the amount of compensation claimed, and being unable to come to any agreement with Sir Norman on the subject, an arrangement was entered into for having the claims of Sir Norman disposed of by arbitration.

The deed of submission, after designing the parties, being the pursuers and the late Sir Norman, was as follows:—"That is to say, the said parties considering that by the Lands Clauses Consolidation (Scotland) Act 1845 entituled 'An Act for consolidating in one Act certain provisions usually inserted in Acts authorising the taking of land for undertakings of a public nature in Scotland,' which is incorporated in and forms part of the Caledonian Act, it is enacted that, subject to the provisions of the said Acts, it shall be lawful for the promoters of the undertaking to agree with the owners &c.; and that if no agreement be come to between the promoters of the

undertaking and the owners of or parties by the said Acts enabled to sell or convey any lands taken or required for, or injuriously affected by the execution of the undertaking, or any interest in such lands as to the value of such lands or of any interest therein, or as to the compensation to be made in respect thereof, it shall be lawful for the parties to refer the same to arbitration, &c. &c. Therefore the said Caledonian Railway Company and the said Sir Norman Macdonald Lockhart have submitted and referred, and hereby submit and refer to the amicable decision, final sentence, and decreet-arbitral of David Low, professor of agriculture in the University of Edinburgh, as sole arbiter mutually chosen by the said parties, all claims for the value of said lands and others to be taken, used, and occupied by the said Caledonian Railway Company, and in general all claims or demands whatever competent to the said Sir Norman Macdonald Lockhart against the said Caledonian Railway Company, by or in consequence of the said Caledonian Railway Company taking, using, or injuring any part of the said lands for the said railway, or the works or operations of the said Railway Company, in any manner of way whatever, in so far as may be authorised by the foresaid Acts, including accesses and every other claim competent to him against the said Company: Declaring that the said arbiter shall conduct the proceedings to follow hereon, and determine the matters hereby submitted to him, in strict conformity with the rules and regulations under the provisions and conditions specified i the foresaid Act, and of the Acts 8th & 9th Vict. cap. 17 and cap. 33; and he said parties consent to the registration hereof, and of the interim and inal decreet-arbitral to follow hereon, in the books of Council and Session, r others competent, that letters of horning on six days charge, and all ther execution, may pass on a decreet to be interponed hereto, in form as feirs," &c.

The deed of arbitration was subscribed by Sir Norman, and by Mr D. ankine, on behalf of the Caledonian Company, as *secretary*.

The arbiter accepted of the submission on 19th March 1846, and appointed ims and answers, with the plans of the line of railway and grounds to be tersected by the railway, to be lodged with him.

The 24th section of the Lands Clauses Act declares, that after the appoint-nt of an arbiter, " neither party shall have power to revoke the same thout the consent of the other, nor shall the death of either party operate such revocation."

The 35th section provides, that " if, when the matter shall have been erred to arbitration, the arbiter or their umpires shall for three months e failed to make their or his award, the question of such compensation ll be settled by the verdict of a jury."

No award was pronounced in the submission entered into between Sir rman and the Railway Company within the statutory period of three nths. The submission was repeatedly prorogated first by letters or mis-s of the agents, and then by the following formal minute, dated 6th and November 1846 :—" We, the parties to the within submission, consider-that it has been already prorogated from time to time, conform to letters ressed to the arbiter by our agents on our behalf respectively, dated 20th 22d May, 1st June, 18th of July, and 5th day of October last respec-ly; and also considering that it is necessary again to prorogate the said nission, and that we have agreed that the arbiter shall have power to ogate the same in future as hereinafter set forth; do hereby prorogate ime for determining the matter submitted, to the day of . and of new submit to the arbiter within named the whole matters aced under the within submission; and whatever the said arbiter shall mine in the premises, in whole or in part, by interim or final decreet-ral to be pronounced by him within the above period, or on or before

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any other day to which he may prorogate the submission, which he is hereby empowered to do at pleasure, both parties bind and oblige themselves to acquiesce in and fulfil to each other under the penalty within expressed; and we do hereby homologate and confirm the prorogations granted by our agents respectively above referred to." Mr Rankine subscribed this minute on behalf of the Railway Company as *treasurer*.

The arbiter thereafter subscribed minutes bearing to prorogate the submission on the 4th November 1847, the 31st October 1848, and the 17th October 1849. In each case the period was prorogated " to the day of next."

On the 22d January 1848, after various proceedings in the submission and notes issued of his views regarding the compensation to be awarded, th arbiter pronounced an interim decreet-arbitral, whereby he awarded L.600 against the pursuers, and also disposed of certain portions of Sir Norman' claim as to accesses or other works. The draft of this interim decreet wa submitted to the agents for the parties, who suggested various remarks o alterations.

On 9th May 1849, Sir Norman Lockhart died. The tutors of the prese Sir Norman, and the trustees and executors of the late Sir Norman, the proposed to sist themselves as parties to the submission, which the pursue opposed on the ground that the submission had fallen by Sir Norman's deat This objection was over-ruled by the arbiter, who sisted the tutors an trustees, and appointed the decreet-arbitral to be completed. The pursue thereupon presented a note of suspension and interdict, in which they plead that no award or decreet-arbitral having been pronounced and delivered b the arbiter in the submission within three months of its being entered int nor within three months from the date of the minute of prorogation a renewal, the submission, in terms of the 35th section of the Lands Claus Consolidation Act, had fallen and become inoperative. Farther, that t submission by the various prorogations, and more particularly by the min prorogating to the day of next, and giving the arbiter pow to prorogate at pleasure, was taken out of the provisions of the Lands Clau Act, and became a submission, subject to the rules of common law, and fell by the death of Sir Norman Macdonald Lockhart.

The Lord Ordinary on the Bills (Fullerton) refused the note, and judgment was adhered to by the Judges of the Second Division on 12th D cember 1849.[1]

On 20th June 1850 thereafter, the arbiter issued his final decreet-arbit In that decreet-arbitral there is the following passage:—" In respect o the sums found due by this and my interim decreet-arbitral aforesaid, incl *inter alia* the sum of L.4000 awarded to the said deceased Sir Norman M donald Lockhart, as compensation for the damages occasioned to his prope by the operations of the said Company in carrying their line of rail across the valley of the Clyde, I find that the said Sir Norman Macdo Lockhart, and the succeeding heirs of entail, shall relieve the said Rail Company of any claims which his present tenants, whose farms are intersected by the said railway, may be enabled to establish against the Company in consequence of their said operations, to the extent of the int accruing on the said sum of L.4000 from and after the date hereof, c lated at the rate of 3½ per cent per annum, but under deduction of the of L.16, 4s. per annum, included in the abatement of L.49, 15s. allowed by Sir Norman Macdonald Lockhart to the tenant of Wester pits, in terms of my said interim decreet-arbitral; and I decern accordi

In these circumstances the pursuers brought this reduction of the in and final decreets. They set forth the above facts, and detailed the

[1] See ante, vol. xii. p. 338.

dure which had taken place before the arbiter. Their pleas in law were as follows:— No. 125.

"1st, The arbitration and alleged prorogation thereof being informal, and not duly stamped or authenticated or authorised by the shareholders, are not binding on the Company. Feb. 25, 1857. Caledonian Railway Co. v. Lockhart.

"2d, The arbitration cannot be held as statutory, or protected by the provisions of the statute—(1.) Because the subject of the submission goes beyond the matters as to which arbiters are empowered to decide under the provisions of the Lands Clauses Act, and the arbiter did truly deal with such matters. (2.) Because a statutory arbitration terminates by the lapse of the periods prescribed by the Act for disposal of the case, with or without the prorogations rendered competent by statute. An attempt to give an arbiter a power of indefinite prorogation constitutes a new and different kind of arbitration from that which the statute renders competent, and if effectual deprives the proceeding of its statutory character.

"3d, If, on the other hand, the arbitration is to be held as statutory, it fell by the lapse of the statutory period, and the case, under the peremptory provisions of the 35th section, fell to be disposed of by a jury.

"4th, If regarded otherwise than as a statutory arbitration, it fell by the death of Sir Norman Lockhart, one of the parties submitters, and the whole subsequent proceedings were null and void.

"5th, A refusal of a suspension and interdict in the Bill-Chamber forms no *res judicata* as to the merits of the case in which the interdict has been ineffectually craved.

"6th, Upon the assumption that the arbitration was statutory, the decreet-arbitral is otherwise void and null,—In particular, because (1.) It was *ultra vires* and incompetent for the arbiter to proceed by way of interim and final decreets-arbitral: it was incompetent to pronounce any interim decreet-arbitral. (2.) It was farther *ultra vires* and incompetent for the arbiter, under the arbitration or the provisions of the Lands Clauses Act, to give decree for damages entirely prospective and contingent. (3.) It was farther *ultra vires* and incompetent for him to give decree in favour of Sir Norman Macdonald Lockhart for damages which were assumed as likely to be incurred by tenants whose lands were not traversed by the railway, and who were not parties to the submission, and which were also of the nature of prospective and unascertained damage; and these damages being inseparably mixed up with the damages payable to the defenders, the award is bad *in toto*. (4.) It was farther incompetent to order the execution of works, or to enforce their execution by pecuniary penalties for their non-execution. (5.) It was farther incompetent to decern for sums without discriminating and specifying the parties who were to take under the decree.

"7th, The decrees are farther reducible as having proceeded from corrupt partiality and bias, and being in direct opposition to the truth and to the evidence led and adduced in the case, and the proceedings having been irregularly and incompetently conducted.

"8th, Generally, the grounds of reduction being well founded, decreet falls to be pronounced in terms of the conclusions of the action."

The defenders pleaded;—"1. The judgment in the suspension and interdict forms *res judicata* against the pursuers, in so far as they now seek to plead the points decided by the Court in the suspension and interdict. 2. The pursuers have not set forth any facts relevant or sufficient to support a challenge of the decreet-arbitral on any of the grounds pleaded or indicated in their pleas in law. 3. In particular, the pursuers have failed to aver or substantiate either that the arbiter exceeded his powers, or that any of the proceedings are incompetent under the submission. 4. There exist no valid grounds, either in fact or in law, for setting aside the decreet-arbitral now challenged."

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The Lord Ordinary, on 14th July 1854, pronounced an interlocutor, reporting the case to the Lords of the First Division.*

* "NOTE.—The Lord Ordinary has thought it fitting to report this case to the Inner House. The pursuers seek substantially a review of a decision in a suspension brought by them several years ago, having agitated the same point of law in the reduction since raised. They contend it is open to them to do this, as an interlocutor in a suspension does not form a *res judicata*. And perhaps they are right in this as a general proposition, though it may require consideration whether, under the circumstances of this case, where the only point in the suspension was that now attempted to be revived in the reduction, they are not disentitled from questioning it as being a concluded issue between the parties. The pursuers might, it is conceived, have carried the judgment in the suspension before the highest tribunal whereas they submitted. The point was as purely raised in the suspension as it i now stated in the reduction.

"If, however, the pursuers shall be held as not foreclosed by the result of th suspension, the question they renew is one with which the Lord Ordinary, after du consideration, has thought it scarcely suitable for a single Judge to deal; for the dispute the law laid down in the suspension on the ground of a judgment of th House of Lords in a later case between other parties, which they represent as ove ruling the principles of the decision in the suspension.

"There are other grounds of reduction pleaded to overset the decree-arbitra but they can scarcely be separated from the objection to the validity of the sul mission itself and its continuing in force, which were the precise points adjudicat in the suspension. Unless the pursuers should be now successful in obtaining decision on these points in this reduction, in disregard of the law laid down by t Court in determining the process of suspension, it is thought that the decree-arbitr is not open to any formidable ground of challenge on the objections which othe wise are stated to it.

"The circumstances of the case are shortly as follows:—The Caledonian Railw Company, before entering upon the lands of Sir Norman Macdonald Lockha entered into a submission with him to Professor Low as sole arbiter. The subje of submission are stated in very wide terms, comprehending all claims and dema whatever competent to Sir Norman against the Company, including accesses. was declared that the arbiter shall conduct the proceedings and determine t matters submitted to him in strict conformity with the rules and regulations a provisions and conditions contained in the Lands Clauses Act and Railway Clau Act. Power is given to pronounce interim or final decrees-arbitral. There no specified term of duration of the submission. It was treated as falling und the three months clause, and was prorogated or extended by the parties for successi periods of three months or under, till a general prorogation was executed by th to the day of and a power of further prorogation bestow on the arbiter himself. This he exercised, continuing the submission till he h pronounced an interim and final decree-arbitral. The first was issued before t death of Sir Norman, the latter after that event.

"The Company attempted to break up the submission on Sir Norman's dea and raised this dilemma:—that it must be held to be either a statutory arbitrat or one at common law;—if the former, it was invalid by reason of the proceedi not having been brought to a close within the statutory period, treating the la prorogations as absolutely null, being unauthorised by the statute;—and if to treated as an ordinary submission at common law, it had fallen by the death of o of the parties. In either view, they pleaded that the submission had come to end. They presented a note of suspension against the submission being proceed with, and took judgment upon these points.

"Their note was refused by Lord Fullerton, whose interlocutor was adhered to the Inner House.

"The pleas thus disposed of by a deliberate judgment are attempted to be revi in this process. The encouragement to it is a case determined in the House Lords in 1850. The circumstances of that case—the Glasgow Barrhead and N ston Railway Company v. the Nitshill Coal Company—are, as the Lord Ordin thinks, very different from the present. The judgment of this Court was revers

On 26th May 1855,[1] the Court repelled the plea of *res judicata*, in so far as the pleas disposed of in the Bill-Chamber were now revived in this action of reduction. The pursuers now farther pleaded:—(1), That this was not a statutory submission. The subject matter of reference was not merely compensation in the ordinary sense of the term, but also every other claim competent to Sir Norman Lockhart under the Act of Parliament. Now an important class of claims was for accommodation works. Such claims were not disposed of by the statute in the same way as claims for compensation. The Sheriff was constituted the proper judge in the matter, to whom alone parties were by the statute directed to resort. The defenders themselves, in art. 1 of their revised statement, described the submission in question as embracing, (1.) Sums for land taken from the estates of Carnwath, Lee, and Covington; (2.) Sums on account of intersectional and other damages done to land; (3.) A sum for injury to the amenity of the mansion-house of Carnwath; (4.) Value of wood; and *lastly*, The construction of various works, such as roads, bridges, accesses, and embankments, required to be executed by the pursuers for the proper use and protection of Sir Norman's grounds.

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That was a description of accommodation works. The submission was entered into for determining that claim. Therefore it was a submission not to determine compensation merely, but also accommodation works. Again, in art. 3, the defenders stated that "the nature of the claim, and course of procedure under the submission, were such as necessarily required a considerable period of time;" and again, in art. 5, "The very purpose of the agreement and power thereby conferred upon the arbiter was to continue and enable him to continue the submission until the whole matter referred should be finally determined."

The next question was, whether an heir of entail could enter into an

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...the appeal was argued on grounds different from those pleaded in this Court, ...ging from the reports of the case in the Session Reports and Scottish Jurist. ...reversal proceeded on the arbitration being held to be purely under the statute; ...the oversman was not duly appointed;—it being held that the prorogation ...the parties was to be viewed as a renewed submission, and while it renewed the ...ers of the arbiters, could not revive the previous appointment by the arbiters of ...oversman, which was to be done by a new act of the arbiters themselves, under ...r renewed powers. These were the special points on which the reversal was ...d. But in moving the judgment, views were expressed regarding submissions ...red into under the Railway Acts, of more general application, and which of ...e must be received with the utmost deference.

This reversal was brought under the notice of the First Division in a suspen...—the Dundee Perth and Aberdeen Railway Company v. Sir John Richardson, ...which it was founded on to affect the validity of the submission and decree-...al in that case. The Court held it to have no application, on the ground of ...strictly statutory character of the Nitshill arbitration; while in Sir John ...rdson's case the submission was considered as being in the ordinary terms, ...gh by declaration of parties there was imported into it all the statutory effects ...e entered into under the Lands Clauses and Railway Clauses Acts. The judg... of the Court, however, may be held to have rested on acts of homologation and ...escence in the decree-arbitral after it had been pronounced. The difficulty in ...resent case, as the Lord Ordinary apprehends, lies in the terms of the sub... itself being apparently statutory and being treated as such by the early pro...on or renewals, till there was afterwards grafted upon it powers of prorogation ...ng only, as is conceived, to the ordinary common law submission. What ...e this shall be held to have effected in its character, appears to the Lord Ordi... with all humility, to be a question, regard being given to the Nitshill case, ...ought to be brought directly under consideration of the Inner House,—and ...tains from expressing any opinion of his own."

[1] See ante, vol. xvii. p. 775.

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arbitration for the purpose of determining matter of compensation, except a statutory arbitration; and, (2), whether he could enter into any arbitration whatever in reference to accommodation works. He could do neither By the common law, an heir of entail could not dispose of any portion of hi estate, and therefore, by the common law, the Railway Company could no pass through his estate. But the statute interposed, and conferred autho rity upon them to take land from entailed estates, and empowered heirs o entail to sell portions of their land for the purposes of the Railway. Th conditions upon which that capacity was given must be strictly construed Therefore, if the pursuer's construction of the statute be right, and if this b not a statutory but a common law submission, then no farther argument wa required to establish the soundness of the reasons on which the presen reduction was founded.[1]

The defenders now admitted that the submission was not statutory, bu pleaded:—That it was competent for the parties to a common law submi sion to import into it the machinery of the Lands Clauses Act, for the pu pose of regulating the proceedings. Nothing more had been done in t present instance. The parties had imported the machinery under t statute to a certain extent, but not so absolutely as to make an absolu adherence to its form of procedure imperative. Thus the limited enduran of a submission to three months was dispensed with, and the submissi therefore, being of that mixed nature, was not open to the technical obje tions now taken to it.

As to the objection founded on Sir Norman's position as an heir of ent that was a plea which was competent to the succeeding heir of entail, b which he, having waived, the pursuers had no title to adopt.

At advising,—

Lord President.—In this case we formerly disposed of the fifth plea stated the pursuers—that is the plea as to the judgment in the Bill-Chamber being *judicata* in this case. The first, the seventh, and the eighth pleas we have he nothing about, and I presume they are merely formal, and are not now insisted All the others remain.

This is an action of reduction at the instance of the Caledonian Railway Co pany, directed against the representatives of the late Sir Norman Macdonald Lo hart; and the pursuers call for production of two decreets-arbitral, one dated January 1848, which is an interim decreet-arbitral, and the other, which is a decreet-arbitral, dated 20th June 1850. These decreets were pronounced by P fessor Low, under a submission entered into in 1846 between the Caledonian R way and Sir N. M. Lockhart, who was then alive. Sir Norman died after interim decree-arbitral was pronounced, but before the final decree-arbitral pronounced. His representatives had sisted themselves as parties to the proceed before the final decree had been pronounced. This action is now brought to re and set aside these decrees.

It appears that the Caledonian Railway Company acquired certain portions of lands belonging to Sir Norman Lockhart. It is stated in article 1 of the purs condescendence, that they gave the requisite notices of their intention to take land, and required from Sir Norman the particulars of his interest in the lands so ta and of the claims made by him in respect thereof. Sir Norman, in obedience to regulation, gave in a claim; but the pursuers having declined to pay the amou compensation claimed by him, an arrangement was entered into for having claim disposed of by arbitration. By a submission entered into between the ties, various matters were referred to Professor Low. The submission cont a condition as to the proceedings being conducted in terms of the Lands Cl Act. In the course of the proceedings there were prorogations of the tim pronouncing the award; and, in particular, a minute of prorogation, giving pow

[1] Glasgow Railway Co., 7 Sidney Bell, 325; Scottish Midland Junction Ra h December 1850, ante, vol. xiii, p. 410.

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the arbiter to prorogate the submission was signed in November 1856. Interim decree-arbitral was pronounced after various proceedings, and after various orders, by Professor Low, and bears date 22d January 1848. It appoints a certain sum to be paid in a certain way. In 1849 Sir Norman Macdonald Lockhart died. His representatives proposed to sist themselves at that stage of the proceedings; but the Caledonian Railway Company interposed, and refused to allow the submission to proceed, and presented a note of suspension against the proceedings, on the ground that the submission had fallen. That note was refused, and is the note referred to in the fifth plea in law for the pursuers, which I have already mentioned.

In 1850 Professor Low pronounced his final decree, in which it is said that certain of the findings are on matters not submitted to him; and which it was therefore not *within* his power to decide.

This summons of reduction was raised in March 1852. Among the grounds of reduction argued, there was one to this effect, that in this case the submission, if it was not a submission precisely in terms of the statute, and conducted in exact conformity with the provisions of the Lands Clauses Act, was an incompetent proceeding, inasmuch as Sir Norman, as an heir of entail, was under disability under the statute, and had no power to agree to the price of land to be taken, except either under a submission conducted in terms of the Lands Clauses Act, or by a jury, or by certain valuators to be appointed, in terms of the statute, to fix the amount of the price. That the proceedings here were not proceedings in terms of the Lands Clauses Act at all; that there was no verdict of a jury, and no valuation; and therefore that the whole proceedings were null and void, on the ground of Sir Norman being an heir of entail under disability. A proposal was made at the debate to insert a plea in law to that effect, on the assumption that the statements in the record were sufficient to bring out the facts, and that all that was wanting was a plea in law applicable to them. I think that after the course this case has taken, it is out of the question to admit any such plea; and I am of opinion that there is no ground of reduction founded on the disability of Sir Norman to be a party to the submission. I shall not detain your Lordships by examining the statements on record. They are not calculated to lay a foundation for such a plea; but they are not here in form as a ground of reduction, and that part of the argument I hold to be out of the case which we are called on to decide.

Being of that opinion in regard to what is not before us, I do not express any opinion on what would be the merits of such a ground of reduction if it were here, nor do I hold that the pursuers are excluded from afterwards founding upon it. I pronounce no opinion at all, and do not wish to be misunderstood as expressing a doubt on the one side or the other. I do not say that I have no opinion, but I do not express it. Neither is it pleaded as a ground of reduction, that the Railway Company have no power to settle the price of land taken by them by any kind of arbitration except an arbitration in terms of the statute. I pronounce no opinion on that point. Such a plea might perhaps amount to a repudiation of a great act done by the Railway Company in this submission. Although I may have an opinion on that subject too, I do not express it.

These two elements being out of the case, I proceed to examine the case as presented to us; and to consider whether the grounds of reduction stated are sufficient for setting aside the decrees-arbitral, interim and final, pronounced under the submission, or whether they are not. The pleas in law which embody the grounds of reduction, are the 2d, 3d, 4th, and 6th. These grounds of reduction are put forward in an alternative form: It is said that the submission was either a statutory submission, or it was not. The pursuers put this dilemma. They say, if it was a statutory submission, it fell by the lapse of time, and by reason of the procedure not being conformable to the statute. If it was not a statutory submission, it fell by reason of the death of one of the parties submitters. There are other subordinate questions raised as to whether the arbiter exceeded his powers; but substantially, these are the views now submitted to us.

The first view taken by the Railway Company is this, that the submission cannot be held to be statutory, or protected by the statute, because of certain things:—" 1st, because the subject of the submission goes beyond the matters as to which arbiters are empowered to decide under the provisions of the Lands Clauses Act, and the

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arbiter did truly deal with such matters. 2d, Because a statutory arbitration terminates by the lapse of the periods prescribed by the Act for disposal of the case, with or without the prorogations rendered competent by statute. An attempt to give an arbiter a power of indefinite prorogation constitutes a new and different kind of arbitration from that which the statute renders competent, and if effectual deprives the proceeding of its statutory character." Upon these grounds the pursuers hold that the submission cannot be regarded as statutory. The submission itself is peculiarly expressed. I am not prepared to differ from the statements set forth here, that it goes beyond matters as to which arbiters are empowered to decide under the provisions of the Lands Clauses Act; and I am not prepared to say that it may not be competent in a statutory submission as to the price of land to introduce other matters, if the parties choose to have these matters so regulated. But I think that this submission does go beyond the matters which arbiters are empowered to decide under the provisions of the Lands Clauses Act. It goes beyond the matter of fixing the price, and the compensation to be made generally for the taking of land. It embraces, in particular, the matter of accesses. That is expressly made the subject of submission. I have not seen the claim made by Sir Norman, which formed the subject of the reference. There is a statement of the import of the claim, in the first article of the statement for the defenders; but the claim itself is not here, and I do not see that he demanded an arbitration under the statute. The statement bears that he made a certain claim, and, the Railway Company not being disposed to pay the sum, that it was agreed to enter into the submission now before us; and it was entered into, embracing matters, as the Railway Company say, beyond the scope of the statutory arbitration. I am not at all surprised that the parties should have adopted that course, because it appears from the proceedings in the submission, that a great many other things required to be adjusted in the making of the railway, and that it depended on whether these were done one way or other, what should be the amount of compensation to be awarded to Sir Norman, or whether there should be any compensation at all. At various stages of the proceedings, the arbiter gave the Railway Company the choice to say whether they would perform certain operations suggested by him, so as to avoid the necessity of compensation, or whether they would abstain from performing them; in which case there would be a certain award of damages. All that implied that the consideration of these things formed the condition of the discussion before the arbiter, embracing also the question as to accesses, which I think the parties had power to submit if they chose. There is nothing to prevent them. On the contrary, it is competent for the Railway Company to compound for part of the amount of compensation to which Sir Norman might be entitled in place of accesses, and if they could not agree, they could refer it to arbitration. Therefore I see nothing incompetent in settling that by arbitration; but I agree that it is not within the Lands Clauses Act, nor the proper matter of this submission. But here it was made matter of submission, and the arbiter could regulate the compensation according to what he might think were the accesses the party should get. When a case goes to a jury, it is common for the parties to settle what are the accesses in order that the jury may know precisely what they are doing. That is done constantly.

All these things were brought under the consideration of this arbiter in a general submission. The words of the submission are very broad. Everything that could arise between the parties is referred. The submission also contains a clause of registration, and a clause consenting to letters of horning on six days' charge,—consequences which the statute does not attach to a decree-arbitral.

Looking to that, I am rather disposed to think that the Railway Company are right in their contention that this was not a strict statutory submission, and I think I see a reason for that in the number of matters referred. There is a great deal to be said for these things being submitted to an arbiter such as Professor Low; and I may mention, that the proceedings under this submission go on very much in a way that indicates that the parties did not regard it as strictly a statutory submission. There is a clause in it that the arbiter shall proceed in conformity with the rules and conditions of the statute. I know nothing in the common law of Scotland in regard to submissions which would prevent the parties from introducing a condition of this kind into a submission, although they did not hold it to be a strictly statutory sub-

mission. They might choose to limit the period for issuing the award to three No. 125.
months. They might choose to provide in that way that the submission should not —
fall by the death of one of the parties. They might choose to provide for various Feb. 25, 1857.
other events provided for by the statute, although they might not make it a strictly Caledonian Railway Co.
statutory submission. They might choose to add to it conditions as to issuing v. Lockhart.
letters of horning, and so forth. This is differently expressed in many respects from the submission in the case of the Nitshill Company. Upon looking into the terms of that submission, I observe that it is knitted up with the statutes in a way that does not occur here. This one is merely connected with the statute by a declaration that the arbiter shall conduct it in terms of the statute.

In the case of Nitshill, a good deal of discussion took place elsewhere as to whether that was a statutory submission or not. It was held to be statutory, and the proceedings were there set aside on grounds which were not argued in this Court. These grounds were stated in substance in the note of suspension presented in the Bill-Chamber, but no argument as to these grounds was submitted to the Court here, when the case came before this Court on the reclaiming note against the Lord Ordinary's interlocutor. All argument as to the formality of the proceedings was abandoned, and we had to address ourselves to other grounds. In the House of Lords that was revived, and there was a separate additional ground, which was the ground of judgment, and which was not argued here at all. But that was essentially a different submission from the present.

The parties here conducted the proceedings without regard to the statute. No ...ht the arbiter was tied down to the rules of the statute at first, but the parties prorogated the endurance of the submission from time to time. I am not prepared, however, to say that that is incompetent in a statutory submission: That has not been decided, and I express no opinion upon it, nor whether parties can revive ...h a submission by merely saying they wish to revive it after the three months have elapsed. I give no opinion upon the absence of a clause in regard to that. But here the parties do prorogate from time to time, and in prorogating they enter into that minute of 6th and 9th November 1846, which gives the arbiter a power to prorogate, which was plainly contemplated from the beginning. At length he pronounces his award. Being of opinion that the Railway Company are right in their contention that this was not a statutory submission, I think it is to be judged of as being not a statutory submission; and we have now to inquire, whether, viewing it in that light, the submission has fallen by reason of the arbiter acting beyond the powers conferred upon him, or whether it has fallen by reason of any ...g else.

When the parties attached to the submission the condition that the arbiter should proceed, and that the submission should be conducted in the manner prescribed by the Lands Clauses Act, I think they imported into it all the forms of procedure, as well as the effect of endurance that that statute provides. But being ... a statutory submission, they had the power, of themselves, as in a court of their own making, and giving the law for the decision of their own case—to relax the condition, and depart from it—and they did depart from the statutory necessity of deciding within three months: They gave power to the arbiter to prorogate. The arbiter, acting on that power, issued a decree-arbitral, and there ... no objection to that decree now as not being statutory. Then came the death of Sir Norman Lockhart, and the question arose, if this is not to be regarded as a statutory submission, then did it fall by his death? and this is ... other branch of the Railway Company's dilemma. Now I do not think that ... result necessarily follows. Like many other dilemmas, this is not so sharp in ... horns when narrowly examined. I think the parties imported into the submission all these conditions of the Lands Clauses Act, but that they had the power ... relax these by mutual consent. They did relax the condition as to the necessity ... deciding within three months—but they did not depart from the provision which preserves the submission alive, notwithstanding the death of one of the parties. ...y allowed it to stand on the provisions of the Lands Clauses Act, and therefore ... remained, with this condition, that it was a submission not to lapse by the death ... party; and that being so, I think that horn of the dilemma is not fatal to ... proceedings under this submission. That was the view taken by Lord Fullerton ... the Bill-Chamber when the suspension was before him, and the other Division of

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the Court took the same view. They were of opinion that the submission did not fall by the death of Sir Norman, and pronounced judgment to that effect. We held, and I see no reason to doubt the soundness of that judgment, that that decision is no *res judicata* here. It was not on a passed note; the decision only went the length of refusing the note; but still it is the expression of opinion of Lord Fullerton and the other Division in that matter, and not to be disregarded altogether as the expression of opinion of the Court. Therefore I come to the conclusion, that the death of Sir Norman was not fatal to these proceedings. The condition of importing the provisions of the Lands Clauses Act remained entire as to this matter, neve having been abrogated by the consent of parties.

The next plea is the 3d, which I have already spoken to. The 4th I have als spoken to. Then comes the 6th plea, embracing several heads, which all procee on the assumption that the submission was statutory. But I am not of opinio that the submission was statutory, and therefore I cannot go into this plea, whic is conditional upon the assumption that it is statutory.

The first head of the plea is, that "it was *ultra vires* and incompetent for th arbiter to proceed by way of interim and final decreets-arbitral: it was incompeten to pronounce any interim decreet-arbitral." If so, then as this submission in it commencement contemplated interim decrees-arbitral, as is expressed in the regis tration clause,—if that be the view which the Railway Company had of what i competent or not under the statute, it goes far to support their second plea, th this was never intended to be a statutory submission.

Second, "It was farther *ultra vires* and incompetent for the arbiter, under th arbitration or the provisions of the Lands Clauses Act, to give decree for damag entirely prospective and contingent." I do not know very well what damage other than prospective, a jury could deal with in estimating the injury to be don to land. It is always prospective damage for amenity. But this applies to som anticipated results of throwing water on the lands. I do not think that it wa incompetent to award damage on this head, for the arbiter must determine a damage done, and to be done to the estate.

The third branch of the plea is, "It was farther *ultra vires* and incompetent fo him to give decree in favour of Sir Norman Macdonald Lockhart for damages whi were assumed as likely to be incurred by tenants whose lands were not travers by the railway, and who were not parties to the submission, and which were al of the nature of prospective and unascertained damage; and these damages bein inseparably mixed up with the damages payable to the defenders, the award is ba *in toto*."

This statement looked perplexing at first; but I have gone through the whol proceedings on that point, and I do not think that there was any incompetency i the award. This plea is put on the footing of the submission being statutory, bu I rather think it might have equally applied to a common law submission, if th award be really *ultra vires* of the arbiter. But I do not think it is so. It is i reference to the injury done to Sir Norman Lockhart's estate, which is travers by the railway—to parts of it, no doubt, through which the railway does not g but that does not make it incompetent, for it is the injury done to the estate whi makes the award competent. The tenants of these parts not traversed by th railway would find difficulty in making a claim against the Railway Company, bu Sir Norman would not, for it is his estate that is damaged. It could not be said th the railway did any injury to the tenants. But Sir Norman's estate suffered. I do not see how the tenants could have answered the statement, we never touche your farm. But Sir Norman's estate was touched, and all the injury done to i was matter for inquiry.

The fourth branch is, "It was farther incompetent to order the execution o works, or to enforce their execution by pecuniary penalties for their non-execution." I think that that is an inaccurate statement of what the arbiter did. It is a per version of the terms used by him. The arbiter did not enforce the execution o works by pecuniary penalties. He said this, "If you execute certain works, I a of opinion that certain consequences will follow to the estate. The cost of th works will be so and so. If not made, the damages to the estate will be so and s Now, before I fix the award for damages to that amount, I give you an opportuni of saying whether you will execute these works." I think that was quite right. T

was beneficial and proper, and gave the Railway Company the option to make the works or not as they pleased. No. 125.

The fifth branch is, "It was farther incompetent to decern for sums without discriminating and specifying the parties who were to take under the decree." That sufficiently distinguishes between the tenants. This is substantially the same thing as that with regard to the tenants whose lands the railway did not run through. But this leads to what I have spoken to already. Therefore, I do not think that in regard to these matters of detail they are grounds for reducing this decree, whether considered as statutory or not. But the plea is only put on the footing of the submission being statutory. Some of the pleas equally apply to any other submission, but I do not think they are valid.

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Such being my view, and being of opinion that this action does not embrace as a ground of reduction Sir Norman's disability of entering into any but a statutory submission; and being of opinion that the submission was truly not a statutory submission, I think that the parties were entitled to attach to it the conditions which the statute provides for the mode of conducting such submissions, and entitled to depart from those conditions by mutual agreement if they chose; that they did attach these conditions, and did depart from some of these, but not from others, and therefore that the decree-arbitral is not reducible on any ground here stated.

Lord Ivory.—I have come to the same result as your Lordship. The first question arises incidentally, how far the record is sufficient to raise the question of disability in the case of an heir under strict entail? If necessary to rest the judgment on that point, I should have had some doubt. Sir Norman is set forth as "heir of entail,"—the very words used in the statute in regard to an heir under disability,—and it is such an expression as might have forced the Court to look into the entail, and the proceedings before the arbiter, to obtain light by which the clear meaning of the record might have been construed. If so, I doubt not that it would have been discovered that Sir Norman was an heir under a strict entail. But farther, even if the general description of Sir Norman as heir of entail could be held fairly to raise the question of his disability, the record is not in proper shape to make that disability a substantive ground of reduction. Indeed the main argument of the pursuers would rather indicate that it was not in that respect that the case was meant to be insisted in. For they say the submission was not a statutory submission, because the subject of it went beyond the matter which the arbiter was empowered by the statute to decide. Then, if it was not a statutory submission, there is little need to call into play that argument as to disability, because any objection that would otherwise have been raised would not apply any more to an heir under a strict entail, than to an heir with plenary right. But I take it on the ground on which your Lordship has rested it, that that is not to be taken as one of the elements on which the present discussion is to rest.

As to the further question, whether the submission is in proper parlance to be held a statutory submission, or a submission at common law, or a mixed submission, there might also be room for difference of opinion. I agree with your Lordship on the whole matter, that it is to be considered as a submission not under the statute, at least not wholly and absolutely under it, but a submission principally deriving its strength and validity from common law, and into which certain statutory privileges have been imported by the voluntary agreement of the parties, acting within their own power at common law, either to narrow or extend the limits of the submission.

This brings me to consider the three principal heads upon which the reasons of reduction were argued. The first of these turned upon the objection that the submission had fallen by reason of the lapse of three months before the award had been pronounced. Now, unquestionably, it does seem to have been the intention of parties, in entering into this submission, that the provisions of the statute as to the endurance of it should be imported into the contract; and I think that, if nothing farther had taken place, it would have been held that the endurance of the submission in its primary constitution, as a common law submission into which the provisions of the statute were imported, was limited, and was intended to be limited, to three months. But whilst that was the case, it does not necessarily follow that, because the endurance of the submission in its conception was limited to three months, that therefore, by the time the arbiter came to pronounce his awards, interim

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and final, the same character applied to it. By that time the parties had unquestionably given their consent to the enlargement of the endurance of the submission by the joint-minute, in which they authorised the arbiter to deal with the matter at any time between the day of , and thereafter to appoint such prorogation as he should think fit. That made the submission, from that time forward, precisely the same in respect of endurance as it would have been, if, in its original form, it had been expressly declared to be a submission to endure in the ordinary common law form, with power to the arbiter to pronounce decree between and the day of , with a power of prorogation given to the arbiter himself to exercise as he might think right.

This raises a very important question, whether it was within the power of the parties—a proprietor of land on the one hand, not being a proprietor under disability, and the Railway Company on the other hand—to enter into any other than a statutory submission, with the statutory limited endurance of three months. I see nothing under the Lands Clauses Act to limit the common law powers of either party in this respect. By force of his natural rights, the proprietor might dispose of his land as he pleased, or he might refuse to dispose of it. He is controlled in the exercise of his right by the compulsory power against him contained in the statute. But there is nothing in the statute to prevent him transacting or entering into a submission with the Railway Company, in such terms as they might mutually agree to. The statute contains no restriction upon the power of either. No doubt, if they do not agree, there are within the statute powers of compulsion given to the one party, and against the other. But if these statutory provisions are not called to the aid of any disagreement as to the mode of settlement, all the plenary rights of parties at common law remain untouched, and certainly one of them is the power of a fee-simple proprietor on the one hand, and a statutory company on the other, to enter into a submission of unlimited endurance, and with unlimited power to the arbiter to deal with all matters without or within the statute. The only limit of the arbiter's power, then, would be the measure of the power given to him by the mutual agreement of parties. Probably there might be so large a portion of an estate taken, and under such circumstances taken possession of at different times, that it might be utterly impossible to deal with the question between the parties within three months, or in any submission which did not give the arbiter full powers to deal from time to time with all contingencies. If the parties had entered into such submission,—which I assume is with a fee-simple proprietor,—setting forth that, because of the peculiarities of the requirements of the Railway Company on the one hand, and the time at which they were to enter into possession on the other hand, and the delays in executing the works, it was impossible to enter into a statutory submission with statutory limitations, that it was necessary to give enlarged powers to the arbiter, and therefore, giving him all the powers of an arbiter at common law, I cannot imagine there is anything in the statute to prevent parties entering into such a submission. If so, and if, in point of fact, not seeing all the difficulties before them, they have entered into a submission, and assumed, but assumed erroneously, that matters might be brought to a bearing in three months, and so have limited the submission to three months, the same inherent power which would have enabled them, if they had seen better, to enter into a submission with longer endurance at first, would equally enable them afterwards to enlarge the powers which they had made originally too narrow. As they might at the outset have entered into a submission with unlimited endurance, so now, finding that the statutory endurance will not suffice for the purpose which it was the object of the submission to accomplish, it is equally competent to them, in the course of the submission, to follow out the purpose which has been partially executed, by extending the submission, enlarging the powers of the arbiter, and so enabling him to decide under these larger powers.

Even under the statute, the consent of parties may do a great deal. Section 24, dealing with a statutory submission, says, in effect, that parties may revoke the appointment of an arbiter, or proceed to the appointment of another, if they consent. I allude to this clause to shew that "consent of parties" is an element which the Legislature contemplate might come into operation; and dealing here with a statutory submission, in which, if consent is not given, the statutory limitation must operate, I draw the inference that the consent of parties was very much in the

view of the Legislature as what would regulate their rights. The same thing is alluded to in the case of Mitchell. It is said by Lord Brougham, in the judgment delivered in that case, that he will not speak of the question whether parties might not renew a submission. These are very much his words. But I infer from the context in which these words are found, that it did press on his Lordship's mind, that if the parties there had done nothing but renewed the submission, that was a matter not beyond their power; and it was the object of the judgment to distinguish between what parties might have done of consent, and what had not been *de facto* done. Therefore, both from the statute and the judgment of the House of Lords, I draw the inference that wherever this element of consent comes into play, it is a most important element to be dealt with in this class of questions in regard to the powers of an arbiter, and the rights of parties.

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I was a good deal struck with the observation—and at first I thought there was more ingenuity than solidity in it, but now I think the reverse—that there is a distinction to be taken under the enactments of this statute between what is properly a compulsory submission, and what is a voluntary submission. The statute says, in the 20th section, that disputes as to compensation may be referred to arbitration. By the 23d section the compensation claimed may be settled by arbitration if the claimant desires; and, by the 35th, if the arbitration or award be not made within three months, "the question of such compensation shall be settled by the verdict of a jury." In that case, either party may originate the proceedings before the jury. The only clause which speaks of a *submission* into which the Railway Company may be *compelled* to enter is the 23d, and there it is left in the choice of the landed proprietor to compel them. Now, if placed in such a position, of course they can only be compelled by force of the statute, and the submission therefore must and can only be a statutory submission. If the landed proprietor insists that the Railway Company *must* enter into a submission by force of the statute, then he cannot compel them beyond the statute, because the Railway Company are at all times entitled to say, our liability is limited to that period authorised by the statute, and upon that period expiring, our position rebounds into one of entire liberty; and, therefore, as you could only compel us to enter into a submission of limited endurance—that limited period having expired, we are by force of that ame statute no longer bound at all. So also in a submission under the 20th clause y mutual agreement of parties. The mutual agreement, of course, is the measure f obligation on either side. It implies that the Railway Company are consenting. ut whilst in treaty, they might refuse to consent to anything but a submission with tatutory conditions, and of statutory endurance, and then it would be not by force f statute, but of the agreement, that these are introduced. But if both parties had id, neither of us want this statutory endurance, we must have a longer submison, in order that all matters between us may be exhausted, and therefore we import into the submission all the forms of the statute otherwise, and which can be vailable to strengthen the hands of the arbiter; but, in the matter of the three nth's endurance, we are satisfied it will not do, and therefore we make the subssion of longer endurance;—then the element of consent comes in, and the pares are on both sides bound by force of the contract, it being a contract into which th parties had power at the date of it to enter, and which is not prohibited by ything in the statute.

Such is the conclusion at which I arrive with reference to a submission between ailway company and a fee-simple proprietor; that is, in the case in which the ument of disability on the part of a proprietor is excluded. But if the question f disability had been here, I do not wish to commit myself to any absolute opinion regard to it; but entertaining a doubt how far that element is raised in the cord, I nevertheless feel bound to say that if it had been here, I should not have t much disturbed by it in reference to any general doctrines on which to proed. The disability is a disability under the statute to sell. The enabling clause a clause which enables an heir of entail, or other party under disability, to sell, d not only to sell, but there are these important words in the clause:—"It shall lawful for all parties being possessed of any lands, or any such right or interest rein, to contract for, sell, convey, and dispose of such lands, or of such right rein, to the promoters of the undertaking, and *to enter into all necessary agreents for these purposes.*"

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ceeded with, on the ground that the above minute rendered it no longer a statutory but a common law submission, which therefore fell by the death of either of the parties. The note was refused. The submission was proceeded with, and interim and final decrees pronounced. In a reduction of these decrees at the instance of the railway company;—*Held* (1.) that the judgment in the Bill-chamber was not *res judicata* in an action of reduction; (2.) that the submission was statutory in so far as it was to be conducted according to the statutory procedure; but that in so far as the parties had themselves modified the provision, limiting its endurance to three months, it was a submission at common law, embodying some though not all of the statutory provisions. Therefore, that it did not fall by the death of one of the parties, and was not reducible by reason of the proceedings not being conducted in strict conformity with the statute—(*diss.* Lord Deas).

Opinion, that the submission was statutory; and *Observed*, that the minute of prorogation left it in doubt whether it was intended to constitute a common law submission, adopting some of the provisions of the statute, or to engraft certain common law provisions upon an existing statutory submission, and also to what extent the common law was to regulate and to what extent the statute, which was a sufficient reason for holding that neither the one thing nor the other had been effectually done.

1st Division.
Ld. Handyside
C.

The late Sir Norman Macdonald Lockhart of Carnwath, Lee, and Covington, died in 1849. This action was directed by the Caledonian Railway Company against the present Sir Norman Macdonald Lockhart, the heir of entail in possession of the estates of Carnwath, Lee, and Covington, and also against the trustees and executors of the late Baronet. It concluded for reduction of two decreets-arbitral, pronounced in an arbitration entered into between the late Sir Norman Macdonald Lockhart and the pursuers, to Lavid Low, Professor of Agriculture in the University of Edinburgh.

The first article of the pursuer's revised condescendence was as follows: —The line of the Caledonian Railway passes through and intersects the lands and estates of Carnwath, Lee, and Covington, in the county of Lanark, which belonged to the late Sir Norman Macdonald Lockhart, Baronet; and in order to the formation of the Railway and works connected therewith, it became necessary for the pursuers to acquire certain portions of these estates. They accordingly, in terms of the provisions of the Lands Clauses Consolidation (Scotland) Act 1845, and in the manner thereby prescribed, gave notice to the said deceased Sir Norman Macdonald Lockhart, the then heir of entail in possession, of their intention to take and acquire certain portions of the said lands and estates, as particularly described in the notices and relative plans delivered to him, for the purposes of the Caledonian Railway Act. And they further required from him the particulars of his interest in the said lands so to be taken, and of the claims made by him in respect thereof.

Article second was as follows:—In obedience to this requisition, the late Sir Norman gave in a claim detailing the compensation claimed by him in respect of the taking of the said lands, and for the damage done by severance, with other claims. The pursuers having declined to pay the amount of compensation claimed, and being unable to come to any agreement with Sir Norman on the subject, an arrangement was entered into for having the claims of Sir Norman disposed of by arbitration.

The deed of submission, after designing the parties, being the pursuers and the late Sir Norman, was as follows:—"That is to say, the said parties, considering that by the Lands Clauses Consolidation (Scotland) Act 1845, entituled 'An Act for consolidating in one Act certain provisions usually inserted in Acts authorising the taking of land for undertakings of a public nature in Scotland,' which is incorporated in and forms part of the Caledonian Act, it is enacted that, subject to the provisions of the said Acts, it shall be lawful for the promoters of the undertaking to agree with the owners, &c.; and that if no agreement be come to between the promoters of the

undertaking and the owners of or parties by the said Acts enabled to sell or convey any lands taken or required for, or injuriously affected by the execution of the undertaking, or any interest in such lands as to the value of such lands or of any interest therein, or as to the compensation to be made in respect thereof, it shall be lawful for the parties to refer the same to arbitration, &c. &c. Therefore the said Caledonian Railway Company and the said Sir Norman Macdonald Lockhart have submitted and referred, and hereby submit and refer to the amicable decision, final sentence, and decreet-arbitral of David Low, professor of agriculture in the University of Edinburgh, as sole arbiter mutually chosen by the said parties, all claims for the value of said lands and others to be taken, used, and occupied by the said Caledonian Railway Company, and in general all claims or demands whatever competent to the said Sir Norman Macdonald Lockhart against the said Caledonian Railway Company, by or in consequence of the said Caledonian Railway Company taking, using, or injuring any part of the said lands for the said railway, or the works or operations of the said Railway Company, in any manner of way whatever, in so far as may be authorised by the foresaid Acts, including accesses and every other claim competent to him against the said Company: Declaring that the said arbiter shall conduct the proceedings to follow hereon, and determine the matters hereby submitted to him, in strict conformity with the rules and regulations under the provisions and conditions specified in the foresaid Act, and of the Acts 8th & 9th Vict. cap. 17 and cap. 33; and the said parties consent to the registration hereof, and of the interim and final decreet-arbitral to follow hereon, in the books of Council and Session, or others competent, that letters of horning on six days charge, and all other execution, may pass on a decreet to be interponed hereto, in form as effeirs," &c.

The deed of arbitration was subscribed by Sir Norman, and by Mr D. Rankine, on behalf of the Caledonian Company, as *secretary*.

The arbiter accepted of the submission on 19th March 1846, and appointed claims and answers, with the plans of the line of railway and grounds to be intersected by the railway, to be lodged with him.

The 24th section of the Lands Clauses Act declares, that after the appointment of an arbiter, " neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as such revocation."

The 35th section provides, that " if, when the matter shall have been referred to arbitration, the arbiter or their umpires shall for three months have failed to make their or his award, the question of such compensation shall be settled by the verdict of a jury."

No award was pronounced in the submission entered into between Sir Norman and the Railway Company within the statutory period of three months. The submission was repeatedly prorogated first by letters or missives of the agents, and then by the following formal minute, dated 6th and [illegible]th November 1846 :—" We, the parties to the within submission, considering that it has been already prorogated from time to time, conform to letters addressed to the arbiter by our agents on our behalf respectively, dated 20th and 22d May, 1st June, 18th of July, and 5th day of October last respectively; and also considering that it is necessary again to prorogate the said [illegible], and that we have agreed that the arbiter shall have power to [illegible] the same in future as hereinafter set forth; do hereby prorogate [illegible] determining the matter submitted, to the day of [illegible] submit to the arbiter within named the whole matters [illegible] the within submission; and whatever the said arbiter shall [illegible] premises, in whole or in part, by interim or final decreet-[illegible] pronounced by him within the above period, or on or before

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any other day to which he may prorogate the submission, which he is hereby empowered to do at pleasure, both parties bind and oblige themselves to acquiesce in and fulfil to each other under the penalty within expressed; and we do hereby homologate and confirm the prorogations granted by our agents respectively above referred to." Mr Rankine subscribed this minute on behalf of the Railway Company as *treasurer*.

The arbiter thereafter subscribed minutes bearing to prorogate the submission on the 4th November 1847, the 31st October 1848, and the 17th October 1849. In each case the period was prorogated "to the day of next."

On the 22d January 1848, after various proceedings in the submission, and notes issued of his views regarding the compensation to be awarded, the arbiter pronounced an interim decreet-arbitral, whereby he awarded L.6000 against the pursuers, and also disposed of certain portions of Sir Norman's claim as to accesses or other works. The draft of this interim decreet was submitted to the agents for the parties, who suggested various remarks or alterations.

On 9th May 1849, Sir Norman Lockhart died. The tutors of the present Sir Norman, and the trustees and executors of the late Sir Norman, then proposed to sist themselves as parties to the submission, which the pursuers opposed on the ground that the submission had fallen by Sir Norman's death. This objection was over-ruled by the arbiter, who sisted the tutors and trustees, and appointed the decreet-arbitral to be completed. The pursuers thereupon presented a note of suspension and interdict, in which they pleaded, that no award or decreet-arbitral having been pronounced and delivered by the arbiter in the submission within three months of its being entered into, nor within three months from the date of the minute of prorogation and renewal, the submission, in terms of the 35th section of the Lands Clauses Consolidation Act, had fallen and become inoperative. Farther, that the submission by the various prorogations, and more particularly by the minute prorogating to the day of next, and giving the arbiter power to prorogate at pleasure, was taken out of the provisions of the Lands Clauses Act, and became a submission, subject to the rules of common law, and so fell by the death of Sir Norman Macdonald Lockhart.

The Lord Ordinary on the Bills (Fullerton) refused the note, and his judgment was adhered to by the Judges of the Second Division on 12th December 1849.[1]

On 20th June 1850 thereafter, the arbiter issued his final decreet-arbitral. In that decreet-arbitral there is the following passage:—"In respect that the sums found due by this and my interim decreet-arbitral aforesaid, include *inter alia* the sum of L.4000 awarded to the said deceased Sir Norman Macdonald Lockhart, as compensation for the damages occasioned to his property by the operations of the said Company in carrying their line of railway across the valley of the Clyde, I find that the said Sir Norman Macdonald Lockhart, and the succeeding heirs of entail, shall relieve the said Railway Company of any claims which his present tenants, whose farms are not intersected by the said railway, may be enabled to establish against the said Company in consequence of their said operations, to the extent of the interest accruing on the said sum of L.4000 from and after the date hereof, calculated at the rate of $3\frac{1}{2}$ per cent per annum, but under deduction of the sum of L.16, 4s. per annum, included in the abatement of L.49, 15s. to be allowed by Sir Norman Macdonald Lockhart to the tenant of Wester Lan-pits, in terms of my said interim decreet-arbitral; and I decern accordingly."

In these circumstances the pursuers brought this reduction of the interim and final decreets. They set forth the above facts, and detailed the pro-

[1] See ante, vol. xii. p. 338.

dure which had taken place before the arbiter. Their pleas in law were as follows:—

"1st, The arbitration and alleged prorogation thereof being informal, and not duly stamped or authenticated or authorised by the shareholders, are not binding on the Company.

"2d, The arbitration cannot be held as statutory, or protected by the provisions of the statute—(1.) Because the subject of the submission goes beyond the matters as to which arbiters are empowered to decide under the provisions of the Lands Clauses Act, and the arbiter did truly deal with such matters. (2.) Because a statutory arbitration terminates by the lapse of the periods prescribed by the Act for disposal of the case, with or without the prorogations rendered competent by statute. An attempt to give an arbiter a power of indefinite prorogation constitutes a new and different kind of arbitration from that which the statute renders competent, and if effectual deprives the proceeding of its statutory character.

"3d, If, on the other hand, the arbitration is to be held as statutory, it fell by the lapse of the statutory period, and the case, under the peremptory provisions of the 35th section, fell to be disposed of by a jury.

"4th, If regarded otherwise than as a statutory arbitration, it fell by the death of Sir Norman Lockhart, one of the parties submitters, and the whole subsequent proceedings were null and void.

"5th, A refusal of a suspension and interdict in the Bill-Chamber forms no *res judicata* as to the merits of the case in which the interdict has been ineffectually craved.

"6th, Upon the assumption that the arbitration was statutory, the decreet-arbitral is otherwise void and null,—In particular, because (1.) It was *ultra vires* and incompetent for the arbiter to proceed by way of interim and final decreets-arbitral: it was incompetent to pronounce any interim decreet-arbitral. (2.) It was farther *ultra vires* and incompetent for the arbiter, under the arbitration or the provisions of the Lands Clauses Act, to give decree for damages entirely prospective and contingent. (3.) It was farther *ultra vires* and incompetent for him to give decree in favour of Sir Norman Macdonald Lockhart for damages which were assumed as likely to be incurred by tenants whose lands were not traversed by the railway, and who were not parties to the submission, and which were also of the nature of prospective and unascertained damage; and these damages being inseparably mixed up with the damages payable to the defenders, the award is bad *in toto*. (4.) It was farther incompetent to order the execution of works, or to enforce their execution by pecuniary penalties for their non-execution. (5.) It was farther incompetent to decern for sums without discriminating and specifying the parties who were to take under the decree.

"7th, The decrees are farther reducible as having proceeded from corrupt partiality and bias, and being in direct opposition to the truth and to the evidence led and adduced in the case, and the proceedings having been irregularly and incompetently conducted.

"8th, Generally, the grounds of reduction being well founded, decreet falls to be pronounced in terms of the conclusions of the action."

The defenders pleaded;—"1. The judgment in the suspension and interdict forms *res judicata* against the pursuers, in so far as they now seek to re-plead the points decided by the Court in the suspension and interdict. 2. The pursuers have not set forth any facts relevant or sufficient to support a challenge of the decreet-arbitral on any of the grounds pleaded or indicated [illegible] in law. 3. In particular, the pursuers have failed to aver or [illegible] either that the arbiter exceeded his powers, or that any of the [illegible] incompetent under the submission. 4. There exist no valid [illegible] in fact or in law, for setting aside the decreet-arbitral now [illegible] challenged.

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The Lord Ordinary, on 14th July 1854, pronounced an interlocutor, reporting the case to the Lords of the First Division.*

* "NOTE.—The Lord Ordinary has thought it fitting to report this case to the Inner House. The pursuers seek substantially a review of a decision in a suspension brought by them several years ago, having agitated the same point of law in the reduction since raised. They contend it is open to them to do this, as an interlocutor in a suspension does not form a *res judicata*. And perhaps they are right in this as a general proposition, though it may require consideration whether, under the circumstances of this case, where the only point in the suspension was that now attempted to be revived in the reduction, they are not disentitled from questioning it as being a concluded issue between the parties. The pursuers might, it is conceived, have carried the judgment in the suspension before the highest tribunal; whereas they submitted. The point was as purely raised in the suspension as it is now stated in the reduction.

"If, however, the pursuers shall be held as not foreclosed by the result of the suspension, the question they renew is one with which the Lord Ordinary, after due consideration, has thought it scarcely suitable for a single Judge to deal; for they dispute the law laid down in the suspension on the ground of a judgment of the House of Lords in a later case between other parties, which they represent as overruling the principles of the decision in the suspension.

"There are other grounds of reduction pleaded to overset the decree-arbitral, but they can scarcely be separated from the objection to the validity of the submission itself and its continuing in force, which were the precise points adjudicated in the suspension. Unless the pursuers should be now successful in obtaining a decision on these points in this reduction, in disregard of the law laid down by the Court in determining the process of suspension, it is thought that the decree-arbitral is not open to any formidable ground of challenge on the objections which otherwise are stated to it.

"The circumstances of the case are shortly as follows:—The Caledonian Railway Company, before entering upon the lands of Sir Norman Macdonald Lockhart, entered into a submission with him to Professor Low as sole arbiter. The subjects of submission are stated in very wide terms, comprehending all claims and demands whatever competent to Sir Norman against the Company, including accesses. It was declared that the arbiter shall conduct the proceedings and determine the matters submitted to him in strict conformity with the rules and regulations and provisions and conditions contained in the Lands Clauses Act and Railway Clauses Act. Power is given to pronounce interim or final decrees-arbitral. There was no specified term of duration of the submission. It was treated as falling under the three months clause, and was prorogated or extended by the parties for successive periods of three months or under, till a general prorogation was executed by them to the day of and a power of further prorogation bestowed on the arbiter himself. This he exercised, continuing the submission till he had pronounced an interim and final decree-arbitral. The first was issued before the death of Sir Norman, the latter after that event.

"The Company attempted to break up the submission on Sir Norman's death, and raised this dilemma:—that it must be held to be either a statutory arbitration or one at common law;—if the former, it was invalid by reason of the proceedings not having been brought to a close within the statutory period, treating the later prorogations as absolutely null, being unauthorised by the statute;—and if to be treated as an ordinary submission at common law, it had fallen by the death of one of the parties. In either view, they pleaded that the submission had come to an end. They presented a note of suspension against the submission being proceeded with, and took judgment upon these points.

"Their note was refused by Lord Fullerton, whose interlocutor was adhered to by the Inner House.

"The pleas thus disposed of by a deliberate judgment are attempted to be revived in this process. The encouragement to it is a case determined in the House of Lords in 1850. The circumstances of that case—the Glasgow Barrhead and Neilston Railway Company v. the Nitshill Coal Company—are, as the Lord Ordinary thinks, very different from the present. The judgment of this Court was reversed

On 26th May 1855,[1] the Court repelled the plea of *res judicata*, in so far as the pleas disposed of in the Bill-Chamber were now revived in this action of reduction. The pursuers now farther pleaded:—(1), That this was not a statutory submission. The subject matter of reference was not merely compensation in the ordinary sense of the term, but also every other claim competent to Sir Norman Lockhart under the Act of Parliament. Now an important class of claims was for accommodation works. Such claims were not disposed of by the statute in the same way as claims for compensation. The Sheriff was constituted the proper judge in the matter, to whom alone parties were by the statute directed to resort. The defenders themselves, in art. 1 of their revised statement, described the submission in question as embracing, (1.) Sums for land taken from the estates of Carnwath, Lee, and Covington; (2.) Sums on account of intersectional and other damages done to land; (3.) A sum for injury to the amenity of the mansion-house of Carnwath; (4.) Value of wood; and *lastly*, The construction of various works, such as roads, bridges, accesses, and embankments, required to be executed by the pursuers for the proper use and protection of Sir Norman's grounds.

That was a description of accommodation works. The submission was entered into for determining that claim. Therefore it was a submission not to determine compensation merely, but also accommodation works. Again, in art. 3, the defenders stated that "the nature of the claim, and course of procedure under the submission, were such as necessarily required a considerable period of time;" and again, in art. 5, "The very purpose of the agreement and power thereby conferred upon the arbiter was to continue and enable him to continue the submission until the whole matter referred to should be finally determined."

The next question was, whether an heir of entail could enter into an

but the appeal was argued on grounds different from those pleaded in this Court, judging from the reports of the case in the Session Reports and Scottish Jurist. The reversal proceeded on the arbitration being held to be purely under the statute; and so the oversman was not duly appointed;—it being held that the prorogation by the parties was to be viewed as a renewed submission, and while it renewed the powers of the arbiters, could not revive the previous appointment by the arbiters of the oversman, which was to be done by a new act of the arbiters themselves, under their renewed powers. These were the special points on which the reversal was rested. But in moving the judgment, views were expressed regarding submissions entered into under the Railway Acts, of more general application, and which of course must be received with the utmost deference.

"This reversal was brought under the notice of the First Division in a suspension,—the Dundee Perth and Aberdeen Railway Company v. Sir John Richardson,—in which it was founded on to affect the validity of the submission and decree-arbitral in that case. The Court held it to have no application, on the ground of the strictly statutory character of the Nitshill arbitration; while in Sir John Richardson's case the submission was considered as being in the ordinary terms, though by declaration of parties there was imported into it all the statutory effects of one entered into under the Lands Clauses and Railway Clauses Acts. The judgment of the Court, however, may be held to have rested on acts of homologation and acquiescence in the decree-arbitral after it had been pronounced. The difficulty in the present case, as the Lord Ordinary apprehends, lies in the terms of the submission itself being apparently statutory and being treated as such by the early prorogation or renewals, till there was afterwards grafted upon it powers of prorogation belonging only, as is conceived, to the ordinary common law submission. What change this shall be held to have effected in its character, appears to the Lord Ordinary, with all humility, to be a question, regard being given to the Nitshill case, which ought to be brought directly under consideration of the Inner House,—and abstains from expressing any opinion of his own."

[1] See ante, vol. xvii. p. 775.

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arbitration for the purpose of determining matter of compensation, except a statutory arbitration; and, (2), whether he could enter into any arbitration whatever in reference to accommodation works. He could do neither. By the common law, an heir of entail could not dispose of any portion of his estate, and therefore, by the common law, the Railway Company could not pass through his estate. But the statute interposed, and conferred authority upon them to take land from entailed estates, and empowered heirs of entail to sell portions of their land for the purposes of the Railway. The conditions upon which that capacity was given must be strictly construed. Therefore, if the pursuer's construction of the statute be right, and if this be not a statutory but a common law submission, then no farther argument was required to establish the soundness of the reasons on which the present reduction was founded.[1]

The defenders now admitted that the submission was not statutory, but pleaded:—That it was competent for the parties to a common law submission to import into it the machinery of the Lands Clauses Act, for the purpose of regulating the proceedings. Nothing more had been done in the present instance. The parties had imported the machinery under the statute to a certain extent, but not so absolutely as to make an absolute adherence to its form of procedure imperative. Thus the limited endurance of a submission to three months was dispensed with, and the submission, therefore, being of that mixed nature, was not open to the technical objections now taken to it.

As to the objection founded on Sir Norman's position as an heir of entail, that was a plea which was competent to the succeeding heir of entail, but which he, having waived, the pursuers had no title to adopt.

At advising,—

Lord President.—In this case we formerly disposed of the fifth plea stated for the pursuers—that is the plea as to the judgment in the Bill-Chamber being *res judicata* in this case. The first, the seventh, and the eighth pleas we have heard nothing about, and I presume they are merely formal, and are not now insisted in. All the others remain.

This is an action of reduction at the instance of the Caledonian Railway Company, directed against the representatives of the late Sir Norman Macdonald Lockhart; and the pursuers call for production of two decreets-arbitral, one dated 22d January 1848, which is an interim decreet-arbitral, and the other, which is a final decreet-arbitral, dated 20th June 1850. These decreets were pronounced by Professor Low, under a submission entered into in 1846 between the Caledonian Railway and Sir N. M. Lockhart, who was then alive. Sir Norman died after the interim decree-arbitral was pronounced, but before the final decree-arbitral was pronounced. His representatives had sisted themselves as parties to the proceedings before the final decree had been pronounced. This action is now brought to reduce and set aside these decrees.

It appears that the Caledonian Railway Company acquired certain portions of the lands belonging to Sir Norman Lockhart. It is stated in article 1 of the pursuers' condescendence, that they gave the requisite notices of their intention to take the land, and required from Sir Norman the particulars of his interest in the lands so taken, and of the claims made by him in respect thereof. Sir Norman, in obedience to the regulation, gave in a claim; but the pursuers having declined to pay the amount of compensation claimed by him, an arrangement was entered into for having the claim disposed of by arbitration. By a submission entered into between the parties, various matters were referred to Professor Low. The submission contained a condition as to the proceedings being conducted in terms of the Lands Clauses Act. In the course of the proceedings there were prorogations of the time for pronouncing the award; and, in particular, a minute of prorogation, giving powers

[1] Glasgow Railway Co., 7 Sidney Bell, 325; Scottish Midland Junction Railway Company, 20th December 1850, ante, vol. xiii, p. 410.

the arbiter to prorogate the submission was signed in November 1856. Interim decree-arbitral was pronounced after various proceedings, and after various orders, by Professor Low, and bears date 22d January 1848. It appoints a certain sum to be paid in a certain way. In 1849 Sir Norman Macdonald Lockhart died. His representatives proposed to sist themselves at that stage of the proceedings; but the Caledonian Railway Company interposed, and refused to allow the submission to proceed, and presented a note of suspension against the proceedings, on the ground that the submission had fallen. That note was refused, and is the note referred to in the fifth plea in law for the pursuers, which I have already mentioned.

In 1850 Professor Low pronounced his final decree, in which it is said that certain of the findings are on matters not submitted to him; and which it was therefore not within his power to decide.

This summons of reduction was raised in March 1852. Among the grounds of reduction argued, there was one to this effect, that in this case the submission, if it was not a submission precisely in terms of the statute, and conducted in exact conformity with the provisions of the Lands Clauses Act, was an incompetent proceeding, inasmuch as Sir Norman, as an heir of entail, was under disability under the statute, and had no power to agree to the price of land to be taken, except either under a submission conducted in terms of the Lands Clauses Act, or by a jury, or by certain valuators to be appointed, in terms of the statute, to fix the amount of the price. That the proceedings here were not proceedings in terms of the Lands Clauses Act at all; that there was no verdict of a jury, and no valuation; and therefore that the whole proceedings were null and void, on the ground of Sir Norman being an heir of entail under disability. A proposal was made at the debate to insert a plea in law to that effect, on the assumption that the statements in the record were sufficient to bring out the facts, and that all that was wanting was a plea in law applicable to them. I think that after the course this case has taken, it is out of the question to admit any such plea; and I am of opinion that there is no ground of reduction founded on the disability of Sir Norman to be a party to the submission. I shall not detain your Lordships by examining the statements on record. They are not calculated to lay a foundation for such a plea; but they are not here in form as a ground of reduction, and that part of the argument I hold to be out of the case which we are called on to decide.

Being of that opinion in regard to what is not before us, I do not express any opinion on what would be the merits of such a ground of reduction if it were here, nor do I hold that the pursuers are excluded from afterwards founding upon it. I pronounce no opinion at all, and do not wish to be misunderstood as expressing a doubt on the one side or the other. I do not say that I have no opinion, but I do not express it. Neither is it pleaded as a ground of reduction, that the Railway Company have no power to settle the price of land taken by them by any kind of arbitration except an arbitration in terms of the statute. I pronounce no opinion upon that point. Such a plea might perhaps amount to a repudiation of a great deal done by the Railway Company in this submission. Although I may have an opinion on that subject too, I do not express it.

These two elements being out of the case, I proceed to examine the case as presented to us; and to consider whether the grounds of reduction stated are sufficient for setting aside the decrees-arbitral, interim and final, pronounced under the submission, or whether they are not. The pleas in law which embody the grounds of reduction, are the 2d, 3d, 4th, and 6th. These grounds of reduction are put forward in an alternative form: It is said that the submission was either a statutory submission, or it was not. The pursuers put this dilemma. They say, if it was a statutory submission, it fell by the lapse of time, and by reason of the procedure not being conformable to the statute. If it was not a statutory submission, it fell by reason of the death of one of the parties submitters. There are some subordinate questions raised as to whether the arbiter exceeded his powers; but, substantially, these are the views now submitted to us.

The first view taken by the Railway Company is this, that the submission cannot be held to be statutory, or protected by the statute, because of certain things:—"1st, because the subject of the submission goes beyond the matters as to which arbiters are empowered to decide under the provisions of the Lands Clauses Act, and the

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arbiter did truly deal with such matters. 2d, Because a statutory arbitration terminates by the lapse of the periods prescribed by the Act for disposal of the case, with or without the prorogations rendered competent by statute. An attempt to give an arbiter a power of indefinite prorogation constitutes a new and different kind of arbitration from that which the statute renders competent, and if effectual deprives the proceeding of its statutory character." Upon these grounds the pursuers hold that the submission cannot be regarded as statutory. The submission itself is peculiarly expressed. I am not prepared to differ from the statements set forth here, that it goes beyond matters as to which arbiters are empowered to decide under the provisions of the Lands Clauses Act; and I am not prepared to say that it may not be competent in a statutory submission as to the price of land to introduce other matters, if the parties choose to have these matters so regulated. But I think that this submission does go beyond the matters which arbiters are empowered to decide under the provisions of the Lands Clauses Act. It goes beyond the matter of fixing the price, and the compensation to be made generally for the taking of land. It embraces, in particular, the matter of accesses. That is expressly made the subject of submission. I have not seen the claim made by Sir Norman, which formed the subject of the reference. There is a statement of the import of the claim, in the first article of the statement for the defenders; but the claim itself is not here, and I do not see that he demanded an arbitration under the statute. The statement bears that he made a certain claim, and, the Railway Company not being disposed to pay the sum, that it was agreed to enter into the submission now before us; and it was entered into, embracing matters, as the Railway Company say, beyond the scope of the statutory arbitration. I am not at all surprised that the parties should have adopted that course, because it appears from the proceedings in the submission, that a great many other things required to be adjusted in the making of the railway, and that it depended on whether these were done one way or other, what should be the amount of compensation to be awarded to Sir Norman, or whether there should be any compensation at all. At various stages of the proceedings, the arbiter gave the Railway Company the choice to say whether they would perform certain operations suggested by him, so as to avoid the necessity of compensation, or whether they would abstain from performing them; in which case there would be a certain award of damages. All that implied that the consideration of these things formed the condition of the discussion before the arbiter, embracing also the question as to accesses, which I think the parties had power to submit if they chose. There is nothing to prevent them. On the contrary, it is competent for the Railway Company to compound for part of the amount of compensation to which Sir Norman might be entitled in place of accesses; and if they could not agree, they could refer it to arbitration. Therefore I see nothing incompetent in settling that by arbitration; but I agree that it is not within the Lands Clauses Act, nor the proper matter of this submission. But here it was made matter of submission, and the arbiter could regulate the compensation according to what he might think were the accesses the party should get. When a case goes to a jury, it is common for the parties to settle what are the accesses, in order that the jury may know precisely what they are doing. That is done constantly.

All these things were brought under the consideration of this arbiter in a general submission. The words of the submission are very broad. Everything that could arise between the parties is referred. The submission also contains a clause of registration, and a clause consenting to letters of horning on six days' charge,—consequences which the statute does not attach to a decree-arbitral.

Looking to that, I am rather disposed to think that the Railway Company are right in their contention that this was not a strict statutory submission, and I think I see a reason for that in the number of matters referred. There is a great deal to be said for these things being submitted to an arbiter such as Professor Low; and I may mention, that the proceedings under this submission go on very much in a way that indicates that the parties did not regard it as strictly a statutory submission. There is a clause in it that the arbiter shall proceed in conformity with the rules and conditions of the statute. I know nothing in the common law of Scotland in regard to submissions which would prevent the parties from introducing a condition of that kind into a submission, although they did not hold it to be a strictly statutory sub-

mission. They might choose to limit the period for issuing the award to three months. They might choose to provide in that way that the submission should not fall by the death of one of the parties. They might choose to provide for various other events provided for by the statute, although they might not make it a strictly statutory submission. They might choose to add to it conditions as to issuing letters of horning, and so forth. This is differently expressed in many respects from the submission in the case of the Nitshill Company. Upon looking into the terms of that submission, I observe that it is knitted up with the statutes in a way that does not occur here. This one is merely connected with the statute by a declaration that the arbiter shall conduct it in terms of the statute.

In the case of Nitshill, a good deal of discussion took place elsewhere as to whether that was a statutory submission or not. It was held to be statutory, and the proceedings were there set aside on grounds which were not argued in this Court. These grounds were stated in substance in the note of suspension presented in the Bill-Chamber, but no argument as to these grounds was submitted to the Court here, when the case came before this Court on the reclaiming note against the Lord Ordinary's interlocutor. All argument as to the formality of the proceedings was abandoned, and we had to address ourselves to other grounds. In the House of Lords that was revived, and there was a separate additional ground, which was the ground of judgment, and which was not argued here at all. But that was essentially a different submission from the present.

The parties here conducted the proceedings without regard to the statute. No doubt the arbiter was tied down to the rules of the statute at first, but the parties prorogated the endurance of the submission from time to time. I am not prepared, however, to say that that is incompetent in a statutory submission: That has not been decided, and I express no opinion upon it, nor whether parties can revive such a submission by merely saying they wish to revive it after the three months have elapsed. I give no opinion upon the absence of a clause in regard to that. But here the parties do prorogate from time to time, and in prorogating they enter into that minute of 6th and 9th November 1846, which gives the arbiter a power to prorogate, which was plainly contemplated from the beginning. At length he pronounces his award. Being of opinion that the Railway Company are right in their contention that this was not a statutory submission, I think it is to be judged of as being not a statutory submission; and we have now to inquire, whether, viewing it in that light, the submission has fallen by reason of the arbiter acting beyond the powers conferred upon him, or whether it has fallen by reason of any thing else.

When the parties attached to the submission the condition that the arbiter should proceed, and that the submission should be conducted in the manner prescribed by the Lands Clauses Act, I think they imported into it all the forms of procedure, as well as the effect of endurance that that statute provides. But being not a statutory submission, they had the power, of themselves, as in a court of their own making, and giving the law for the decision of their own case—to relax that condition, and depart from it—and they did depart from the statutory necessity of deciding within three months: They gave power to the arbiter to prorogate. The arbiter, acting on that power, issued a decree-arbitral, and there is no objection to that decree now as not being statutory. Then came the death of Sir Norman Lockhart, and the question arose, if this is not to be regarded as a statutory submission, then did it fall by his death? and this is the other branch of the Railway Company's dilemma. Now I do not think that that result necessarily follows. Like many other dilemmas, this is not so sharp in the horns when narrowly examined. I think the parties imported into the submission all these conditions of the Lands Clauses Act, but that they had the power to relax these by mutual consent. They did relax the condition as to the necessity of deciding within three months—but they did not depart from the provision which preserves the submission alive, notwithstanding the death of one of the parties. They allowed it to stand on the provisions of the Lands Clauses Act, and therefore it remained, with this condition, that it was a submission not to lapse by the death of a party; and that being so, I think that horn of the dilemma is not fatal to the proceedings under this submission. That was the view taken by Lord Fullerton in the Bill-Chamber when the suspension was before him, and the other Division of

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the Court took the same view. They were of opinion that the submission did not fall by the death of Sir Norman, and pronounced judgment to that effect. We held, and I see no reason to doubt the soundness of that judgment, that that decision is not *res judicata* here. It was not on a passed note; the decision only went the length of refusing the note; but still it is the expression of opinion of Lord Fullerton and the other Division in that matter, and not to be disregarded altogether as the expression of opinion of the Court. Therefore I come to the conclusion, that the death of Sir Norman was not fatal to these proceedings. The condition of importing the provisions of the Lands Clauses Act remained entire as to this matter, never having been abrogated by the consent of parties.

The next plea is the 3d, which I have already spoken to. The 4th I have also spoken to. Then comes the 6th plea, embracing several heads, which all proceed on the assumption that the submission was statutory. But I am not of opinion that the submission was statutory, and therefore I cannot go into this plea, which is conditional upon the assumption that it is statutory.

The first head of the plea is, that "it was *ultra vires* and incompetent for the arbiter to proceed by way of interim and final decreets-arbitral: it was incompetent to pronounce any interim decreet-arbitral." If so, then as this submission in its commencement contemplated interim decrees-arbitral, as is expressed in the registration clause,—if that be the view which the Railway Company had of what is competent or not under the statute, it goes far to support their second plea, that this was never intended to be a statutory submission.

Second, "It was farther *ultra vires* and incompetent for the arbiter, under the arbitration or the provisions of the Lands Clauses Act, to give decree for damages entirely prospective and contingent." I do not know very well what damages, other than prospective, a jury could deal with in estimating the injury to be done to land. It is always prospective damage for amenity. But this applies to some anticipated results of throwing water on the lands. I do not think that it was incompetent to award damage on this head, for the arbiter must determine all damage done, and to be done to the estate.

The third branch of the plea is, "It was farther *ultra vires* and incompetent for him to give decree in favour of Sir Norman Macdonald Lockhart for damages which were assumed as likely to be incurred by tenants whose lands were not traversed by the railway, and who were not parties to the submission, and which were also of the nature of prospective and unascertained damage; and these damages being inseparably mixed up with the damages payable to the defenders, the award is bad *in toto*."

This statement looked perplexing at first; but I have gone through the whole proceedings on that point, and I do not think that there was any incompetency in the award. This plea is put on the footing of the submission being statutory, but I rather think it might have equally applied to a common law submission, if the award be really *ultra vires* of the arbiter. But I do not think it is so. It is in reference to the injury done to Sir Norman Lockhart's estate, which is traversed by the railway—to parts of it, no doubt, through which the railway does not go, but that does not make it incompetent, for it is the injury done to the estate which makes the award competent. The tenants of these parts not traversed by the railway would find difficulty in making a claim against the Railway Company, but Sir Norman would not, for it is his estate that is damaged. It could not be said that the railway did any injury to the tenants. But Sir Norman's estate suffered. I do not see how the tenants could have answered the statement, we never touched your farm. But Sir Norman's estate was touched, and all the injury done to it was matter for inquiry.

The fourth branch is, "It was farther incompetent to order the execution of works, or to enforce their execution by pecuniary penalties for their non-execution." I think that that is an inaccurate statement of what the arbiter did. It is a perversion of the terms used by him. The arbiter did not enforce the execution of works by pecuniary penalties. He said this, "If you execute certain works, I am of opinion that certain consequences will follow to the estate. The cost of the works will be so and so. If not made, the damages to the estate will be so and so. Now, before I fix the award for damages to that amount, I give you an opportunity of saying whether you will execute these works." I think that was quite right. It

was beneficial and proper, and gave the Railway Company the option to make the works or not as they pleased. No. 125.

The fifth branch is, "It was farther incompetent to decern for sums without discriminating and specifying the parties who were to take under the decree." That sufficiently distinguishes between the tenants. This is substantially the same thing as that with regard to the tenants whose lands the railway did not run through. But this leads to what I have spoken to already. Therefore, I do not think that in regard to these matters of detail they are grounds for reducing this decree, whether considered as statutory or not. But the plea is only put on the footing of the submission being statutory. Some of the pleas equally apply to any other submission, but I do not think they are valid. Feb. 25, 1857. Caledonian Railway Co. v. Lockhart.

Such being my view, and being of opinion that this action does not embrace as a ground of reduction Sir Norman's disability of entering into any but a statutory submission; and being of opinion that the submission was truly not a statutory submission, I think that the parties were entitled to attach to it the conditions which the statute provides for the mode of conducting such submissions, and entitled to depart from those conditions by mutual agreement if they chose; that they did attach these conditions, and did depart from some of these, but not from others, and therefore that the decree-arbitral is not reducible on any ground here stated.

Lord Ivory.—I have come to the same result as your Lordship. The first question arises incidentally, how far the record is sufficient to raise the question of disability in the case of an heir under strict entail? If necessary to rest the judgment on that point, I should have had some doubt. Sir Norman is set forth as "heir of entail,"—the very words used in the statute in regard to an heir under disability,—and it is such an expression as might have forced the Court to look into the entail, and the proceedings before the arbiter, to obtain light by which the clear meaning of the record might have been construed. If so, I doubt not that it would have been discovered that Sir Norman was an heir under a strict entail. But farther, even if the general description of Sir Norman as heir of entail could be held fairly to raise the question of his disability, the record is not in proper shape to make that disability a substantive ground of reduction. Indeed the main argument of the pursuers would rather indicate that it was not in that respect that the case was meant to be insisted in. For they say the submission was not a statutory submission, because the subject of it went beyond the matter which the arbiter was empowered by the statute to decide. Then, if it was not a statutory submission, there is little need to call into play that argument as to disability, because any objection that would otherwise have been raised would not apply any more to an heir under a strict entail, than to an heir with plenary right. But I take it on the ground on which your Lordship has rested it, that that is not to be taken as one of the elements on which the present discussion is to rest.

As to the further question, whether the submission is in proper parlance to be held a statutory submission, or a submission at common law, or a mixed submission, there might also be room for difference of opinion. I agree with your Lordship on the whole matter, that it is to be considered as a submission not under the statute, at least not wholly and absolutely under it, but a submission principally deriving its strength and validity from common law, and into which certain statutory privileges have been imported by the voluntary agreement of the parties, acting within their own power at common law, either to narrow or extend the limits of the submission.

This brings me to consider the three principal heads upon which the reasons of reduction were argued. The first of these turned upon the objection that the submission had fallen by reason of the lapse of three months before the award had been pronounced. Now, unquestionably, it does seem to have been the intention of parties, in entering into this submission, that the provisions of the statute as to the endurance of it should be imported into the contract; and I think that, if nothing further had taken place, it would have been held that the endurance of the submission in its primary constitution, as a common law submission into which the provisions of the statute were imported, was limited, and was intended to be limited, to three months. But whilst that was the case, it does not necessarily follow that, because the endurance of the submission in its conception was limited to three months, that therefore, by the time the arbiter came to pronounce his awards, interim

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and final, the same character applied to it. By that time the parties had unquestionably given their consent to the enlargement of the endurance of the submission by the joint-minute, in which they authorised the arbiter to deal with the matter at any time between the day of , and thereafter to appoint such prorogation as he should think fit. That made the submission, from that time forward, precisely the same in respect of endurance as it would have been, if, in its original form, it had been expressly declared to be a submission to endure in the ordinary common law form, with power to the arbiter to pronounce decree between and the day of , with a power of prorogation given to the arbiter himself to exercise as he might think right.

This raises a very important question, whether it was within the power of the parties—a proprietor of land on the one hand, not being a proprietor under disability, and the Railway Company on the other hand—to enter into any other than a statutory submission, with the statutory limited endurance of three months. I see nothing under the Lands Clauses Act to limit the common law powers of either party in this respect. By force of his natural rights, the proprietor might dispose of his land as he pleased, or he might refuse to dispose of it. He is controlled in the exercise of his right by the compulsory power against him contained in the statute. But there is nothing in the statute to prevent him transacting or entering into a submission with the Railway Company, in such terms as they might mutually agree to. The statute contains no restriction upon the power of either. No doubt, if they do not agree, there are within the statute powers of compulsion given to the one party, and against the other. But if these statutory provisions are not called to the aid of any disagreement as to the mode of settlement, all the plenary rights of parties at common law remain untouched, and certainly one of them is the power of a fee-simple proprietor on the one hand, and a statutory company on the other, to enter into a submission of unlimited endurance, and with unlimited power to the arbiter to deal with all matters without or within the statute. The only limit of the arbiter's power, then, would be the measure of the power given to him by the mutual agreement of parties. Probably there might be so large a portion of an estate taken, and under such circumstances taken possession of at different times, that it might be utterly impossible to deal with the question between the parties within three months, or in any submission which did not give the arbiter full powers to deal from time to time with all contingencies. If the parties had entered into such submission,—which I assume is with a fee-simple proprietor,—setting forth that, because of the peculiarities of the requirements of the Railway Company on the one hand, and the time at which they were to enter into possession on the other hand, and the delays in executing the works, it was impossible to enter into a statutory submission with statutory limitations, that it was necessary to give enlarged powers to the arbiter, and therefore, giving him all the powers of an arbiter at common law, I cannot imagine there is anything in the statute to prevent parties entering into such a submission. If so, and if, in point of fact, not seeing all the difficulties before them, they have entered into a submission, and assumed, but assumed erroneously, that matters might be brought to a bearing in three months, and so have limited the submission to three months, the same inherent power which would have enabled them, if they had seen better, to enter into a submission with longer endurance at first, would equally enable them afterwards to enlarge the powers which they had made originally too narrow. As they might at the outset have entered into a submission with unlimited endurance, so now, finding that the statutory endurance will not suffice for the purpose which it was the object of the submission to accomplish, it is equally competent to them, in the course of the submission, to follow out the purpose which has been partially executed, by extending the submission, enlarging the powers of the arbiter, and so enabling him to decide under these larger powers.

Even under the statute, the consent of parties may do a great deal. Section 24, dealing with a statutory submission, says, in effect, that parties may revoke the appointment of an arbiter, or proceed to the appointment of another, if they consent. I allude to this clause to shew that "consent of parties" is an element which the Legislature contemplate might come into operation; and dealing here with a statutory submission, in which, if consent is not given, the statutory limitation must operate, I draw the inference that the consent of parties was very much in the

view of the Legislature as what would regulate their rights. The same thing is alluded to in the case of Mitchell. It is said by Lord Brougham, in the judgment delivered in that case, that he will not speak of the question whether parties might not renew a submission. These are very much his words. But I infer from the context in which these words are found, that it did press on his Lordship's mind, that if the parties there had done nothing but renewed the submission, that was a matter not beyond their power; and it was the object of the judgment to distinguish between what parties might have done of consent, and what had not been *de facto* done. Therefore, both from the statute and the judgment of the House of Lords, I draw the inference that wherever this element of consent comes into play, it is a most important element to be dealt with in this class of questions in regard to the powers of an arbiter, and the rights of parties.

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I was a good deal struck with the observation—and at first I thought there was more ingenuity than solidity in it, but now I think the reverse—that there is a distinction to be taken under the enactments of this statute between what is properly a compulsory submission, and what is a voluntary submission. The statute says, in the 20th section, that disputes as to compensation may be referred to arbitration. By the 23d section the compensation claimed may be settled by arbitration if the claimant desires; and, by the 35th, if the arbitration or award be not made within three months, " the question of such compensation shall be settled by the verdict of a jury." In that case, either party may originate the proceedings before the jury. The only clause which speaks of a *submission* into which the Railway Company may be *compelled* to enter is the 23d, and there it is left in the choice of the landed proprietor to compel them. Now, if placed in such a position, of course they can only be compelled by force of the statute, and the submission therefore must and can only be a statutory submission. If the landed proprietor insists that the Railway Company *must* enter into a submission by force of the statute, then he cannot compel them beyond the statute, because the Railway Company are at all times entitled to say, our liability is limited to that period authorised by the statute, and upon that period expiring, our position rebounds into one of entire liberty; and, therefore, as you could only compel us to enter into a submission of limited endurance—that limited period having expired, we are by force of that same statute no longer bound at all. So also in a submission under the 20th clause by mutual agreement of parties. The mutual agreement, of course, is the measure of obligation on either side. It implies that the Railway Company are consenting. But whilst in treaty, they might refuse to consent to anything but a submission with statutory conditions, and of statutory endurance, and then it would be not by force of statute, but of the agreement, that these are introduced. But if both parties had said, neither of us want this statutory endurance, we must have a longer submission, in order that all matters between us may be exhausted, and therefore we import into the submission all the forms of the statute otherwise, and which can be available to strengthen the hands of the arbiter; but, in the matter of the three month's endurance, we are satisfied it will not do, and therefore we make the submission of longer endurance;—then the element of consent comes in, and the parties are on both sides bound by force of the contract, it being a contract into which both parties had power at the date of it to enter, and which is not prohibited by anything in the statute.

Such is the conclusion at which I arrive with reference to a submission between a railway company and a fee-simple proprietor; that is, in the case in which the argument of disability on the part of a proprietor is excluded. But if the question of disability had been here, I do not wish to commit myself to any absolute opinion in regard to it; but entertaining a doubt how far that element is raised in the record, I nevertheless feel bound to say that if it had been here, I should not have felt much disturbed by it in reference to any general doctrines on which to proceed. The disability is a disability under the statute to sell. The enabling clause is a clause which enables an heir of entail, or other party under disability, to sell, and not only to sell, but there are these important words in the clause:—" It shall be lawful for all parties being possessed of any lands, or any such right or interest therein, to contract for, sell, convey, and dispose of such lands, or of such right therein, [illegible] promoters of the undertaking, and *to enter into all necessary agreements* [illegible] *purposes.*"

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It appears to me that there is nothing in that enabling clause which bears on the question of arbitration. Arbitration is but one of the kinds of machinery by which a disputed question of compensation may be determined. But it is a mere piece of machinery by which the thing may be done. It is not essential to enable the proprietor to sell. He may sell, if he pleases, and at a price fixed by himself. Of course the price must be agreed to on the other side. He may sell by a common-law arbitration, if the other party consent. And I do not read the word arbitration in section 9, which provides for the ascertaining of compensation in the case of parties under disability, as different from the agreements spoken of in section 7, which empowers parties possessed of lands, or having right or interest therein, to sell the same to the promoters of a railway scheme, and to enter into all necessary agreements. I think that a submission is one of those agreements which the seventh section authorises. A proprietor under disability may enter into arbitration, and the terms of that arbitration may be as full as if he were a fee-simple proprietor, provided they are agreed to on the other side. Holding that to be the construction, I do not think that section 9 merely applies to an arbitration that is necessarily a statutory arbitration, but may be of that kind which becomes one of the "agreements" by which a sale may be carried out, and under which, as by an "agreement," the price between the parties may be settled. It is not necessary to have an after proceeding of testing that price by two valuators. But if I were wrong in that, there is another mode in which the terms of the statute may be satisfied, namely, that the parties not being at one as to the price, may agree that it be settled by a neutral party, in whom they have confidence, and so place themselves in the hands of an arbiter. I do not say that in such a case, if they were to make the arbitration of that limited character, they would bring the matter to a further point than if they had settled the price between themselves. The price, in that case, would still require to be tested by the valuation of two valuators, in terms of section 9, and shewn not to be less than the value of the subject. But it might be so much more; and, in the present case, it is clear that the Railway Company could not obtain benefit in that way by valuation, for their complaint is that they have been mulcted too severely. But be that as it may, what I point at is, that it is an answer to a reduction of a decree-arbitral, as a decree, if it went no further than settling the price of the compensation. Because, whilst the price of it falls below the test, it would not be binding on the heirs; if above the test, it will be binding. The parties would be entitled to have the statutory test of valuation applied, but not entitled to have the award struck down *de plano*, without the application of the statute.

With reference to this matter of the three months' limitation, there is certainly nothing in the statute to show that it was ever intended to have a different application with reference to different classes of proprietors. If it is not to have a restrictive operation against a fee-simple proprietor, it does not appear that it is to have any restrictive application against a proprietor under disability. A proprietor under disability must be unable to sell. But when you come to deal with arbitration as applied to his case, it is to be dealt with as in the case of a proprietor with ability to sell. He is entitled by the statute to sell; and arbitration in his case, as a piece of machinery for arriving at the price, is precisely the same as the statute has given, and chiefly given for the case of a fee-simple proprietor. And that was what I meant to say, when I observed that a proprietor under disability was not affected by that three months' clause more than the other.

Upon the whole, therefore, so far as regards the limitation of three months, I am perfectly satisfied that the parties had the power to enter into a submission, of which there should be no limitation; and having entered into a submission, in which it may be argued that it was meant there should be a limitation,—having power to do so, they have been pleased, by their own act, to withdraw the limitation, and extend the submission into one of such endurance as they had the power to execute from the first; and that being the case, the lapse of the three months has nothing to do with the matter.

I should have had little or no hesitation in regard to the result of my deduction, had it not been for the use in the argument of the decision in the case of Nitshill. In that case, as I read it, I can make no more out of the judgment of the House of Lords than this. The case was one in which there had been a submis-

sion entered into (as was ultimately assumed on all hands), on the ground of its being a statutory submission, and one, therefore, which was to be followed out in terms of the statute. I entirely agree with the line of judgment, that, being a statutory submission, you must treat it as such out and out. But even as a statutory submission, it was a submission as to which the judge who delivered the judgment seemed to say that he did not dispute the powers of the parties to renew the submission,—to have done something by consent which would disturb its existence as a statutory submission. That goes a great way. But the ground on which the judgment was rested was this, that when the parties came to renew the submission, they only renewed the power of the arbiters; but already they had named an oversman, and when the deed had expired, and was revived, they did not reappoint the oversman, which was the first step they ought to have taken; and therefore the award being the award, not of the arbiters, but of an oversman appointed under an expired statutory submission which had fallen to the ground, and not nominated by the parties, and not consented to at all, there was no jurisdiction in the oversman under the statute, and therefore that the whole proceedings must fall to the ground. That is the whole extent of that judgment, and, so limited, I quite agree with it. But that does not apply to the present case. There were here not two arbiters, and no oversman. There was a single arbiter, and nothing had to be revived but his power; and therefore, even if this had been a question more approaching that of Nitshill, the elements on which that case was decided are not here, and the case comes nearer our own case of Richardson, where the matter was dealt with as a matter which the parties themselves had under control, and which they might waive, just as they might waive any other proceeding under the statute. And so, if the case had gone to a jury trial, there are many things under the statute which they might enforce, and which they might waive. It is not a statutory matter, in that absolute sense, that if not done in a particular way, the party shall not have it in his power to waive it as if it were a statutory solemnity. This three months clause is a provision inserted for the benefit of parties, to avoid delays which might be very prejudicial to them, but not to disturb their primary powers, where necessity arises to prorogate of consent, so as to enable the arbiter to deal with the questions submitted to him in the way that shall be most advantageous to the parties.

There are two cases in the English books which arose under English civil law procedure,—of no force as direct authority; but which present an analogy to submissions having a three months clause. In one of them there was power given to the parties to submit their case in Court, to be decided within three months, unless the parties, by written consent, should prorogate the time. The three months elapsed, and the parties, without a statutory consent, yet *de facto* consented to prorogations. The award was pronounced, and a challenge was brought, on the ground that this was entirely a statutory submission, that the party had no power to deal with it, inasmuch as he had no written act of the parties to authorise him, and that it was therefore out of his jurisdiction. But the Court held that the party, having *de facto* consented, and gone on with the submission, was not entitled to take the plea that he had not consented in writing, and that there was a want of statutory technicality; that consent being a matter which prorogated jurisdiction, and having been given really, or *rebus et factis*, and the party not being able to repudiate the fact that the consent was so given, was barred from afterwards challenging the proceedings. Just so here. There is a radical jurisdiction in the submission, as originally entered into. There is consent to prorogate, and the award has been pronounced under that prorogation; and on that ground it is impossible to hold that the result ought to be other than your Lordship has arrived at.

The next point for consideration is whether this submission, not being statutory, lapsed by the death of one of the parties. Now, unquestionably it is a general rule of submission law, that, in an ordinary submission, in ordinary circumstances, if one of the parties dies, the submission falls. But it seems to me, as to your Lordship, that there are specialties, which take the present case out of that category.

In [illegible] it is perfectly clear that parties may provide, under a common law [illegible], that it shall exist notwithstanding the death of one of them. [illegible] competent for them, by reference, to import the provision of

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a statute which stipulates that the submission shall survive, notwithstanding the death of one of the parties. They have done so here. The judgment in the suspension was authority of the strongest kind for that; and the result is, that notstanding the death of Sir Norman Lockhart, the submission subsists, and is still binding upon his representatives and the Railway Company.

Apart from that, there is a great deal, in the special circumstances of this case, upon which to hold that the death of one of the parties does not cause the fall of the submission. The matters which it was intended to settle implied continuous arrangement between the parties for the purchase and sale of land. In the meanwhile, before the submission was brought to a close, the understanding was,—and the contract of parties shewed that that understanding was carried into effect,—that the Railway Company should enter into possession, and have the disposal of the lands, and change their whole structure and state of existence. It appears, farther, that in consequence of the railway operations, and whilst proceedings were taking place, year after year, in this submission, there were progressive and connected arrangements with reference to the land; and now the land has been so converted into the property or possession of the Railway Company, that it is impossible to obtain *restitutio in integrum*. There is no ground of title or right in the Railway Company, except possession obtained in this way, and none at all independent of the submission. The disability which they now call into their own aid only seems to me to complicate and aggravate their position; for if they never had a good submission, they got into possession by the act of one heir, but they have no title with the new heir; and though he is willing, they will not abide by the settlement arranged with his predecessor; and, therefore, are the Company, in this situation, to remain in possession for ever? It is impossible to say that that is a position in which they are entitled to say that the submission is to fall by the death of one of the parties. I hold the submission to have been for the purchase and sale of lands under which possession was to be given instantly, and I hold that that formed an integral part of the larger contract of sale. If it had stood there alone, I should have held that the death of one of the parties did not put an end to the submission; but I am quite satisfied with the footing on which your Lordship has been pleased to put it.

On the third head, I have never felt satisfied that I quite understood the ground on which the pursuers went. I concur in your Lordship's views as to the alleged prospective nature of the damage for which compensation was awarded. The pursuers have not made it clear to me upon what ground they rested this branch of their case; but it appears to me that a good deal in regard to it has been done by the arbiter, in such a shape as might have been done otherwise. If the operations are to be gone into, and allowances to be made to the tenants, then a certain result is to follow. If the operations are not to be gone into, then the proprietor is to obtain a larger compensation. The arbiter has provided for both alternatives, and I think that was quite within his power. I concur entirely with your Lordship's views on this branch as on the other branches of the case.

Lord Curriehill.—Your Lordship having fully stated the facts of the case, I shall proceed at once to state the grounds in law on which my opinion is rested.

There are some things, with which the only question before us has been unduly confounded in argument, and which, being quite irrelevant to that question, it is desirable to clear away. In the first place, what are here challenged are only the interim decree-arbitral pronounced on 22d January 1848, and the final decree-arbitral pronounced 20th June 1850. These are the only things of which reduction is craved. The submission, on which these awards proceeded, is not challenged, and no reduction of it is concluded for. I therefore deal with the decrees-arbitral as pronounced under a submission which we must hold to be valid and effectual.

In the next place, I think we have only to deal with those reasons of reduction which have been pleaded. There is a long list of reasons of reduction, some stated absolutely, others alternatively; but several of them were not argued, and it was stated by the pursuers' counsel that those only are insisted in which were pleaded at the hearing.

And, thirdly, we are not to deal with any reason of reduction which is not on the record. I make this remark, because, at the last debate, a new ground of reduction was introduced, viz., that one of the parties submitters, the late Sir Norman Macdonald Lockhart, was under disability to enter into such an arbitration, in re-

pect he was an heir of entail. But, although it is stated incidentally in the 1st and 16th articles of the condescendence that Sir Norman was an heir of entail, this is nowhere set forth as a ground of reduction of the decrees-arbitral under challenge. As in this action there is only a challenge of the actings of the *arbiter* under an unchallenged submission, a very explicit statement of facts and pleas in law would be requisite to shew that the fact of one of the submitters having been an heir of entail disabled the arbiter from pronouncing decrees-arbitral under such a submission. Even if an action of reduction of the submission itself had been instituted on the ground of Sir Norman having been disabled by the entail of his estate from entering into it, the pursuers must have set forth on the record that the entail contained some prohibition which imposed such disability, and which is fenced with proper irritant and resolutive clauses; for, unless this were the case, he would not have been disabled from even selling the estate,—far less from entering into a submission of this kind. And, when what is challenged is not the submission itself, nor any act of the parties submitters, but only the actings of the arbiter under the unchallenged submission, a still more particular statement and pleas would be necessary to shew how the fact of Sir Norman being an heir of entail has any relevancy to that challenge. But there is nothing of that kind in the record in this case. And, without setting the Judicature Act at defiance in a manner that would make our judgment a nullity, we are not entitled to take that plea into consideration. And, accordingly, it appears from the Lord Ordinary's note that this plea was not stated to him. It has been resorted to only at the last debate in the Inner House. And however it may be dealt with if an action of reduction of the submission itself and the proceedings following on it should be instituted on this ground, it is not within the present action; and I have formed and shall now state my opinion on the merits of this case upon that footing.

Of the pleas which are on the record, only four have been insisted in; and these, when viewed apart from the extraneous matters above mentioned, are not attended with difficulty. 1. The first is, that the submission, as is alleged, was limited in its endurance to three months, and that everything done after that date was null and void. It is said,—not that there is any such limitation expressed in the deed of submission itself, or at common law,—but that, under the 35th section of the Lands Clauses Act, such submissions as are there referred to come to an end if the final award be not pronounced within three months. Even supposing that to be the true construction of the enactment, the answer made to it is satisfactory,—namely, that the parties themselves enlarged the time. I think that they did so both by their prorogations and by their continued pleading after the three months. Even had there been nothing but such continued pleadings, it would have been sufficient, as was decided in the case of Fleming, 7th July 1827. In the present case, there was much more than such implied prorogations. In November 1846, long after the three months had expired, the parties entered into a new written agreement. There they narrate the agreement that had been originally entered into, and then they say,—"We have agreed that the arbiter shall have power to prorogate the same in future, as hereinafter set forth." That is not all: they proceed thus,—"And the parties of new submit to the said arbiter within named the whole matters embraced under the within submission," and so forth. Therefore, even supposing there had been originally introduced into this submission the three months limitation clause in the 35th section, here the parties, by a most express deed, departed from that limitation, and conferred on the arbiter express power to determine not only within a period which is construed as extending to a year, but within any further time to which he might think proper to prorogate the submission. This being the footing on which the parties contracted, their contract is binding upon them, unless it was unlawful; and there is nothing stated in the record which could prevent the parties from so contracting.

It is said that this was a statutory submission. Even had it been so, I would not be prepared at present to dissent from the view stated by Lord Ivory on this subject. All that the clause in the statute says is, that if the arbiter shall not determine the [illegible] within three months, it shall be settled by a jury. It is not a necessary [illegible] this use of the words "shall be settled" that the parties may not enter [illegible] submission, or may not prorogate as long as they think proper. [illegible] settled," are repeatedly used in this statute, but never in [illegible]. The 19th section declares that the amount of the price

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and compensation, if not settled by agreement within twenty-one days, "shall be settled" in the manner prescribed for settling disputed claims. But could it be maintained that the parties, although after the lapse of that period they should come to an agreement as to the amount of the price and compensation, would not have power to settle in conformity with their agreement, and would be compelled either to have an arbitration, or a jury trial? I do not think that can be maintained. Again, the 28th section says,—"If, when a single arbiter shall be appointed, such arbiter shall die or become incapable to act before he shall have made his award, the matters referred to him *shall be determined* by arbitration, under the provisions of this and the special act, in the same manner as if such arbiter had not been appointed." Now, could it be maintained, on the contingency here spoken of, that it would not be competent for the parties either to settle by agreement or by jury trial? These are two examples where the use of the words "shall be settled" do not warrant the construction put upon them by the Railway Company.

Although I make these remarks as to what might be the effect of this if it were a statutory submission, I do not think that this was its character. Indeed the parties appear to be agreed as to this,—the pursuers having pleas in law to this effect, and the defenders at the debate having pleaded on the same footing. It comprehended matters which were not competent in a statutory submission, at least under a compulsory statutory submission. It referred to those matters of accesses which are to be dealt with only under the Railway Clauses Act, and could be settled by compulsion only in the manner therein pointed out. But, whatever the original submission may have been, it was not under it that the decrees-arbitral were pronounced. This was done under the new submission entered into in November 1846, wherein the parties not only lengthened the time, but conferred on the arbiter himself the power to prorogate, which is not competent under a compulsory statutory submission. Then it stipulates that summary diligence should pass; a matter also incompetent under such statutory submission. The submission, therefore, under which the decrees-arbitral were pronounced not having been a compulsory statutory submission, and the parties having expressly authorised the prolongation of its endurance this reason of reduction is groundless.

2. The next ground is, that the submission expired by the death of Sir Norman Here again I am not at present prepared to differ from the general views stated by Lord Ivory, although I think they are attended with difficulty. The submission was entered into for the purpose of ascertaining the price and damages arising under a compulsory sale of land. This was a contract of sale where implement had been given on one side by the pursuers being put into possession, and by certain things being done which could not be rescinded. And the principle under which it has been held that an arbitration entered into as part of a contract of sal subsists, notwithstanding the death of either of the contracting parties, may b applicable to a case of this kind.

I do not, however, rest my opinion on that ground. My ground is this: A though by the common rules of law, a submission may expire by the death one of the parties, it is competent for the parties to stipulate that it shall not expire. That such stipulation is binding and effectual is settled by the case Ewing, 19th December 1820. The parties here did enter into such an agreemen They did so, not indeed in express words,—but by incorporating as the cond tion of their submission the rules of certain Acts of Parliament, including t Lands Clauses Act. One of the rules for conducting submissions is contained the 24th section of that Act, whereby it is enacted that the submission shall n expire by the death of either of the parties. The case of Richardson, 31st Janu 1851, is an authority for holding that a submission framed in this way renders t rules so referred to and adopted conditions of the submission. Therefore th reason of reduction appears to me also to be groundless.

Other two grounds of reduction, although not anxiously pressed, were adver to at the debate, and therefore we must dispose of them. They are stated on record only on the footing of the submission being statutory, and as I hold t assumption to be groundless—and indeed both parties, as already stated, plead case upon this footing—it may not be necessary for me to say more as to th pleas. I will just, however, state what my views are on their merits.

3. One of these pleas is, that the interim award was qualified by the declarat —"*Secundo*, I find that on implement by the said Railway Company of

preceding finding, the said Sir Norman Macdonald Lockhart and the heirs of entail succeeding to him in the estates shall, out of the rents payable to him and them, grant to the several tenants under named, on the said estates of Carnwath, Lee, and Covington, the following annual abatements or deductions respectively," for the remainder of their leases which were current when the Railway Company entered into possession of the ground, and that *pro tanto* of the sums found due to them in a separate decree-arbitral. It is said to have been incompetent for the arbiter to pronounce his award on that footing. I see no incompetency in the matter at all; for what does the finding amount to? Several of these tenants, through whose lands the railway had gone, were entitled to damages, and they entered into similar submissions with the Railway Company to the same arbiter; and the arbiter having thus the whole matter before him, found the tenants entitled to indemnification, by getting annual deductions from the rents payable by them to the landlord. And that being so settled, it was properly found in the submission with the landlord that the compensation payable by the Company for these damages should be paid, not to the tenants who thus received their indemnification from the landlord and his successors, but to the landlord and his successors. The amount is assessed in the clearest and most precise terms, and there is no uncertainty about it.

4. The only remaining ground is, that the final decree-arbitral was incompetent, because there is the following finding:—(see supra, p. 530).

The compensation which is here awarded is for damage done to the defender's estate. His estate is a *unum quid*, and the damage done to that whole estate amounts to so much. That he is entitled to. The condition annexed to this finding was to protect the pursuers against the risk of any claims for indemnification from a different set of tenants, whose farms on the estate were not intersected by the railway, it not having been then a settled point whether or not parties in that predicament are entitled to compensation. But it is now settled that parties whose possessions are not touched by the railway at all are not entitled to compensation. The pursuers accordingly do not allege that any claim has been made, or even threatened, against them by any tenant of farms so situated. On the contrary, the pursuers expressly state on the record that no such damage is claimable. According, therefore, to their own pleading, this reservation in their favour was unnecessary. At all events, the introduction of that precautionary reservation in their favour cannot be founded upon by them as affecting the validity of the decree-arbitral.

The pursuers say that even the landlord is not entitled to compensation for damage alleged to be done to that part of his estate. But, with regard to him the case is quite different. His estate, being a *unum quid*, was damaged by the railway, and the compensation awarded was for the damage which the arbiter found to be done to the whole estate. That finding of the arbiter being final, cannot be reviewed by us; and there being no allegation in the record that the pursuers, or any other party, have any claim under the precautionary reservation in their favour, there is no legal ground for disturbing the decree-arbitral.

Lord Deas.—I should be glad if I could concur in the judgment proposed to be pronounced by your Lordships. For, I daresay this action has been instituted mainly because the result of the submission has not been in accordance with the pursuer's views and expectations. But, after the best consideration I can give to the case, I have been unable to find legal grounds for holding the decreets-arbitral to be binding upon the parties.

Upon one point I have formed my opinion without difficulty, and that is, that the submission must be held to have been entered into under and with reference to the Lands Clauses (Scotland) Act, 1845, and other Acts incorporated therewith. The submission proceeds upon the narrative of that Act, and of the power contained in it to refer to arbitration, as well as on the narrative of the special Act. It refers to arbitration all claims for the value of lands taken and for injury done to the lands, by the works or operations of the Railway Company, "in so far as may be [illegible] by the foresaid Acts, including accesses, and every other claim [illegible] him" (the claimant) "against the said Company, declaring hereby that the [illegible] shall conduct the proceedings to follow hereon, and determine the [illegible] submitted to him, in strict conformity with the rules and regulations, [illegible] the provisions and conditions specified in the foresaid Acts," [illegible] Clauses Act and Railways Clauses Act; all of which Acts, your [illegible], are incorporated with each other.

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I cannot look upon this as anything else than a statutory submission. The main, if not the only, reason urged at the bar, for holding it not to be so, was that it includes all claims connected with accesses, which, it was said, can only be disposed of by the Sheriff or two Justices, under section 61 of the Railways Clauses Act. But I do not so read that enactment, which appears to me to contemplate the case of parties being willing, or having agreed, or of one or other of them insisting that the Railway Company shall actually proceed to execute the accommodation works necessary, and *then* a difference arising as to "the kind or number of any such accommodation works, or the dimensions or sufficiency thereof, or respecting the maintaining thereof,"—but that it does not prevent the parties from including, if they please, all claims connected with accommodation works, or arising from the want of them, in the statutory submission. And I am confirmed in this by the subsequent sections of the Railways Clauses Act, from 62 to 66 inclusive, with reference to works executed by the owner himself, and the effect, upon his rights, of his "having received, or agreed to receive, compensation for, or on account of, any such communications, instead of the same being formed," as well as by the terms of the Lands Clauses Act, which appear to me to connect the matter of arbitration, under section 20, with the matter of notice by the Company under section 17, so as to enable the parties to include in the arbitration everything included in the notice, which demands from the owners "the particulars of their interest in such lands, and of the claims made by them in respect thereof," and intimates the readiness of the Railway Company to treat for *all* such claims. Nor am I prepared to hold, supposing this were otherwise, that, by including in the submission all claims connected with accesses, or, (as the words of this submission may equally well import) all claims for compensation for the want of accesses, this would convert the submission into a common law submission, or prevent it from being a statutory submission as to matters falling within the statute. Acting upon it as a statutory submission the arbiter, in his minute of acceptance, appointed copies of the Acts of Parliament to be lodged with the clerk,—obviously for the purpose of being guided by these Acts in his proceedings.

And here it appears to me that in construing the deed of submission, we cannot lay out of view the fact, stated in article 1st of the revised condescendence, that Sir Norman Macdonald Lockhart, who entered into it, and who is now dead, was "the then heir of entail in possession" of the estate, with reference to which the submission was entered into. It is true we have no plea in the record founded on the incapacity of an heir of entail to enter into any other than the statutory submission; and the plea tendered, to that effect, by the Railway Company, has not been received by your Lordships. But we have *the fact* stated and admitted that Sir Norman was the heir of entail in possession, which means, I think, the heir in possession under a strict entail; and is, indeed, just the phraseology used in the statute to describe such an heir. And, although, in the absence of any plea to that effect, we cannot set aside the decreets-arbitral in so far as they may be held to proceed upon a common law submission, on the ground that it was *ultra vires* of an heir of entail to enter into such submission, I do not think we can overlook either the fact or the law applicable to such an heir in considering whether the submission and the minute which followed on it, or either of them, can fairly be construed as a common law submission.

Now it humbly appears to me that to suppose Sir Norman to have entered into a common law submission for fixing the price of land taken and compensation for permanent injury to the entailed estate, would be to suppose him to have done what he had no power to do;—a supposition not readily to be adopted.

It is true that by sections 6 and 7 of the Lands Clauses Act it is declared lawful for the promoters to agree for the purchase, and for all parties, including heirs of entail, to sell to the promoters, the lands required for the purposes of the undertaking. But all this, as is provided in the outset of section 6, is "*subject to the provisions of this and the special Act,*" and, consequently, to the provision in section 9 that the purchase money or compensation for lands, &c., to be purchased or taken from persons under disability, shall not, except where determined by the Sheriff or a jury, or by arbitration (meaning, obviously, I think, the statutory arbitration), or by a valuator appointed by the Sheriff, "be less than shall be determined by the valuation of two able practical valuators," one to be named by each

party, and, if they disagree, thenby a third valuator appointed by the Sheriff,—a certain declaration being to be annexed to the valuation, and the money being appointed to be consigned for the benefit of those interested.

It is also true that certain subsequent sections, commencing with section 17, are introduced by the words,—"And with respect to the purchase and taking of lands *otherwise* than by agreement, be it enacted as follows:" But this, obviously, does not imply that the preceding sections are applicable exclusively to lands taken by agreement. On the contrary, it has been seen, that the provisions of section 9 are applicable equally whether the lands be "*purchased*" or whether they be "*taken* from any party under any disability;" and, in either case, the price is to be fixed *in one or other* of the compulsory modes subsequently prescribed, or to be not less than shall be determined by a valuation made and certified in the manner already referred to.

Nor is it surprising that the Legislature should thus have protected the interests of heirs of entail. On the contrary, it would, I think, have been surprising had a power been conferred on the heir in possession to deal with and dispose of the estate without some safeguard being provided for the protection of the interests of subsequent heirs.

Holding, then, the submission to have been statutory, the next question is whether its nature was changed, and, if so, to what effect, by anything afterwards done by the parties?

If changed at all, this must have been done by the mutual minute of 6th and 9th November 1846:—for there is no other writing, under the hands of the parties, which can possibly be said to have had this effect.

Now, laying aside the technical objection, that Mr Rankine, who had signed the original submission as *secretary*, signs this minute as *treasurer*, and, assuming the minute to be duly subscribed on the part of the Railway Company, as well as by the owner, I am not able to regard it as having the effect, which is now attempted to be attributed to it, of converting the submission into a common law submission, and, at the same time, retaining, in that common law submission, all the provisions of the statute, except in so far as these were inconsistent with the extension of the period of endurance and with the indefinite power of prorogation said to have been thereby conferred upon the arbiter.

If the original submission was statutory, and if the heir of entail had no power to enter into any other than a statutory submission, it is not easy to suppose that the object of the minute, of 6th and 9th November 1846, was to convert this statutory submission, which was valid and binding on the parties, into a common law submission, which, being *ultra vires* of one of them, would be binding upon neither. It is still less easy to suppose that the object was to convert it into a common law submission, in which certain provisions of the statute, different from the common law rules, should be inferentially held to be embodied and others to be superseded or rejected;—a species of submission of which we have, hitherto, had no example, even between parties under no legal disability.

In place of its being clear that this *was* the object of the parties, I profess myself unable to tell, with any certainty, from the terms of this minute, *what* was their object. The minute narrates that "the within submission"—that is to say the statutory submission—had been prorogated by certain letters, on looking to which we see that the professed object of these letters was simply to prolong the time within which the arbiter, to whom they were addressed, might act upon his statutory powers. The minute farther narrates "that it is necessary again to prorogate the said submission"—that is to say the statutory submission,—"and that we have agreed that the arbiter shall have power to prorogate *the same* in future"—that is to say the same statutory submission; and then it goes on to the effect that they do prorogate the time to the day of , and of new submit the matter to the arbiter, and empower him to prorogate the submission at pleasure.

Judging, from the language here employed, I should rather be disposed to say that the object was to engraft upon the statutory submission certain provisions not in the statute, than to say that the object was to enter into a common law submission which should embody some, though not all of the statutory provisions, by force of the consent of parties. Accordingly the minute is written upon the same sheet of paper with the statutory submission. It is admittedly not stamped as a separate

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and common law submission; and, while unstamped, I do not know how your Lordships can look at it as such. The fact of its being on the same sheet, and without stamp, rather indicates that the object was to prolong the statutory submission, than that the object was to enter into a common law submission, in which some things were to be borrowed from the statute, and others not.

I do not say it was beyond the power of parties, under no disability, to take this last course. But I think the deed of submission, by which it was done, would require to be expressed in very clear and appropriate terms. We have had no instance of such a deed; and it will be time enough to judge of it when it comes. I cannot hold, from the terms of it, that this minute was intended to form such a deed. Nor, if so intended, can I hold that the thing intended has been aptly and effectually done. Moreover, I should say that, even if regarded in the light contended for, the fair inference, from the terms of the minute, would be, that *the endurance* of the submission was altogether taken out of the statutory provisions, and brought under the common law, whether such endurance depended upon the lapse of time, or upon the survivance of the parties, or of the arbiter, for the deaths of whom, respectively, provision is made by sections 24, 25, and 28 of the statute. In dealing with the matter of endurance, must not the minute be held to regulate *everything* relating to the endurance, whether depending upon lapse of time or upon survivance? Can it be held that such language as is here employed would confer the power to prorogate, indefinitely, not merely on the existing arbiter, or arbiters, but upon any arbiter or arbiters who might come in his or their place, by force of sections 25 and 28 of the statute? I cannot arrive at that conclusion; and yet this must be implied in holding that the minute, although professing to regulate the endurance, does not regulate the endurance *in all respects*, as I think it must be held to do if it can be read at all as a common law submission, which embodies certain of the provisions of the statute, and not others.

The other view of it,—that the object of the minute was not to adopt some of the statutory provisions into a common law submission, but to engraft certain common law provisions upon an existing *statutory* submission,—would be still more difficult to extricate; for not only has this not been expressed, as it would require to be, in terms leaving no room to doubt the meaning of the parties, but I do not well see how it could be done at all consistently with the terms of the statute, which confers powers and privileges, and gives certain effects to the procedure under and in virtue of the statutory submission, but not to procedure under and in virtue of another and a different submission which the parties may compound out of the common law and the statute. Moreover, if common law provisions were held to be here engrafted on the statutory submission, the observation would again occur that the common law, being introduced to regulate the matter of endurance, must regulate that matter in all respects, whether depending on the lapse of time or survivance.

But the mere fact that we are left in doubt, on the face of this minute, whether it was intended to constitute a common law submission adopting some of the provisions of the statute, or to engraft certain common law provisions upon an existing statutory submission,—together with the fact that, whichever of these may have been intended, it is left in doubt to what extent the common law was to regulate, and to what extent the statute, seem to me to be sufficient to prevent us from holding that either the one thing or the other has been effectually done here. If the thing could be done at all, it would require to be done in clear and unambiguous language, very different from what is employed in this minute.

The minute might perhaps be construed as a new statutory submission;—reading "the day of ," as authorising a new statutory period of endurance, and the power to prorogate as importing merely the *statutory* power to prorogate. But this would not serve the defenders' purpose, and it is unnecessary therefore to speculate upon it. For supposing that the statutory submission could be, and had been, competently renewed, the submission would still have fallen equally by reckoning the time from the date of the minute, as by reckoning it from the date or acceptance of the original submission. If, again, the common law be the rule, there can be no question that the submission fell by the death of one of the parties.

If *the minute* did not effectually prorogate or renew the submission, it seem

clear enough that nothing which intervened between the date of that minute and the date of the decreets-arbitral can have that effect. Even in a common law submission, neither the actings nor the letters or writings of agents, not specially authorised, would have this effect, or be binding on the parties. This (as Mr Parker observes, p. 83), has been repeatedly decided. The case of Fleming, referred to by Lord Curriehill, was a case in which both parties appeared personally, and pleaded before the oversman after the lapse of the period, and the party who afterwards objected to the award had written holograph letters to the oversman, asking farther delay. As to homologation of the decreets-arbitral, whether interim or final, it is admitted that nothing of that kind has taken place here. On the contrary, before the interim decreet-arbitral had been issued, or had even been seen by the Railway Company, Sir Norman Lockhart, who entered into the submission, had died, and the Railway Company had, thereupon, intimated their objection to all farther proceedings under it.

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Nor can I give any effect to the argument that the submission, here, was part of a contract of sale, and so endured indefinitely, notwithstanding the death of either of the parties. It was not the deed of submission, but the statutory notice given by the Company, under section 17, of what they were to take, which formed the contract of sale. The *price* might, thereafter, be fixed in various ways. But the submission to fix the price, whether it be regarded as a statutory or common law submission, has no resemblance to an agreement to buy lands at a price to be fixed by arbiters, where the fixing of the price in that particular manner is part of the contract of sale, without which the contract cannot be carried into effect. It is only in cases of that kind that a submission forms and subsists as a part of the contract, in place of falling like an ordinary submission.

I have only to add, that, although the defender's whole argument was rested upon the footing that this submission was originally, or, (alternatively) that it became, by the minute of November 1846, either wholly or partially, a common law submission, I can find neither statement nor plea, upon the defender's part, to that effect in this record. On the contrary, his second statement bears that the submission was entered into in virtue of the Lands Clauses Act. I do not, therefore, see how a view so special as that which is now relied on could be given effect to, under this record, even if it were well founded in itself, which I humbly think it is not.

The Court pronounced the following interlocutor:—"The Lords, on report of Lord Handyside, Find that the 1st, 7th, and 8th pleas in law for the pursuers are not now insisted on, and that their 5th plea in law has been in effect already disposed of by the Court's interlocutor of 26th May 1855; and having heard counsel for the parties on the remaining parts of this cause, and considered the whole cause, and the procedure therein, Repel the reasons of reduction, and assoilzie the defenders from the whole conclusions of the summons, and decern: Find the pursuer liable in expenses to the defenders, with the exception of the expenses incurred in the discussion on the 1st plea in law for the defenders in May 1855: Find the defenders liable to the pursuers in the expenses of that discussion: Appoint accounts to be put in, and remit to the Auditor to tax the same and to report."

Hope, Oliphant, & Mackay, W.S.—Bell & M'Lean, W.S.—Agents.

The Right Hon. the Earl of Buchan, Pursuer.—*D. F. Inglis—Penney.* No. 126.
The Scottish Widows' Fund and Life Assurance Society, Defenders.
—*Sol.-Gen. Maitland—Moir.*

Jury trial—Issues—Writ—Reduction.—A disposition containing a clause of redemption was signed with the sum blank. When redemption was proposed, a sum had been filled in. The granter brought a reduction, alleging that the blank which existed at the date of execution existed also at the date of delivery, and

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had been improperly filled up with a sum larger than the understanding of parties warranted. The defence was that the deed was signed before the transaction was completed, and before it was possible to ascertain the sum to be inserted, but that it remained in the custody of the pursuer's agent, and was filled up in concert with him in terms of the bargain before delivery;—*Held* (*abs.* Lord Wood) that the pursuer was not bound to put in issue that the blank was in the deed when delivered, but only when subscribed.

Question, Whether, in answer to such an issue, it would be open to the defenders to prove their whole defence.

Issues adjusted to try the question.

2D DIVISION.
Ld. Handyside
I.

IN 1841, the Earl of Buchan, through his agent, Mr Patrick Forbes, W.S., entered into communings with the Scottish Widows' Fund and Life Assurance Society, with a view to obtaining a loan of L.35,000 on redeemable annuity, secured over various estates of which he was heir of entail in possession. Policies of insurance had been previously opened on the Earl's life in various offices, to the amount of L.22,900. These were to be assigned in security of the advance, and new policies were to be opened to cover the difference, and the premiums were to be met out of the rents of the estates.

According to the defenders' averment, which, however, was not admitted, "the premiums of insurance on some of the policies became payable before any annuity could be received by the defenders under the bond to be granted by the pursuer, and in order to protect them from risk of loss," it was agreed "that it should be provided in the bond, that in the event of redemption there should be paid to the defenders, in addition to a fine of one quarter's annuity, twice the amount" of the proportions of the premium effeiring to the period between the time when they fell due and the completion of the transaction.

A redeemable bond of annuity and disposition in security in favour of the trustees of the Assurance Company by the Earl, with consent of Lady Buchan, was accordingly prepared, containing the usual clauses applicable to such transactions, the clause of redemption declaring—"that the foresaid annuity and the foresaid lands, &c., shall be redeemable by me from the said trustees, and their foresaids, . . . by my making payment of or tendering to them or . . . consigning for their behoof, but at my charge and risk, in the hands of the manager for the time of the British Linen Company, within their banking office in Edinburgh, the sum of with all and every sum or sums of money which shall be due," &c. The bond contained no clause touching the fine of a quarter's annuity, or any other penal or other sum in addition to the provision for repayment of the money advanced, interests and premiums and charges, and no sum of redemption money. It was prepared by Messrs Gibson-Craig, Dalziel, and Brodie, W.S., the law-agents of the defenders; and after being extended, was by them laid before the pursuer, and signed by him and the Countess, his wife, in Edinburgh, on 28th January 1842, and the deed was immediately after ratified by the Countess.

The pursuer alleged, "the bond was then carried away by these gentlemen, the defenders' law-agents, and was never farther or otherwise in the pursuer's or in Mr Forbes' possession. The deed was continuously in the hands of Messrs Gibson-Craig, Dalziel, and Brodie, the defenders' law-agents, or of some party acting for the defenders, after the same was executed." And in Art. 17 of his condescendence, he alleged—"Sometime after 9th March 1842, the defenders, or their agents, without any authority from the pursuer or the Countess of Buchan, who was a consenter to the deed, and without the knowledge even of any person assuming to act on their behalf, took upon themselves to insert, or cause to be inserted, in the blank in the redemption clause, the words, 'Thirty-seven thousand seven hundred and fifty-eight pounds, fifteen shillings, and tenpence sterling.'"

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The defenders, on the other hand, alleged in their 8th statement of facts, "Although the bond of annuity was signed by the pursuer on the 28th January 1842, several policies of insurance had not been opened at that date, and the transaction was not completed till on or about the 11th March 1842. In consequence of all the policies not having been opened, and the requisite calculations having been made when the bond was signed, a blank was left in it for the amount of the redemption-money; but before the transaction was completed, and before the bond was delivered by Mr Forbes, the pursuer's agent, to the defenders, the blank was filled up by inserting the sum of L.37,758, 15s. 10d. with Mr Forbes' consent and approbation—the redemption-money having been calculated in the manner above explained,* and on the principles previously agreed upon. After the deed had been so completed in terms of the agreement, it was delivered by Mr Forbes, as agent for the pursuer, in exchange for the advance of L.35,000 on the 11th March 1842."

The money having been thus advanced, the interest and premiums were duly paid till 1852, when notice of redemption was given, and it was in the course of making the necessary arrangements for that purpose that the present dispute arose between the defenders and the pursuer's new agents, Messrs Graham and Webster, who contended that the Earl of Buchan was entitled to redeem on payment of L.35,000, which sum was accordingly consigned in the British Linen Company's Bank, and the Earl brought the present action of declarator of redemption on payment of the L.35,000, and reduction as regards the words L.37,758, 15s. 10d.

After unsuccessful attempts to get parties to make such admissions as to the facts as would enable him to dispose of the case without any proof being led, the Lord Ordinary pronounced the following interlocutor:—"Finds that the parties are at issue on the following questions, viz.:—Whether the bond of annuity, though signed by the pursuer on or about 28th January 1842, was left with his agent Mr Forbes, and was not delivered by him to the defenders till on or about 11th March 1842? Whether, before delivery, the blank in the bond, referred to in article 8th of the defenders' revised statement of facts, had been filled up, by inserting the sum of L.37,758, 15s. 10d., with Mr Forbes' consent and approbation? And that it is proper that a proof before answer should be allowed on these points, allows a proof accordingly; and appoints the trial of these questions to take place before the Lord Ordinary without a jury, and that," &c.

The defenders reclaimed, praying that a proof generally of the facts still in dispute might be allowed, or that issues should be ordered with a view to jury trial, which last course was adopted, and the pursuer proposed the following issues:—

"1. Whether the words 'Thirty-seven thousand seven hundred and fifty-eight pounds fifteen shillings and tenpence sterling,' contained in the clause of redemption of the bond of annuity granted by the pursuer, the Right Hon. Henry David Erskine Stewart, Earl of Buchan, with consent of his wife, the Right Hon. Caroline Rose Maxwell, Countess of Buchan, to the defenders, bearing date the 28th January 1842, were inserted in the said bond subsequently to the subscription of the said bond by the said Earl and Countess?

* This sum was made up as follows:—

Sum advanced	L.35,000	0	0
Fine of Quarter's annuity (*i.e.*, ¼ of L.3778, 2s. 3d.)	944	10	6
Double the proportion of premium from the dates when they severally became payable . . .	1814	5	4
	L.37,758	15	10

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"2. Whether, on or about the 15th day of May 1852, the pursuer, the Earl of Buchan, duly redeemed the said bond, by making payment himself, or by another or others for his behoof, to the defenders of the sum of L.35,000?"

The defenders, on the other hand, proposed that the pursuer should take the following issue:—

"Whether the words, 'Thirty-seven thousand seven hundred and fifty-eight pounds fifteen shillings and tenpence sterling,' contained in the clause of redemption of the bond of annuity granted by the pursuer, the Right Hon. Henry David Erskine Stewart, Earl of Buchan, with consent of his wife, the Right Hon. Caroline Rose Maxwell, Countess of Buchan, to the defenders, bearing date the 28th January 1842, were inserted in the said bond, wrongously and contrary to the understanding and agreement of parties?"

The pursuer contended, that truly the *onus* lay here on the defenders, whose admissions were sufficient for his case, the deed having been admittedly signed blank as regards the sum in the clause of redemption; that blank and clause were not necessary to make the deed operative, and no one without the direct assent of the party was entitled to fill up the blank. As to that part of it the deed was improbative; and to that extent it was not binding between the parties, and the defenders are deprived of it. It was not a question of statutory nullity under the Act 1696, but of a deed which may be available in consequence of personal exception. As to the delivery, the pursuer denied having ever seen it after subscription; and, indeed, it was not asserted by the defenders that he had been present when the blank was filled up. He did not even know when it was filled up. It had all along been in the control of the defenders—how, then, could he be called upon to prove anything as to the filling up? The *onus* lay on the defenders; if they founded on the words in that clause, they must prove that the filling up was with the consent of the pursuer.

The defender contended, that the *onus* lay on the pursuer of the reduction to prove the allegations in his 17th article upon which his action was based. The Earl of Buchan must have intended the blank in the deed to be filled up; and that being so, everything covered by the testing clause was obligatory upon him. This clause was so covered, it was part of a probative deed *ex facie* good. Such a deed may be written over a blank signature intended for a totally different purpose; still, if *ex facie* probative, the whole deed was good till reduction. Here the pursuer felt that it would not be sufficient to say that the deed was signed blank; and, accordingly, he does not rest with saying so, but avers that it was not filled up at the time of delivery, but was filled up afterwards improperly, and contrary to the understanding of parties. These allegations he must surely prove; and if he did, then he must cut down the deed altogether, and not merely to a certain effect. It was important to observe that this was a unilateral deed by the pursuer, and that the attempt to destroy its effect was made by the granter. This could not be done in the ordinary case without distinct allegation of fraud, or other tampering with the deed. It would not do for him to found upon their admission as to the deed having been signed blank. That admission was qualified, and the pursuer could only take advantage of it in the terms in which it was made—the party wishing to set aside a probative deed must take the issue and prove all that was necessary; and it would not suffice to prove the fact that the blank existed at the date of signature. The case was quite different from that of erasure—the proof of which destroyed a deed; but a whole deed might be written after signature, and still it might be good.[1]

The Court delivered the following opinions:—

LORD JUSTICE-CLERK.—I have considered this case much, because it is important in itself, and because the principle should be fixed. If the case of Cairns had been

[1] Smith v. Bank of Scotland, 4th July 1816, F.C.

reported fully, perhaps the present point might never have arisen, for it was decided on the very point whether the issues should be framed in the manner Lord Buchan here proposes. The parties could give us no information, but I sent for the pleadings. The question put in issue is, whether certain words were in the deed or not. This may be a step in the reduction, but it is not the reduction itself. The deed may have been blank when signed, and yet the blank filled up before delivery. In the ordinary case there is a question of fact put which exhausts the case, but in this case the effect of the fact alleged, if made out by the pursuer, remains for the Court after the trial. Now I find the case of Cairns had been reported by the Lord Ordinary specially on this point—whether it was enough that the words were filled up after signature. The parties there had the benefit of the Lord Ordinary's opinion. The matter was before the Court, and we have before us the issue which was settled. But even without the case of Cairns I should have no difficulty in this matter. All the objections taken by the Solicitor-General to the course proposed on the other side proceed on a misapprehension. The pursuer says the redemption money was filled in after the signature; and, if so, the words are not authenticated by the testing clause. If that fact is established, what remains? That they did not subscribe a deed containing these words, and that the authentication of their signature and attestation applied to a deed without them. It is no answer to say this is a very extraordinary case, for you are using this very clause of redemption, and it is a material part of your own case. What the result of this having been a blank at the time may be I do not know, and do not say. I do not say it may not be filled up by the Court fixing it on some principle as to the sum advanced, and so falling to be repaid, and therefore I do not think any answer is given by saying you are using that clause of redemption. That may be left blank, and yet the party may be entitled to redeem. The question is—Is the pursuer entitled to have it established that these words were not there when he signed the deed? It is admitted that the pursuer may make out that, but it is contended that he must also make out it was filled up without his authority. Now I do not think this *onus* lies on the pursuer. If the clause was blank at the time of signature, it rests on the party using that clause filled up after signature to show it was done with the knowledge and consent of the other. The consent may be proved in various ways, and that may be a very good answer in point of fact. It may turn out that after the necessary calculations there was a meeting with Mr Forbes, and the sum was duly filled up. It is, however, certainly the duty of the party who uses the clause so filled up, to shew that was done with good and sufficient authority. Everything required for the defence will come in properly in answer to the pursuer's issue.

The Lord Ordinary, in the case of Cairns, thinks the main thing is delivery. I differ from him entirely, and so did the First Division. I can conceive this objection to be good, even though the blank were filled up long before delivery. Suppose at the time the money was paid it was filled up without consent with the sum of L.35,000, but truly the redemption money was L.37,000, it might be quite open to have that corrected,—and there may be many grounds of objection besides that,—I do not think the question of delivery of much importance here. I do not see any difference between a bilateral and a unilateral deed in this respect. I think it would always be open to a party prejudiced to say, "that is not the deed signed."

Therefore, without the aid of the authority of the case of Cairns, I hold the issue proposed by Lord Buchan to be the correct one. Whether the defenders wish a counter issue or not, I do not know, but I should think their case was fully open to them without it. I do not think it necessary, but that rests with themselves.

Lord Murray.—I consider this the same as if there had been an erasure. To say it was blank, is as positive an assertion as to say there was something previously written. It is a matter of fact, and the great point is to put this as simply before the jury as can be done. I think the Earl of Buchan's issue ought to be allowed. I give no opinion as to whether the opposite party should also take an issue; but I rather lean to the view that it would be better for them also to have an issue. It would put the case more clearly before the jury.

Lord Wood absent.

Lord Cowan.—But for the special nature of the averments in the record, this case would raise a very general and a very important question affecting the probativeness of deeds under the Act 1681. Both parties concur in stating that the

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deed was blank as regards the sum inserted in the clause of redemption when the Earl and Countess of Buchan subscribed it. That is the case both of the pursuer and the defenders; therefore, under the first issue, the pursuer truly undertakes to prove nothing but what is the admitted fact, and capable of instant proof. But the defenders say, *esto* that the deed was blank then, it was filled up before completion of the transaction and delivery of the bond, by the consent and with the concurrence of the pursuer's agent, and in implement of the prior agreement. The pursuers do not raise any question as to the relevancy of that defence, if such can be proved to have been the case, but they dispute the question of *onus*, and say that it lies with the defenders.

No general question is raised as to the legal efficacy of a deed so executed with blanks in portions of it more or less essential or material. That is an important subject for observation. The Solicitor-General argued as if a case had never occurred of a deed being held good in every respect as a probative writ, except as to certain parts of it which had been left blank at execution of the deed. The case is not new at all in regard to unilateral deeds. In Kennedy, 1722, M. 1681, there was a blank left in a deed of entail at the time of execution, which was filled up by the agent under a special mandate from the granter. Two points were discussed—whether the deed was a good deed to any effect? and whether, supposing it were, the blank had been well filled up? The Court held that the blank was not well filled up, though the deed was good otherwise. This case was reviewed in the subsequent one of Abernethy v. Forbes, Jan. 1835, where a blank had been left in the substitution, but filled up afterwards. The Lord Ordinary, before whom the question in the first action was brought, reduced *in toto* the entail. Under this judgment, which became final, titles were completed in fee-simple, but the next heir came forward and brought a reduction reductivè, arguing that all the substitutions down to the blank were good, and that it was irrelevant as regards those called in the earlier parts of the clause, to say that there was a subsequent blank. This plea was ultimately successful, on grounds which will be found fully stated in the report of the decision in the House of Lords. Therefore, the circumstances which have arisen here are not novel. The deed may be perfectly good, although the portion of it left blank at subscription is ineffectual. The nicety is, whether the blank can be afterwards filled up by the granter, so as to secure that part of its probative character to any effect. But, in fact, that more general question is not before the Court; for the pursuer, though maintaining the deed to be bad *quoad* the clause of redemption, admits it to be good otherwise; neither does he raise any question as to the relevancy of the defence set upon if it be proved. The only real question thus comes to be, on whom does the *onus* lie?

On the general point argued, I quite agree with your Lordship in holding the pursuer to be right. If the character of probativeness is not made out as regards the whole deed, then *quoad* the part in regard to which it is not made out the probativeness of the writ is destroyed; but it may be restored, and it is admitted to be relevant to do so, to prove that the blank was filled up with the consent and authority of the granter.

And this brings us to the delicate part of the case. The defenders contend that the pursuer must show that the blank existed when the deed was issued; and I should have felt great reluctance in holding that the pursuer was not bound to put more in issue than merely this, that there was a blank in the deed at the date of subscription.

On the one hand, observe what a party might do. Having subscribed a probative writ blank, *remotis testibus* he fills it up with his own hand, and then tenders it as a good deed to one who receives it *bona fide* as being what it seems to be. Is the party to be entitled afterwards to come into Court with a reduction, and offer only the limited proof here proposed? I should say he must take an issue not merely that the blank existed at the time of subscription, but that it existed at the time of his having issued it. I see no other way by which a party accepting a deed in *bona fide* could be protected.

But, on the other hand, the question here presents itself under peculiar circumstances, from the state of this allegation in the record. In Cairns' case the deed was a bilateral one, and the simple fact at issue was, whether a blank existed at the date of execution. Hence the terms of the issue. It is different here, where the

deed is unilateral. But then it is averred that Messrs Gibson-Craig, as agents of the defenders, prepared this deed and got it executed by the pursuers while this blank existed, and that this blank was afterwards filled up by them, with the consent of the agent of the pursuers, and in terms of the original agreement of the parties. The defence is based on this state of the facts, and it is for the defenders to take an issue to establish the fact to be as they allege. No 126. Feb. 26, 1857. Hastie v. Campbell.

I do not think that the case of the defenders, which is very special, could well or safely be tried under the pursuer's issue. Indeed, if they don't take a counter issue, they need not go to the jury at all. I think it indispensable that the defenders' case be brought before the jury by counter issues, so expressed as to keep open their whole case for proof stated in the record.

The Court then approved of the first issue proposed by the pursuer, and of the following counter issue for the defenders :—" Whether the words 'Thirty-seven thousand seven hundred and fifty-eight pounds fifteen shillings and tenpence sterling,' contained in the clause of redemption of the bond of annuity granted by the pursuer, the Right Hon. Henry David Erskine Stewart, Earl of Buchan, with consent of his wife, the Right Hon. Caroline Rose Maxwell, Countess of Buchan, to the defenders, bearing date the 28th January 1842, were inserted in the said bond, with the authority or consent of the said Earl and Countess, or of Mr Patrick Forbes, their agent, duly authorised by them to that effect?"

Wotherspoon & Mack, W.S.—Gibson-Craig, Dalziel, & Brodie, W S.—Agents.

Hastie and Hutchison, Pursuers and Respondents.—*Penney*—*Cook.* No. 127.
Archibald Campbell and Peter Dunn, Defenders and Advocators.—*Macfarlane*—*A. Moncrieff.*

Agent and Principal — *Liability* — *Transaction* — *Electric telegraph* — *What is timeous notice of shipment of goods.*—A firm in Glasgow were in use to employ certain commission agents in London to make purchases for them, and the practice was to ship the goods at London on Saturdays for Glasgow, but the practice varied as to the time of advising the shipment. A quantity of goods was shipped past business hours on a Saturday evening, and about an hour before the closing of the post. Notice of the shipment was sent by the first post *during* business hours thereafter, being Monday afternoon. The morning post of that day was before business hours. Before the notice was delivered, intelligence reached the Glasgow firm by telegraph of the loss of the vessel. The London agents had bought the goods and paid the price as for themselves. In an action by them to recover the price—*Held* (*diss.* Lord Deas, *abs.* Lord Ivory), that although it might have been possible to send notice by the post after business hours on Saturday evening, the agents were not bound to make the attempt: that they were not bound to communicate the shipment by telegraph: and that, as the notice posted by them would, in ordinary circumstances, have reached Glasgow in time to enable their constituents to protect their interests by insurance, if so inclined, the delay in advising the shipment did not amount to such *culpa* as would impose on the agents the liability for the loss.

Hastie and Hutchison, commission agents in London, were instructed by Campbell and Dunn, merchants in Glasgow, by letter dated 4th October 1852, to purchase for them a quantity of imperial peas, to be shipped to Glasgow by first steamer. Hastie and Hutchison made the purchase on 6th October. The goods were delivered on the 12th October, and were shipped by the "Metropolitan" steamer, which sailed from London for Glasgow on Saturday the 16th October 1852. Hastie and Hutchison posted notice of the shipment by the afternoon post on Monday the 18th October. Since the 4th October no communication had passed between the parties on the subject. Before that notice reached Campbell and Dunn in Glasgow, they received a telegraph message intimating the loss of the steamer. Campbell Feb. 26, 1857. 1st Division. Lord Deas. L. Sheriff-court of Lanarkshire (Sheriffs Skene & Alison)

No. 127. and Dunn immediately repudiated all liability for the price of the goods, on the ground of Hastie and Hutchison's negligence in not sooner intimating the shipment. This action was then brought by Hastie and Hutchison to recover the value of the goods.

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In order to render proof unnecessary, the parties agreed to the following minute of admissions:—1. That during the period from 1st January to 1st October 1852, the pursuers made six several purchases of peas on account of the defenders, which were respectively shipped at London on a Saturday, and the invoices and letters, or copies thereof in process, in reference to these shipments, sent by the pursuers to the defenders after the shipments, and dated on the Monday following these respective shipments, were despatched by the post leaving London on the afternoon of such Mondays. 2. That the pursuers have paid the price of the peas to the parties from whom they purchased the same on account of the defenders. 3. That the "Metropolitan" and "Cosmopolitan" steamers were advertised to sail from London every Saturday for Glasgow. 4. That these vessels, when in London, lie in the river directly opposite the pursuers' wharf, where the peas in question had been lying from the time they came to hand (12th October), and that they were put into the pursuers' barge, and sent alongside the "Metropolitan" about three o'clock P.M. on 16th October 1852; but that, there being several barges alongside before that of the pursuers, each taking its turn, it was half-past six o'clock before they were taken on board the "Metropolitan." 5. That on said 16th October 1852, the afternoon post from London to Glasgow closed at six P.M., but that letters could be despatched till 7.30 P.M. by payment of sixpence extra at the General Post Office, St Martin's-le-Grand, which is situated 2½ miles from the pursuers' wharf, and one mile from their counting-house, which latter is 1½ miles from the wharf, and is in the line between the wharf and the Post Office. 6. That the usual business hours of the pursuers is from 10 A.M. till 6 P.M., and these are also the usual business hours of parties in the same trade and business as the pursuers. 7. That the first post after that of the afternoon of Saturday the 16th October, was on the morning of Monday, the 18th October 1852, and before business hours, and was the post by which the manifest of the "Metropolitan" was sent by the London agents to the Glasgow agents of that vessel, and that any letter sent by that post would not have arrived in Glasgow till the morning of Tuesday, the 19th October, and would not have been delivered in Glasgow till about nine o'clock on the morning of that day. 8. That a telegraphic message was received in Glasgow about [illegible] o'clock on the morning of Tuesday the 19th October 1852, intimating the loss of the "Metropolitan." 9. That the "Metropolitan" having sailed from London, on Sunday, the 17th October 1852, would, in ordinary circumstances have arrived in Glasgow not sooner than the evening of the Tuesday, or on the Wednesday or Thursday following. 10. That it would have been impracticable to effect an insurance on goods on board the "Metropolitan" during the ordinary hours of business, on Tuesday, the 19th October 1852, the loss of that vessel being then known. 11. In all shipments by the pursuers to the defenders, being twenty-four in number, from January 1851 till October 1852, the defenders never insured except in one instance, and in that instance the insurance was effected through the pursuers. But the defenders effected numerous other insurances on grain during that period, conform to list produced.

It also appeared that the steamer had permission to make profit by towing when occasion offered, in the course of her voyage.

The Sheriff-substitute (Skene) pronounced the following interlocutor on 12th May 1854:—"Finds that the pursuers purchased the peas in question on the defenders' order, to be shipped to Glasgow by the first steamer. Finds that the said peas were delivered to the pursuers on the 12th [illegible]

October 1852, and that the first steamer for Glasgow sailed on the 16th of the same month: Finds that there is no evidence that, either by the general custom of merchants, or by the special practice of the pursuers in dealing with the defenders, they were bound to intimate to the defenders the receipt of the peas, the purchase itself having been previously intimated in the usual form: Finds that the pursuers' previous practice in this particular appears to have varied according to the circumstances of each particular purchase, and that there was nothing in the circumstances of this particular purchase to render it incumbent on them to make such intimation in this case: Finds that as the pursuers could not be certain that the vessel by which they proposed to ship the peas would be able to take them until they were actually shipped, they were not bound to intimate their intention to ship, but merely to give business intimation of the actual shipment: Finds that the peas were in point of fact shipped by the Metropolitan steamer on the 16th October; but finds that owing to the quantity of goods which were being shipped by that steamer, the peas were not taken on board until half-past six o'clock, p.m., being half an hour after the vessel's advertised hour of sailing: Finds that when the peas were so taken on board, it was already past business hours, and that there was not then time to post an intimation of the shipment by that evening's post from London: Finds that the pursuers were not bound to post such an intimation on the Sunday: Finds that the post on Monday morning was before business hours: Finds therefore that the intimation admittedly posted by the pursuers on Monday afternoon, was timeous intimation of the shipment made on the previous Saturday evening: Finds therefore that although the news of the loss of the Metropolitan reached Glasgow by Electric Telegraph before the pursuers' intimation of the shipment, they, the pursuers, were in no degree to blame for this, and are not liable to the defenders for any loss which they may have sustained in consequence. Therefore decerns in terms of the conclusions of the libel, and finds the defenders liable in expenses," &c.*

The defenders appealed to the Sheriff-depute (Alison), who pronounced the following interlocutor on 15th November 1854:—"In respect notification of the shipment of the peas in question is admitted to have been given by the first post after business hours, which immediately succeeded the shipment of the goods; and in respect, neither by the custom of merchants nor the practice of the parties in this individual case, were the pursuers bound to give notice of the shipment at an earlier period, and the intelligence of the loss of the vessel was only anticipated by the Electric Telegraph, a mode of communication which it has never yet been decided a shipper of goods is bound to have recourse to, Dismisses the appeal, and adheres to the interlocutor complained of."†

* "NOTE.—This case is one of those which will probably now be of pretty frequent occurrence, in which injury has been sustained owing to a later message by Telegraph having outstripped a previously posted letter. Had the intimation of the shipment and the news of the loss of the vessel both been sent by post, or both by Electric Telegraph, the defenders would have received intimation of the shipment before the news of her loss could have reached Glasgow. As it was, however, the news dispatched last arrived first. Unless, therefore, it is to be held that nothing is [illegible] intimation but a telegraphic message, which has not, so far as known to the Sheriff-substitute, been as yet held by any Court, the pursuers, who intimated by the first available post after the shipment had taken place, must be held as having [illegible] done their duty in the matter, and the defenders must ascribe the loss they have sustained, through the early knowledge of the wreck of the ship, as an [illegible] but unavoidable consequence of the introduction into mercantile affairs of [illegible] of telegraphic messages."

† [illegible] the case was advised by the Sheriff, and the preceding interlocutor [illegible] out, he has considered the report of a decision by the Second Divi-

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The defenders then advocated, and pleaded;—That admittedly it was the pursuers' duty to give timeous notice of shipment. The question was, what was timeous notice? It must be sent so as to enable the party to whom the goods were sent to protect himself by insurance. It was not mere matter of form or ceremony that the notice was to be sent by first post.[1] Remissness in this respect laid the responsibility on the shippers.[2]

The respondents (pursuers) pleaded:—That the only obligation incumbent on them was to intimate the shipment timeously, which obligation was implemented by intimation by the next post within business hours after the actual shipment. Farther, they intimated the shipment in the same manner, and within the same time as in former similar transactions betwixt the parties where no objection had been stated to the sufficiency of the intimation on any ground; they were therefore entitled to assume that the intimation on this occasion would be held sufficient. It was apparent also from the admissions by the advocators, that intimation by the earliest post leaving London after the shipment of which the respondents could possibly have availed themselves, would not have enabled the advocators to insure before the actual receipt of the intelligence of the loss of the goods in Glasgow. They could have therefore no legal ground for refusing to pay the price, founded on the alleged failure of the respondents to intimate by such post. The advocators not having been in use to insure similar shipments of goods by the respondents on their account, and having had no intention of insuring on the present occasion, were not *in bona fide* in refusing to pay the price of the goods on the grounds now pleaded by them.[3]

At advising,—

Lord President.—(After stating the facts)—A question of considerable nicety and difficulty arises as to the position of the pursuers in this case. It is said that according to the custom of dealing between them and the defenders, the pursuers were in use either to notify the shipment of goods by the afternoon of the day on which the shipment was made, or to send previous notice intimating their intention to ship the goods by that day's steamer, or what was much the same thing, by the first steamer after such notice, for it was known that the steamer by which the goods were sent was a weekly steamer sailing on Saturdays from London direct to Glasgow. On the occasion in question, there was no such previous intimation, and

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sion on 19th July last, in the case of Fleet Brothers v. Morison (ante, vol. xvi. p. 1122), and it appears to him strongly to corroborate the principle involved in the judgment now pronounced in this case. In that case, the order for the goods was received in London on the 28th of March, directing the goods to be sent by the first steamer; they were accordingly sent off by the steamer which sailed on the 30th, but the shippers did not send notice of the shipment till the evening post of the 31st, and the letter arrived at the purchasers in Aberdeen on the 2d of April. On the 1st the vessel had been wrecked on its voyage to Aberdeen, and the Court unanimously held the London shippers liable for the loss, as they had allowed a post to elapse without sending notice of the shipment. This was always what the Sheriff understood to be the rule, viz., that the shipper must not let the first post pass without intimating the shipment. But here the notice *was* sent by the first post after the goods were shipped, and the difficulty has arisen from the loss of the vessel having been communicated by the Electric Telegraph, and arriving first. No decision, however, has yet established the principle, that a shipper is bound to intimate a shipment by the Electric Telegraph, or that he has incurred laches if he intimates by the first post; and till the rule is pushed that length by the Supreme Court, an Inferior Court must abide by the former rule, that the shipper discharges his duty if he intimates the shipment by the first post."

[1] Fleets Brothers (*ut supra*).

[2] Andrew v. Ross, 6th December 1810, F.C; Johnston and Sharp v. Baillie, 24 June 1815, F.C.; 1 Bell's Com. 445-6; Brown on Sale, p. 373.

[3] Cooper, 20th May 1791, Dict. 10,100.

it is said that if such previous intimation had been given, it would have enabled the defenders to make an insurance in Glasgow to cover their risk—that they were entitled to have an opportunity of doing so, but that the pursuers' negligence deprived them of such opportunity, and exposed them to the risk, without any option in the matter. On the other hand, on the part of the pursuers it was argued, that even without such previous intimation to the defenders they could have effected such insurance. It was stated that there was no practice of sending previous intimation of shipment—that, on the contrary, it frequently happened that the pursuers transmitted notice of a shipment of goods on Saturday by the post on the following Monday afternoon without any previous notice of their intention to ship the goods by Saturday's steamer; and they further state that no objection was taken by the defenders to their doing so.

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The correspondence which has been submitted to us does not show any uniformity of practice in this respect. In some of their notices the pursuers say that they intend to ship by the first steamer—in some that they intend to ship by the steamer of Saturday. Sometimes there is no such previous notice at all. Sometimes it is said that the goods, if suitable to sample, will be shipped. On the present occasion there was no previous intimation—not even that the goods had come to hand, and were suitable for the purpose for which they had been commissioned. That also happened on a previous occasion.

It further appears that in their transactions with the pursuers, it was not the practice of the defenders to effect insurances. In one case they did appear to have had an intention of insuring, but it was not done, and their practice was not to insure. It is not unusual for commission agents to effect insurances on goods for behoof of their constituents. But there is no obligation upon them to do so. It requires a special order; and in this particular case we must hold that it was not the intention of the defenders that the pursuers as their agents, should make such insurances. The defenders do not contend that by not effecting such insurance there was any direliction of duty on the part of the pursuers. The defenders do not aver that they had any intention of insuring this particular parcel of goods more than any others; and, in these circumstances, we have to determine upon whom the liability for the loss is to be thrown.

Now, in a case of this kind, where it is proposed to impose on the commission agent, who is not and never was the owner of the goods, but was acting for another party, the responsibility of the sea risk from the port of shipment to the port of destination, it is incumbent on the principal who seeks to impose that responsibility on the agent to shew that the agent has been guilty of such culpa as will subject him in such serious consequences. There is no absolute rule, so far as I know, which determines the date or period within which intimation of shipment of goods should be made by a seller or commission agent to his principal. The expression—"timeous intimation" used by the Sheriff-substitute, is a better expression than that used by the Sheriff. The Sheriff seems to fix a rule that the shipper must intimate the shipment by first post, but I cannot adopt that as the rule on the subject. It is the shipper's duty, however, to give timeous intimation of the shipment, and there are various cases from which we may gather what is the particular time—depending more or less on circumstances—within which such notice of shipment should be given. No case has been cited to us in which a commission agent has been a party, and we must therefore deal with the present as a case new in that particular.

There is no difference between the duty incumbent on an agent and the duty incumbent on any other shipper of goods. Certainly, where it is attempted to hold an agent responsible for his neglect in regard to such shipment, it must be shown that he has been guilty of culpa, just as in the case of any other shippers. Now, were these pursuers so guilty? They did not give previous notice of the goods having come to hand, or of their intention to ship the goods on that particular day. They had so acted on previous occasions, but having so acted, they may have been guilty of neglect. Still the occurrence was not unfrequent, and the defenders made no exception to the want of such previous intimation of the reception of the goods, or of the pursuer's intention to ship them. There is no rule that requires such previous intimation. It may be that the circumstances of some particular case would make it matter of neglect on the part of a commission agent

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not to avail himself of an opportunity of giving such previous notice when it was obvious that there would not be an available opportunity for giving timeous notice after the shipment. But I am not aware of any rule to the effect that there must be notice before shipment. The rule rather is, that shippers should lose no time in giving notice of the fact that they have shipped goods; and then they can afterwards give more complete information in regard to them. That seems to have been conformable to the practice here.

But it is said that the pursuers here did not give timeous notice of the shipment. It is not made out that their not having given previous notice is such failure of duty, in the first instance, as would make them liable. It is not said that there was any undue delay in the shipment itself—that it was the pursuers' fault that the shipment was thrown so late. The shipment of goods depends on different circumstances—the number of applicants and the capacity of the vessel, and various things may occur to make it matter of uncertainty how long the shipment may take, but there is no allegation here of undue delay on the part of the pursuers in making the shipment. The pursuers say that if they were only to act during business hours, they would not and could not send notice of shipment till the post of Monday afternoon. If so, and if that was not a notice that in the ordinary course of events would be adequate or available to apprise their principals timeously of the shipment, then it may be held that it was the more incumbent on them to send previous notice of their intention to ship. In regard to notice after shipment, two or three stages have been pointed out at which such notice might have been given, but which opportunities were allowed to escape.

In the first place, it is said that the agents might, even after the completion of the shipment, have given notice on Saturday evening by sending a letter to the General Post-Office, and despatching it by extra payment. I scarcely think that that was incumbent on them. It is not very clear that it was practicable. The shipment was completed at half-past six. The bargemen would then return, and if there was a clerk to superintend the shipping, he would announce that the shipment had been completed. But, even if a person had been waiting in the counting-house at that time, it is very problematical, looking to the locality, whether it would have been practicable for him to have written a letter after such announcement, and despatched it in time for that evening's post. It has not been made out that that could have been done. But the shipment was completed after business hours at the counting-house. These business hours were not mere matter of regulation of the pursuers themselves, but they were the business hours of that locality, and the clerk was not expected to be at the counting-house after business hours. It is not said that it was usual to keep the office open after business hours and till after the shipment was completed, nor is it said that anything unusual was done in that respect on the particular occasion in question. The person whose duty it was to write the letter giving notice of the shipment, is not said to be the person whose duty it was to take charge of the shipment. Therefore, even if it had been possible, by any great effort, to have accomplished the writing and despatching of the letter by that evening's post, it was not a letter of that kind the failure to write and despatch which would constitute that degree of *culpa* to which I have referred. But it is not clear to my mind that such an effort, even if made, would have been successful.

The next post said to have been available was the post of Monday morning. That post was despatched before business hours on Monday, and some of the observations I have already made also apply to the sending of a communication by that post. The business machinery, so to speak, in the pursuers' office was not then in use and operation, according to the custom of trade in that locality—by which any communication by that early post could have been made. It is not said that notice was in use to be sent by the Monday morning's post, and for the obvious reason that, when notice could be sent by Saturday's post within business hours, it was so sent. So far, the post after business hours on Saturday evening, and before business hours on Monday morning, fall under the same category, and the observations I have already made equally apply to both.

Again, the steamer by which the goods in question were shipped, according to the usual course of its voyages, was due in Glasgow on the evening of Tuesday, or in the course of Wednesday or Thursday. There was an uncertainty as to the

period of her arrival both from the nature of the voyage itself, and also from the permission she had to make a profit in towing other vessels, when occasion offered. She was not over due on Wednesday. That being so, a letter despatched by the pursuers on Monday evening in ordinary course of business, would be received by the defenders before the vessel was due. Now that was a communication available for the purpose of insurance in the ordinary course of events, and it is a communication which would have been available in this instance, but for the intervention of the electric telegraph.

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Now the course adopted by the pursuers was this: They did not remain, or make their clerk remain, after business hours on Saturday evening in order to make the effort which, after all, might have been unavailing,—to send this letter to the General Post Office, for they did not know that even by half past six the shipment would be finished. Nor did they make their clerk come back early on Monday morning, in order to take advantage of the early post. But they had in view to communicate by the post by which they were in use to send notices of shipment,—which post, in ordinary course of events, was due in Glasgow before the vessel was due, and a notice by which was deliverable in time to enable the defenders to effect an insurance, if they so desired. That circumstance appears to me to go far towards the solution of this case, unless the intervention of the electric telegraph and its consequences are to be borne by the agents. I do not mean to say that that is not an element for consideration, and it has led me, in connection with other circumstances, to think that this is a very unusual case indeed, in the even balance of considerations it presents on either side. I do not mean to say that the facility of communication by electric telegraph is not an element which the pursuers ought to have taken into consideration. It ought perhaps to have stimulated them as shippers of these goods to promptness in their communication with their principals. It is a mode of communication which, in matters of business, parties will probably be forced to resort to in order to avoid loss, and, once in general use, it may become a matter of duty to employ it. But, in the meantime, if it had been used here, a letter despatched by the pursuers on Monday morning would have been equally unavailing with the letter despatched by them by the post of Monday afternoon. Therefore the only letter that could have been of use would have been a letter sent by the post of Saturday evening, and which would have been delivered in Glasgow on Monday morning—perhaps before the loss actually took place. But I do not think that the circumstances here are such as to amount to such a dereliction of duty on the part of the pursuers, and such *culpa* as would impose liability on them for not sending the letter by Saturday evening's post.

These considerations lead me to the conclusion that the defenders, seeking to subject the pursuers in the loss which here occurred, have not established against the pursuers such *culpa* or neglect as would impose on them liability for the loss of these goods. It is not clear to me that any loss or damage was sustained through their *culpa*. The defenders had not been in use to insure. They do not allege that they intended on this occasion to insure or—what was an equivalent—to transfer the goods with the risk upon them to a third party. Therefore that they did sustain loss and damage through the pursuers' fault does not appear. The case runs very close. It was *possible* for the pursuers, by giving previous notice, and by doing a thing which I do not think was incumbent upon them, but all of which were precautionary measures, to save this loss. But I do not think that, in the circumstances, the defenders have established a sufficient ground of liability against them.

Lord Curriehill.—The ground upon which the advocators withhold payment of the advances made for them by the respondents as the price, charges, and commission of the shipment in question, is that the latter failed to intimate the shipment timeously to the former, and thereby deprived them of an opportunity of effecting insurance upon the goods, until such insurance had been rendered impracticable by accounts of the wreck of the vessel having been received by electric telegraph in Glasgow. This defence, when analysed, appears to resolve into a counter claim of damages, because the respondents, having, in conformity with the orders of the advocators, safely shipped the goods on the afternoon of the 16th of October, and advanced the price and charges thereon, their constituents were

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bound to reimburse these advances, with the usual commission; and the question is, whether they are entitled to retain these sums, to indemnify them for loss occasioned by the alleged failure of duty of the agents to give timeous notice of the shipment.

I think that the respondents, if they did fail in that duty, and if that failure was the cause of the loss, are liable in such indemnification; because there is incumbent on commission agents, as well as on vendors, an obligation to give timeous notice of shipments to the consignees of the goods, and to indemnify them for any loss created by failure to perform that duty—*vide* Sommerville's Trustee, 18th February 1807, Mor. App. Mandate, No. 4; and Andrew v. Ross and Park, 6th December 1810, F.C. But did the respondents fail to perform this duty? I think they did not.

In the first place, there was no such failure until the shipment was actually made; because their duty is to intimate the shipment itself. There is no authority for holding that they are bound to intimate beforehand that the shipment is proposed or intended to be made. If they do so, this may sometimes render less strictness necessary in intimating the shipment after it is made, because it enables the consignees to effect insurance on the goods before they are made aware of the actual shipment. But if the shippers give timeous notice of the shipment after it is made, there is no failure of duty on their part.

In the next place, there was no negligence in not intimating the shipment by the afternoon post of Saturday the 16th October; because that post was confessedly closed at 6 o'clock p.m., and the shipment was not concluded at that time, nor until half an hour afterwards. And although a letter might have been posted at the General Post Office before half past seven o'clock on the payment of sixpence, there was no neglect of duty on the part of the respondents in not so posting notice of the shipment, which was not completed until half-past six o'clock, because it has not been proved that, in the admitted circumstances, this would have been practicable. This could not have been done unless the bargemen, or other workmen, whose function it was to place the goods on board of the vessel, had proceeded after half-past six o'clock to the counting-house of the respondents, at the distance of a mile and a quarter, and had found it still open, and the clerks in attendance, and unless the latter, after receiving a report of the shipment, had written and booked a letter of intimation thereof to the advocators, and had transmitted it to the General Post Office at the still farther distance of another mile,—all within the short space of one hour from the moment when the shipment was completed. Not only is there no admission nor evidence that all this was practicable, but there is no probabibility that it was so, because it is also admitted tha according to the usual business hours of the counting-house of the respondents, an of others in the same line of business, their counting-house would be shut befor the hour when the shipment was completed; and it is not even alleged that thei counting-house remained open beyond the usual hours of business on the evenin of Saturday the 16th of October.

In the third place, there having been no post from London on Saturday the 17tl and the morning post of Monday the 18th having confessedly been despatche before business hours, and, consequently, before the counting-house was open, th letter of intimation could not be despatched until the afternoon post of that da; it was duly despatched by that post, and it duly arrived in Glasgow on th Tuesday forenoon. Hence there was no undue delay on the part of the respo dents in intimating the shipment.

And, in the fourth place, that letter was despatched, and arrived in sufficie time to have enabled the advocators to effect insurance upon the vessel before t voyage, in ordinary circumstances, could be terminated; because it is also matt of admission, that while the letter arrived on the forenoon of Tuesday, 19 October, the vessel could not arrive until the evening of Tuesday at soonest, until the Wednesday or Thursday following; and the period between the arri of the letter and the earliest period when the vessel could arrive, was amply suf cient to enable the consignees to effect insurance. And although they we unable to avail themselves of that period for this purpose, even if they h wished to do so, which is not proved nor alleged, this arose from the disturb

effect of a natural agency, which had lately been made available for the transmission of intelligence, but which, although it may probably be destined ere long to produce a great revolution in rules for transacting mercantile business, has not yet been recognised to this effect.

In forming an opinion on the conduct of the respondents in this transaction, the prior usage of the parties is an element which cannot be left altogether out of view. The connection of principal and agent between the parties had subsisted for a year or two before the date of the shipment in question. The general usage during that period appears to have been that the shipments were made on Saturdays, and intimated by letters posted on the following Mondays. This usage having always been acquiesced in by the advocators,—it was not incumbent on the respondents to depart from this satisfactory usage on the occasion in question, when, in the circumstances, the ordinary rules of business did not admit of the intimation being earlier despatched.

It has been suggested that the respondents are liable for the value of the goods on a different medium, viz., that the *periculum* of the goods was by law imposed upon them *qua* commission agents, from the time when the same were delivered to them; that they were not relieved of this *periculum* until they intimated the shipment of them to the advocators; and that, as the goods were lost by shipwreck on the morning of Monday, and before the intimation was made, the loss must be borne by them. I think that this view of the case is quite untenable. A commission agent, although he is bound to exercise due care in preserving such of his constituent's goods as are placed under his custody in that capacity, and also in packing them so as to be fit for carriage,—is never subject to the *periculum* of the goods, so as to be liable for any *damnum fatale* which may befal them. Above all, it is clear that he is not subject to such *periculum* after he has placed them safely in the hands of the shipmaster or other carrier, by whom they are to be transported, so as to render the latter legally liable for them. And since the respondents did not fail in their duty to give timeous notice of the shipment of the goods, I do not think they were responsible for their safety on the different ground that the *periculum* of the goods had been imposed upon them even before they were shipped, and that they had not been relieved of that *periculum* at the time of their being lost.

Lord Deas.—This is a case not between buyer and seller, but between principal and agent. The advocators, who are merchants in Glasgow, employed the respondents, commission agents in London, to purchase for, and forward to them, a quantity of pease. On 4th October 1852, the respondents intimated that they had purchased, on account of the advocators, twenty quarters pease, at 48s. per quarter. The documents show that the respondents had purchased and paid for these pease in their own names. The respondents received delivery of the pease on the 12th, and they shipped them, to the advocators' address, on Saturday the 16th. They had not, in the interval, intimated their having received delivery. The pease had been sent, in the respondents' barge, alongside the vessel, about three P.M., but were not taken on board till half-past six; and this being after business hours, no notice of the shipment was sent that night, nor till the afternoon post of Monday—there being no post on Sunday, and the morning post of Monday being early and before business hours. The other and more minute facts are to be found in the joint minute and mutual statements and admissions in the record; and I need not repeat them here.

In these circumstances, the first question to be settled is, were the respondents under any obligation at all to give notice to the advocators, with a view to enabling them to insure against the perils of the voyage?

Now, I cannot doubt that they were. And it was not contended at the bar that they were not. They were bound to give notice, not only with a view to insurance, but for many other reasons:—such as, to enable the advocators to make arrangements for receiving and stowing the goods safely,—to regulate the extent of their purchases and sales,—and to resell these very goods, if they thought proper, before they reached them. The obligation to give notice for these purposes—including the purpose of insurance, where it is not the practice for the shipper himself to insure—is not confined to cases of seller and purchaser, but arises out of, and is incident to the relative position of mandatory and mandant, however constituted, though the precise degree of diligence prestable may not be the same in each

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relation, or in every case. The present is a case in which the mandatory was paid for his trouble by commission on the price—a contract mutually beneficial, and, therefore, inferring responsibility for *culpa levis*. I infer from the report of the case of Hoog, 24th July 1754 (M. 10,096), that the question there was between principal and agent, although the decision went upon principles equally applicable to seller and purchaser. But, be this as it may, I refer to the case here for the observations of Lord Kames, who says—"If regular advice may possibly prevent loss, it clearly follows that it is the duty of the factor or merchant to give advice. In the present case this step was indispensable, where the commission was to send the goods either to Greenock, Leith, or Borrowstounness; for, without advice, the defenders could not know where to expect their goods. This point being established, the only remaining point is, whether the factor's neglect of duty will subject him to every damage that might possibly have been prevented by a regular advice, or only to the damage which is the necessary consequence of neglecting to give advice? This question is easily determined; for I take it to be a general rule in all other affairs, as well as in commerce, that neglect of duty subjects the party to every risk and to every damage, except what he can show must necessarily have happened though he had done his duty."

On this principle, accordingly, in Somervail's Trustee v. Core, 18th February 1807, F. C., a shipowner in Liverpool, who also acted as port agent, was held liable for the value of goods lost at sea, because he had not intimated the shipment to the owner of the goods in Edinburgh, although the shipowner pleaded the fact that he charged no commission as port agent, and, consequently, came under no obligation as such. The report bears,—"A majority of the Court held that the circumstances of Somervail's situation subjected him to the duties of a port agent as well as carrier of the goods; and hence that he was bound to intimate the shipments, and that his failure therein made him liable for the value of the china lost." The difference of opinion here was, as to whether Somervail could be considered a port agent. There was no difference of opinion as to his liability if he was so.

In Andrew v. Ross, &c., 6th December 1810, F. C., the party held liable was a commission agent. No doubt, in that case, he was paid by the sellers. But the liability dealt with was that of a shipper, be he commission agent or seller; and the report bears,—"It was held to be an essential part of the shipper's duty to give notice immediately of the shipment, that the purchaser might have it in his power to take measures for his safety." The case of Arnot v. Stewart, 25th November 1813, F. C., seems to have been similar.

Holding the obligation of notice to attach to the shippers, and leaving out of view, in the meantime, the precise extent of this obligation, two things appear to me to be clear enough—1st, That the course of dealing here between the parties does not tell one way or the other. The letters, taken in connection with the admissions, make this clear enough, and I need not go into the particulars. Indeed in Somervail's case, it was held of no moment that he had made previous shipments —five or six in all,—without having intimated any one of them, and that of th the owner of the goods had made no complaint. 2d, That the advocators' custo not to insure is immaterial in this question. This also must have been assumed Somervail's case, for the owner could not have been in the habit of insuring whe the practice was to give him no notice of the shipments. In the case of Andrew was urged, without effect, that the fact ought to enter deeply into the question th no insurance was ever made or thought of by the purchasers in their previous tran actions with the same house. In the case of Johnston and Sharp v. Baillie, 2d Ju 1815, it was again held irrelevant that the purchaser had not been in the habit insuring. And in the case of Arnot, there was a short period after notice duri which the purchaser might have insured; but even this was held no answer to t mistake of giving erroneous notice, because, as Lord Meadowbank said, for a sho time the purchaser might choose to stand his own insurer. Indeed, the princi of the thing is clear enough without authority. The shipper has no right to ta for granted that the purchaser will not insure, though he never did so before. may be alarmed by stormy weather,—by hearing of unusual losses at sea,—or may have become more timid or more cautious than formerly. Nor am I prepa to say that it will necessarily excuse the fault of the shipper if the purchaser choo to stand his own insurer.

The true and only question of difficulty here is, *when* ought the notice to have been despatched? No. 127.

Now, supposing this were a case of seller and purchaser, I am not prepared to say that, in no circumstances whatever, is it incumbent on the seller to give notice of his intention to ship goods before actual shipment. The obligation on the shipper is to give *due notice*, and the question *what* is due notice must often depend on circumstances. Still less am I prepared to say that, in no case, is it incumbent on a *commission agent* to give notice to his principal of his intention to ship goods before actual shipment. There may sometimes be reasons for delaying till actual shipment on the part of a seller which do not apply in the case of a factor or commission agent; and I do not say that the reasons may not sometimes be the other way. But in the case of seller and buyer there is no intermediate step of importance to be taken between the purchase and shipment. In the case of principal and agent there is the intermediate step of delivery to the agent for behoof of the principal, which may, in some circumstances at least, be a step of importance. Here the respondents bought the pease in their own names. They stood purchasers on the face of the sale-notes and accounts. The receipts for the price acknowledged the price to have been paid by the respondents as purchasers. Until they intimated the shipment to the advocators, there was nothing to enable the advocators to distinguish and claim these specific pease as their property, rather than any other similar quantity of the same sort which the advocators might have chosen to forward to them. In these circumstances I think it clear enough that, until notice of the shipment here, the goods were at the risk of the respondents. If they had perished by fire while in their warehouse they would have perished to them. They might have relieved themselves of this risk by intimating to their constituents that they had received delivery of the goods for their behoof. I do not say they might not also have thereby relieved themselves of the perils of the voyage, if they had either said they meant to forward the goods by the first steamer, or this had been implied and understood from previous usage;—for, in that case, the advocators might easily have effected an insurance in such terms as would have covered the loss even if the goods had been sent by the second and not the first steamer. But they gave no notice whatever of having received delivery till they intimated the shipment. It is true they intimated the *purchase*; and it was contended that this enabled the advocators to have insured by ship or ships, and relieved the respondents from all obligation to give further notice of the shipment, because the practice had been to ship by the first steamer thereafter. But this argument tells against and not in favour of the respondents. For it is founded on the footing that notice fell to have been given before actual shipment, whereby the advocators would have been enabled effectually to insure, and leaves only the question whether notice of the purchase was equally available for this purpose with notice of delivery? Now, I cannot hold it to have been so. Until the goods were delivered to their agents, the advocators could not know when they would be so delivered, and could effect no insurance without imminent risk of its proving abortive,—a risk which would not have been likely to arise had they insured after notice of delivery, in reliance on the goods being shipped by the first opportunity.

Feb. 26, 1857. Hastie v. Campbell.

Now I do not say the failure of duty which renders the respondents liable is their failure to intimate that they had received delivery. But, when I come to consider the question whether the notice of shipment here was timeous, I cannot lay out of view the fact that the respondents might have intimated the delivery without the slightest prejudice or inconvenience to themselves,—and that such intimation might have enabled the advocators to avoid the loss. It cannot be laid down absolutely in all circumstances, that notice by the first post, despatched within business hours after shipment, will be sufficient. There *may* be a case in which notice, to be timeous, must be before shipment, or before the shipment is completed. And, if ever there is to be such a case, it appears to me to be the case which occurs here. The respondents knew that the shipment was to be made in the afternoon of a Saturday, and they must be held to have known that the completion of the shipment might be delayed till after business hours. They knew that the voyage was usually short. They knew that no post left London within business hours till Monday evening. They knew that there was such a thing as the electric telegraph, much used by merchants, particularly on the occurrence of serious misfortunes, such

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as the loss of a ship. And, knowing all this, it appears to me that, if ever there can be a case in which it is to be held the shipper's duty not to await the actual completion of the shipment, this was that case. The goods were sent alongside the steamer about three o'clock in the afternoon. I can see no reason why, at that time, if not sooner, notice should not have been despatched of the intention to ship that day,—in which case, as I have already said, an insurance might have been made which would have covered the loss even if the goods could not have been received on board that week's steamer, but had been sent by the next steamer. I think it was the duty of the respondents not to have delayed this notice after, at all events, they had sent the goods to the wharf; knowing, as they must be held to have known, all the things I have mentioned. Even the existence of the electric telegraph cannot be laid out of view. For a party who fails in his duty may be bound to know what the consequences of a telegraphic announcement by third parties may be, although he may not be bound to send notice by telegraph himself,—a point not necessary to be considered here. Taking this view of the matter, it is unnecessary to enter into the more critical question as to the duty of sending to the post-office after the shipment had been completed,—although I am not prepared to say that this might not be incumbent on a party who chooses to ship goods after business hours, and thereby entails on the owner of the goods an unusual risk. But, whether by reaching the post in this way, or by posting a letter before six o'clock intimating how the matter of shipment then stood, I think the respondents were bound, in the circumstances, to give notice by the Saturday evening post at latest, which might have enabled the advocators to insure.

If this be so, the consequence is clear, that the respondents are liable for the loss, and that it is irrelevant to inquire whether, had the notice been given, an insurance would have been actually effected which would have covered the loss. It is enough that it might have been so. The question is not, in the ordinary sense, a question of damages, whether it occurs with a commission agent or a seller. If it were so, the owner would have to prove that he would have insured, which he has never been held bound to do. The question is, with whom was the risk of the goods? Here I think it was with the respondents, whether we view them as proprietors of the goods, which they were on the face of the documents, or as agents neglecting their duty.

Lord Ivory absent.

The Court pronounced the following interlocutor:—"Advocate the cause; recall the interlocutors pronounced in the Inferior Court on the 12th of May 1854, and 15th November 1854: Find that the defenders have not in this case established such *culpa* or dereliction of duty on the part of the pursuers as to subject them to the loss incurred: Therefore repel the defences, and decern against the defenders, who are advocators in this Court, in terms of the conclusions of the libel in the Inferior Court: Find the defenders liable in expenses both in the Inferior Court and in this Court," &c.

Hill & Robertson, W.S.—Duncan & Dewar, W.S.—Agents.

No. 128.

David Stirling, Petitioner.—*Penney—Gordon.*
Adam Strang, Respondent.—*D. F. Inglis—Fraser.*

Lease—Alteration of subjects by tenant.—A tenant, on a ten years' lease of large manufacturing premises, in course of making repairs rendered necessary by a damage done by a hurricane, made alterations which a man of skill reported improved the buildings for the purposes of the manufacture. Petition to have the tenant ordained to restore the premises to their original state, and interdicted from making "any farther alterations"—*refused.*

Feb. 26, 1857. 2d Division. Sheriff of [illegible]kshire.

David Stirling let certain subjects to Adam Strang on a lease of some duration. The latter having made certain alterations, Stirling presented a petition to the Sheriff to have him ordained to restore the subjects to their original state, and interdicted "from making any alterations" without h[illegible]

consent. Strang pleaded, *inter alia*—1st, That the conclusions were truly declaratory, and therefore not competent in the Sheriff-court; and, 2d, That the pursuer had himself produced and founded on documents, which showed that many acts complained of had not been performed.

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The whole facts of the case sufficiently appear from the interlocutors in the Sheriff-court, which were brought by advocation by Stirling before the Second Division of the Court of Session.

The following is the interlocutor of the Sheriff-substitute (Bell):—"Finds that the conclusions of the action being *ad facta præstanda* and for interdict, it has been competently brought in a summary shape; therefore repels the first preliminary defence; repels also the second preliminary defence, in as far as prejudicial, reserving it *quoad ultra:* Finds, upon the merits, that the defender is tenant under the pursuer of the Hogganfield Bleaching Works, ground adjoining thereto, and other parts and pertinents, under a lease for ten years, at the annual rent for the first five years of L.337, 10s., and for the second five of L.370, and he is taken bound by the said lease, of which No. 4 is a copy, 'at his own expense to maintain and uphold, during the currency of the lease, the whole buildings and machinery thereby let, and to leave the same in a good and sufficient condition at the expiry of the lease, ordinary tear and wear excepted, and for that purpose to make and timeously execute all necessary repairs thereon:' Finds that a hurricane which occurred on the 6th February last blew down and destroyed some of the chimney stalks and roofs of the said works, and did other serious damage to them: Finds that the pursuer having refused to repair said damage, the defender did so at his own expense: Finds that in the course of making these repairs, he caused to be inserted in the roof of the calender-house, for the sake of obtaining more light, a window, which had not been in the former roof, 40 inches long by 23 inches wide; he also, in rebuilding an inside stair in said calender-house, caused it be made 39 inches wide instead of 27½ which was the former width, and to suit this increased width of stair, he enlarged the opening in the upper floor of the calender-house, where the stair enters upon it, to the extent of 11½ inches; and he also caused to be made in the ceiling of the upper flat of a new stove, for the sake of ventilation, eighteen openings, 16 inches long by 5 wide, which, however, were merely through the ceiling, leaving the roof untouched: Finds that a remit having been made of mutual consent to Mr William More, engineer, to report on the extent of said operations, and how far they altered the previously existing state of the premises, the reporter has in his report, No. 9, described them as above, and has also stated,—'I find that they are improvements which have added to the value of the subjects, by rendering them better fitted for the purposes for which they are let:' Finds that the defender has likewise so far altered a machine in the boiling-house, by extending its frame-work, and introducing into it rollers considerably larger than the original rollers; but the reporter states in his said report,—'The frame thus altered or widened remains unimpaired, and supplied with new rollers, whereof the continuance may be only temporary or permanent as shall be desired, while the old displaced rollers are preserved unaltered and capable of being replaced at pleasure:' Finds in point of law upon these facts, and especially considering that the operations complained of, with the exception of that upon the machine, were executed when rebuilding and repairing the damage which the storm had done, that they were not inconsistent with the possession and use of the subjects as let to the defender on lease for some years, and at so considerable a rent, and the defender is not bound forthwith to restore the premises, in the particulars condescended on, to their precise former state,—it being open to the pursuer, should he be so advised, to insist on the defender closing up the window and openings for ventilation, and restoring the machine to its former shape, at the termination of said lease;

No. 128. therefore, in as far as the conclusions *ad facta præstanda* and for immediate restoration are concerned, sustains the defences, and dismisses the action; but, as regards the conclusion for interdict, in respect the defender has made certain limited and not very material alterations, without previously consulting the pursuer, grants interdict as craved; and, in the whole circumstances, finds no expenses due to or by either party, and decerns."

Feb. 26, 1857. Stirling v. Strang.

Both parties having appealed, the Sheriff-depute (Alison) pronounced the following interlocutor:—"Finds it proved by the report of Mr More, that the greater part of the alterations complained of by the pursuer were made by the defender, and that they were chiefly internal, not external repairs, and were an improvement on the edifice in question, not the reverse: Finds, that by the tack, the defender was taken bound to make and timeously execute all necessary repairs on the buildings and machinery let to him, and that he was to be allowed L.50 for ameliorations thereon: Finds that the alterations in question were made during the execution of the repairs by the defender of damage occasioned by the great hurricane in February 1856, on the places damaged thereby, which the landlord had declined to repair: Finds, in point of law, that the repairs, as set forth in the report by the reporter, were within the defender's powers, as a tenant of the premises under a lease of ten years duration, with such clauses, and at a rent of such an amount, and when obliged by the landlord to repair at his own expense the damage occasioned by a *damnum fatale* notoriously of extraordinary severity, seeing the alterations did not amount to an inversion of the subject, and did not materially change its character or condition: Therefore, adheres to the interlocutor appealed from, so far as it refuses the application for instant restoration of the premises to the condition in which they were before the said changes were made; and in the application for interdict against similar changes *de futuro*, finds it premature to pronounce *ab ante* on any such alterations, some of which may be within the tenant's power, and some beyond them, and which must be judged of when it is seen what future alterations are intended to be: Therefore, recalls the interlocutor so far as it grants interdict *de plano* against any future changes, reserving to the pursuer to bring an application for interdict when the case arises, in the event of changes beyond the defender's powers being commenced or persisted in, and reserving to the pursuer his plea at the close of the lease, that the alterations made, if approved of by him as improvements on the subject are, if on heritable subjects, to be left there without compensation or claim of damages, or that he may, at his pleasure, insist on the defender restoring the premises into their original condition at the conclusion of the lease, and to the defender his pleas thereagainst, as accords: Alters the interlocutor appealed from, so far as inconsistent with these findings: Finds the defender entitled to expenses, subject to slight modification: Modifies the same to three-fourths of the defender's costs, including the expense of Mr More's report; allows an account," &c.

In the Court of Session, the objection to the competency of the proceedings before the Sheriff was withdrawn, and it was argued for Stirling that as to damages done, Strang was admittedly liable to repair them,—but that instead of merely restoring the *status quo*, he had proceeded to suit his own convenience to make alterations which were clearly *ultra vires* of a tenant to make, and it was no defence to say that the premises were improved thereby. The landlord was the best judge of that, and could refuse to have the character of his subjects altered. Farther, the tenant having at his own hand made such alterations, the landlord was entitled to interdict against his continuing so to do.[1]

[1] Leck v. Fulton, 20th July 1854, ante, vol. xvii. p. 408; Hood v. Miller, 10th Feb. 1855, ante, vol. xvii, p. 411.

Without calling upon Strang's counsel,— No. 128.

Lord Justice-Clerk.—Common sense and sound reason equally support the interlocutor complained of. A party at a very large rent takes a lease for ten years for the purpose of carrying on a trade which he could not carry on to advantage without improvements. He required more light, and so made a window in the roof, and when a hurricane blew down a chimney stalk, which did a great deal of damage, he took advantage of the opportunity, when repairing it, of improving an inside stair, and making arrangements for better ventilation. There is no changing of the character of the buildings here—these operations are within his power;—no doubt, if the landlord can at the end of the lease instruct injury to the premises, he may get redress, but he certainly is not entitled to have things restored just now. As to the prayer for interdict against "any alteration," the Court can never consent to that, while holding that the tenant has done nothing but what is within his power. The landlord must just complain in the usual way, if he does anything in excess of it. Feb. 27, 1857. Maxwell.

Lord Murray concurred.

Lord Wood was absent.

Lord Cowan.—I concur also. This case is quite different from those at Airdrie and Glasgow. There entire alterations in the character of the premises were made. Here we have nothing of the kind. Mr More, I see, was a referee named in the lease. No objection was made to the remit to him, and his report, to my mind, is conclusive.

The Court pronounced the following interlocutor:—"Advocate the cause: Find, in respect that the objection to the competency of the form of process being a summary petition has been withdrawn, it is unnecessary to pronounce any finding on that plea: Find that the operations complained of, having been executed by the tenant for his own convenience in the course of his trade, while he was making large repairs rendered necessary by the effects of a very violent hurricane, were fairly made by him in the exercise of his rights as tenant of manufacturing premises under a lease for ten years; and therefore of new refuse the desire of the original petition, and decern; of new find the advocator liable in the expenses found due in the inferior Court, and also in the expenses incurred in this Court," &c.

David Crawford, S.S.C.—Patrick Paul, S.S.C.—Agents.

Mrs Clementina Heries Maxwell, Petitioner.—*Sol.-Gen. Maitland*—*A. R. Clark*. No. 129.

Entail—Process—Consents to a disentail defeating provisions in a marriage-contract to a wife and younger children sustained.—In a petition for disentail, one of the consenting heirs was the petitioner's son and heir apparent who was married, and whose eldest son, a pupil, was the only other heir whose consent was required. In his marriage-contract the heir-apparent bound himself, on succeeding to the estate, to grant a bond of provision in favour of his younger children, in accordance with powers contained in the deed of entail. The petitioner was also a party to the marriage-contract, and bound himself, in accordance with powers in the deed of entail, to infeft his son's wife in a liferent locality. A tutor was appointed to the pupil, and consented to the disentail. The petitioner and heir-apparent now executed a bond and obligation for infefting the heir's wife in the lands to be disentailed, and she and the parties at whose instance it was provided in the marriage-contract that execution should pass for the provisions in favour of her and the children of the marriage, executed a discharge of her liferent right in the estate, and consented to the disentail without "any provision being made for the provisions specified in the marriage contract, or for the protection of the parties entitled thereto." *Held* (*dub.* Lord Ivory) that although the heir, by so consenting to the disentail, was defeating the provisions in his marriage-contract in favour of

No. 129. his wife and younger children, his consent was competent and effectual, and also that the discharge by his wife was good, although she was not represented by any one to protect her individual interest.

Feb. 27, 1857. Maxwell.

1st Division. Ld. Mackenzie L.

The petitioner was heiress of entail in possession of the estate of Dinwoodie. Part of the estate was sometime ago sold by authority of the Court under a private Act of Parliament, and this petition was now presented for authority to disentail the remainder of the estate. The heir-apparent was the petitioner's only son, Wellwood Maxwell, who was above twenty-five years of age, and his eldest son, a pupil, was the heir entitled to succeed next to him. These were the only parties whose consents were required. A tutor *ad litem* was appointed to the pupil, and a remit having been made to Mr Mackenzie, W.S., he brought under the consideration of the Lord Ordinary certain eventual provisions under the marriage-contract of Mr Wellwood Maxwell, which the reporter considered might affect the entailed estate, and the heirs of entail.

By the deed of entail executed by the petitioner's grandfather, it was provided "That it shall be lawful to the said Alexander Maxwell, my son, or to any of the heirs of entail above specified, to grant bonds to their children, other than the heir, for payment of competent provisions to them, and for such sums of money, bearing interest only from the granter's death, as shall not in the whole exceed, in case there be one child other than the heir, one years free rent of the foresaid entailed estate; in case there shall be two children, other than the heir, two years free rent; and in case there shall be three or more children, other than the heir, three years free rent of the said lands and estate, after deduction of all feu-duties and other legal and annual burdens, excepting land-tax, and liferents to wives and husbands hereafter allowed."

It was also declared by that deed, that it should be lawful to, and in the power of the "said heirs of entail successively to provide their wives and husbands respectively, and the respective wives and husbands of their presumptive heirs, in a liferent locality of any part of the lands and estate above disponed, not exceeding one-fifth part of the rent of the said entailed lands and estate for the time,—that is, at the time the locality is granted."

Mr Mackenzie stated that it thus appeared, that although the heir of entail in possession was entitled to grant a jointure, by way of locality, in favour of the wife or husband of his or her presumptive heir, no power was given to grant provisions to the children of any such presumptive or apparent heir, and that the heir in possession of the entailed estate could only grant provisions in favour of his or her own younger children.

Accordingly, in the marriage-contract entered into between Mr Wellwood Maxwell, the petitioner's apparent heir, with the petitioner's consent, on the one part, and his present wife, with consent of her father, on the other part, although the petitioner bound herself to infeft Mrs Wellwood Maxwell in a liferent locality, yet she undertook no obligation whatever in regard to the provisions made for the children of the marriage.

By that deed Mr Wellwood Maxwell, her son, obliged himself, his heirs, executors, and successors whomsoever, to pay to the child or children of the marriage, other than the heir, the sum of L.2000, if there should only be one child; the sum of L.4000, if there should be two; and the sum of L.6000, if three or more children—reserving to himself to divide and apportion these provisions among the children, if more than one, in such manner as he should think fit.

In this contract Mr Wellwood Maxwell further bound and obliged "himself, in the event of his succeeding to the foresaid entailed estate" (Munshes) "by the predecease of his said mother, to grant, immediately upon his succession, and put on record, a bond of provision in favour of the child or

children of his said intended marriage other than the heir who will succeed No. 129.
to him in said estate, for securing payment to them, after his decease, in manner, at the terms, and subject to his power of apportionment as aforesaid, Feb. 27, 1857. Maxwell. furth of the rents of the foresaid entailed estate of Munshes and others, disponed by the deed of tailzie aforesaid, of the full amount of the provisions which by the said tailzie the heirs of entail successively in possession of the said estate are empowered to settle upon their younger children: But *declaring*, as it is hereby expressly agreed upon by the contracting parties, and declared, that, upon his implementing the said obligation, it shall be in the power of the said Wellwood Maxwell to curtail, modify, or entirely cancel, as he shall think proper, the specific provisions hereinbefore conceived in favour of his foresaid children."

In regard to these burdens which were set forth in the affidavit, there was produced to Mr Mackenzie a discharge by Mrs Jane Home Jardine or Maxwell, wife of Mr Wellwood Maxwell, with consent of, and by, the parties at whose instance it was provided in her contract of marriage that execution should pass for the provisions in favour of her and the children of the marriage, discharging the lands of Dinwoodie of her liferent right therein. Also a bond and obligation by the petitioner and Mr Wellwood Maxwell, for infefting Mrs Wellwood Maxwell, in liferent, in the lands of Munshes and others; and a deed by Mrs Jane Home Jardine or Maxwell, and by the parties at whose instance it was provided in the contract of marriage that execution should pass for the provisions to Mrs Maxwell and the children of the marriage, narrating the obligation contracted by Wellwood Maxwell in favour of his wife and children, and consenting to the disentail, "without any provision being made for the said provisions specified in the said marriage-contract, or for the protection of the parties entitled thereto."

Mr Mackenzie reported that the procedure was regular and proper, and that in his opinion the petition might be granted.

On 10th February 1857, the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having advised with the Court, remits to Mr Whitefoord Mackenzie to report whether it appears to him to be necessary that any further steps should be taken to protect the interests of the younger children of Mr Wellwood Maxwell, the heir-apparent to the entailed estate, in consequence of the provisions secured to them by the marriage-settlements of their parents."

Mr Mackenzie reported that the obligation in Mr Wellwood Maxwell's marriage contract being merely personal would be evacuated by his predeceasing the petitioner; and there seemed to be no way in which the petitioner could make these provisions to the younger children effectual burdens upon the entailed estate, even if she were inclined to do so. That in his opinion the petitioner's right to disentail, with the proper consents, could not be taken away by such an obligation executed by her apparent heir, and that none of the clauses of the statutes, prohibiting heirs from giving consents in certain circumstances, were applicable to the present case, so as to affect the validity of the consent given by Mr Wellwood Maxwell. He could not find that any case similar to the present had been before the Court. He referred to the cases of Dickson and Agnew,[1] and stated that the rights which the children of Mr Wellwood Maxwell might have under his marriage-contract, could not in any circumstances suffer, except to a trifling extent, by the proposed disentail, while in a certain event they might gain by it; and, in the whole circumstances of the case, "it did not appear to him to be necessary that any further steps should be taken to protect the interests of the younger children of Mr Wellwood Maxwell, the heir-apparent

[1] Dickson, 4th June 1856, ante, vol. xviii. p. 987; Agnew, 18th Jan. 1851.

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to the entailed estate, in consequence of the provisions secured to them by the marriage-settlements of their parents."

The Lord Ordinary reported the case.

Lord Ivory.—I should have liked to hear more upon the clause of the statute as to the consent of the parties to the disentail. My doubt is, whether a person can give a consent of himself which shall defeat the entail, and defeat those provisions in his own marriage-contract in favour of his children. Then I am not sure how far the consent of the wife is available, where she is not represented by some one to protect her individual interest. I merely intimate a hesitation upon these points. It would have been satisfactory to me to hear farther argument upon the application of the statute; for I am not satisfied that, even in the case of an apparent heir, he can give consent to a disentail, which is to affect his children as this does; and I doubt whether the heir in possession can disentail to the effect of disturbing provisions in favour of the widow of the heir-apparent.

The Solicitor-General (Maitland), for the petitioner, referred to the case of Nairne, 11th March 1851, ante, vol. xiii. p. 956.

Lord Ivory.—My doubts have not risen into certainties; but while I am not willing to stand in the way of the rest of the Court, my mind is not satisfied on the subject.

The Court pronounced the following interlocutor:—"The Lords, on report of Lord Mackenzie, Ordinary, interpone their authority, authorise the petitioner to disentail and acquire in fee-simple the said lands of Dinwoodie and others, with the pertinents mentioned in the petition: Approve of the instrument of disentail thereof in process, interpone their authority thereto, and grant warrant for recording the same in the Register of Tailzies, along with this decree, and decern."

David Welsh, W.S.—Agent.

No. 130. James M'Clelland (M'Phail's Trustee), Reclaimer.—*Penney—Gifford.*
The Bank of Scotland, Respondent.—*D. F. Inglis—Millar.*

Bankruptcy—Transaction—Right in security—Statute 2 & 3 *Vict. cap.* 41, *sect.* 37—*Valuation of security.*—A copartnery granted a cash-credit bond to the Bank of Scotland, which was declared to be binding on all the partners who subscribed it, for sums drawn by the firm, notwithstanding any future change in the partners. In security of this cash credit two of the partners conveyed their separate heritable estates to the Bank by dispositions *ex facie* absolute, but qualified by back letters bearing that they were in security, and that upon the debt being paid the Bank were bound to reconvey the property to these two partners or their representatives. These two partners having died, a minute was entered into between their trustees and the remaining partners, by which these last agreed to purchase the estates of the deceased partners (conveyed in security to the Bank), the price of the one estate being credited in the books of the firm as capital advanced by the deceased partner—the price of the other to be paid by ten yearly instalments—and the first estate being conveyed in security of the price of the second. Upon the whole price being paid, the trustees were bound to grant a conveyance to the company, and if not then reinvested, their obligation was to be sufficiently implemented by assigning the right to claim reconveyances from the Bank. The Bank were no parties to this transaction. It was likewise stipulated, that if any of the instalments of the price should remain unpaid for six months, the trustees should be entitled to sell the subjects for the whole balance of the price remaining unpaid. The company, after paying one instalment of the price, became bankrupt, and the Bank having made large advances on the faith of the cash-credit transaction, claimed to be ranked on the bankrupt estate for the full amount of their debt. The trustee objected that they must value and deduct their security,—*Held* (*aff.* judgment of Lord Mackenzie, *diss.* Lord Curriehill), that the estates, as originally conveyed to the Bank, formed a collateral security, and were separate from, and independent of the company estates;

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that the partners could not thereafter, by any transaction to which the Bank was not a party, defeat the position of advantage in which the Bank were originally placed; therefore that the security was not over the estate of the bankrupts under the 37th section of the statute 2 & 3 Vict. c. 41, and therefore that the Bank were not bound to value and deduct it;—*Observed*, that the only right vested in the company by that agreement was a personal but defeasible and contingent right, to demand from the trustees a conveyance, or, in a certain event, a mere assignation of the right to demand from the Bank a reconveyance of subjects, which, until the debt to the Bank was paid, remained the absolute property of the Bank, and which, therefore, formed no part of the company estate at the date of the bankruptcy of the company.

1st Division. Ld Mackenzie. L. Bill-Chamber.

The following narrative is taken from the note appended by the Lord Ordinary to his interlocutor:—" The estates of Dugald M'Phail and Company, merchants in Glasgow, and of Angus M'Phail, as sole partner of that company, were sequestrated under the Bankrupt Act on 13th March 1856. A claim was lodged by the Bank of Scotland to be ranked on the sequestrated estates for a debt on a current account, amounting to L.18,596, 2s. This claim was rejected by the trustee by a deliverance which bears,—' In terms of the 37th section of the Act 2d & 3d Vict. c. 41, which requires a creditor holding a security over the estate of the bankrupt, before being ranked, to place a specified value on such security, and deduct the same from his debt, the claimants are required to value and deduct from this portion of their claim, or from the whole amount of their claim, the security held by them over certain heritable subjects in James Street, which form a portion of the estate of the bankrupt.' Against this deliverance the Bank of Scotland have appealed; and the only question raised under the appeal is, whether the security held by them over the heritable subjects in James Street is a security over the estate of the bankrupts, which requires to be valued and deducted in terms of the 37th section of the statute.

In October 1850, the firm of Dugald M'Phail and Company consisted of five partners—Dugald M'Phail senior, Duncan M'Phail senior, and Dugald M'Phail junior, Angus M'Phail, and Duncan M'Phail junior—the three last being all sons of Duncan M'Phail senior. At that time the company, consisting of five partners, obtained a credit with the Bank of Scotland for L.13,000, and a cash-credit bond in the usual form was granted to the Bank, which was declared to be binding on all the partners who subscribed it, for sums drawn by the firm, notwithstanding any future change in the partners. In security of this cash-credit the Bank obtained two dispositions to heritable subjects in James Street, both dated 7th October 1850. One of these was a disposition by Duncan M'Phail senior to a property belonging to him; and the other was a disposition by Duncan M'Phail senior, and Dugald M'Phail senior, to subjects of which they were joint proprietors. The heritable subjects in these deeds had not been conveyed to the firm of Dugald M'Phail and Company, established in 1850, and they formed separate estates belonging to Duncan M'Phail senior, and Dugald M'Phail senior, as proprietors in their own right. As the dispositions to the Bank were absolute in form, they were qualified by back-letters, bearing that ' they are truly intended as a security for whatever is or shall be due to the Bank by our said firm for the time being, of whomsoever composed;' and it was declared that ' on full and final payment to the Bank, before sale of said subjects, of all sums due by our said firm, the Bank shall be obliged to reconvey to me, the said Duncan M'Phail senior, or my heirs, representatives, or assignees, the foresaid subjects conveyed by my said disposition to the Bank, and further to reconvey to us, the said Dugald M'Phail senior, and Duncan M'Phail senior, equally between us, or to our heirs, representatives, or assignees, the foresaid subjects conveyed by us, the said Dugald M'Phail senior, and Duncan M'Phail senior.' Thus Dugald M'Phail senior, and Duncan M'Phail

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senior, conveyed their separate estates as a security for the debt of the company; and upon that debt being paid, the Bank was taken bound to reconvey the property to the two elder M'Phails or their representatives.

After the date of this cash-credit transaction, on the faith of which the Bank made advances, several changes occurred in the constitution of the firm by the deaths of individual partners. Dugald M'Phail junior died in December 1851, Duncan M'Phail senior died in July 1853, Duncan M'Phail junior died in October 1854, and Dugald M'Phail senior died in May 1855. Angus M'Phail then became sole partner of the Company, which was sequestrated on 13th March 1856. It is under the bankruptcy of this last firm, of which Angus M'Phail was the sole partner, that the present question arises.

"After the death of Duncan M'Phail senior, in July 1853, new arrangements were made between the parties, under two separate deeds. One of these was a new contract of copartnery for the firm of Dugald M'Phail and Company. The other deed was a minute of agreement entered into in June and July 1854, between the testamentary trustees of Duncan M'Phail senior and Dugald M'Phail senior, on the first part, and the said Dugald M'Phail and the other partners of the company, on the second part. By this minute the second parties agreed to purchase the whole heritable property which belonged to the said deceased Duncan M'Phail senior and Dugald M'Phail senior, or in which they were interested, including the heritable subjects which had been conveyed to the bank in October 1850, on certain terms and conditions. The price of the heritable subjects belonging to Dugald M'Phail senior, which was estimated at L.6432, 4s. 6d., was 'to be credited to him by the said second parties, in the books of their firm, as capital advanced by him in their said business, in terms of the contract of copartnery, executed or about to be executed among them;' and the price of the subjects which had belonged to Duncan M'Phail senior, which was estimated at L.20,445, 5s. 4d., was to be paid to his trustees by ten annual instalments, the first nine of L.2000 each, and the last of L.2445, 6s. 4d. It was also agreed 'that the said Dugald M'Phail's interest in the said several subjects should, along with the other heritable property belonging to him, be conveyed to the said trustees of the said Duncan M'Phail, in security of the payment of the price of the subjects sold by them.'

"After setting forth these considerations, the first parties became bound, 'upon the price of the said subjects purchased from the said Dugald M'Phail being duly credited to him as aforesaid, *and* upon the *whole* price of the subjects purchased from the said trustees of the said deceased Duncan M'Phail, and all interest due thereon, being fully satisfied or paid to them by the said second parties, in terms of a separate bond therefor, to make, grant, subscribe, and deliver a valid and absolute disposition in favour of the said second parties, or their heirs or assignees,' of the properties therein described. It was further stipulated that 'should the first parties not be re-invested in the said subjects as vested in the Bank of Scotland when the period for granting the disposition to the second parties arrive, the said obligation on the first parties to grant a disposition of their subjects shall be sufficiently implemented by their assigning to the said second parties or their foresaids, the right to claim reconveyances thereof from the said bank, in virtue of the said dispositions to the bank and relative letter of acknowledgment.'

"It was likewise made an express condition of the minute, that if any of the instalments of the price of the subjects agreed to be purchased from the trustees of Duncan M'Phail should remain unpaid for six months after the term of payment, it should be in the power of these trustees 'to sell the whole or such part of the subjects and others above described, and of the subjects and others conveyed, or about to be conveyed to them by the said

Dugald M'Phail, in security of the payment of the price of the subjects hereby agreed to be sold by them, as will completely satisfy and pay, not only the instalment or interest so in arrear, but also the whole balance of the said price then remaining unpaid, and that either by public roup or private bargain.'

"It is admitted that only one of the stipulated instalments of the price was paid to Duncan M'Phail's trustees. No disposition to the subjects was ever granted to the second parties, and they never were in a condition to demand any such disposition or any assignation to the reversion of the property held by the Bank, and so matters stood at the date of the sequestration in March 1856."

In these circumstances the trustee having disallowed the claim of the Bank, the Bank appealed, and pleaded;—That the heritages held by them in security were not the property of the bankrupts, and therefore the Bank was not bound to deduct their value from the amount of their claim. That the property of the subjects in question was not conveyed to the bankrupts by the arrangements concluded between the trustees of Duncan M'Phail, senior, and Dugald M'Phail, senior, on the one part, and the partners of the company on the other, or by anything which followed upon it; and, at any rate, as that arrangement was concluded without the consent or knowledge of the appellants, the rights previously acquired by them in these subjects for their security could not be thereby prejudiced or impaired.

The trustee pleaded;—That the property contained in the Bank security was part of the estate of the bankrupt, and therefore that the deliverance of the trustee ought to be adhered to.

The Lord Ordinary pronounced the following interlocutor on 28th January 1857:—"Finds that the heritable subjects in James Street, Bridgeton, Glasgow, over which the appellants hold a security, form no part of the estate of the bankrupts, and that the appellants are not bound to place a specified value on that security, and deduct the same from their debt of L.18,596, 2s., in terms of the 37th section of the Act 2 & 3 Vict. chap. 41: Therefore recalls the judgment of the trustee so far as complained of by the appellants, and remits to him with instructions to rank them for the said debt of L.18,596, 2s., and pay the dividend thereon, and decerns: Finds the appellants entitled to the expenses incurred by them in this appeal," &c.*

* "Note.—This is a question of considerable importance, but the Lord Ordinary does not think it attended with difficulty.—(His Lordship then narrated the facts as above given.)

"Now, it is obvious, that when the dispositions were originally granted to the Bank in October 1850, they were not securities over the property of the bankrupts, but securities over the separate estates of Duncan M'Phail, senior, and Dugald M'Phail, senior. If this view be correct, the whole question necessarily turns on the effect of the minute of agreement entered into in June and July 1854. Looking to the terms of that minute, the Lord Ordinary cannot adopt the argument of the trustee, that the heritable subjects conveyed to the Bank thereby became the property or estate of the bankrupts, so as to require to be valued and deducted under the 37th section of the statute. No doubt there was an agreement whereby the subjects were to be conveyed or transferred in certain events, to the firm of Dugald M'Phail and Company. But there were conditions precedent, which never were purified. Not only was the price agreed to be paid for Dugald's subjects to be credited to him, but the price of Duncan M'Phail's subjects, amounting to L.20,445, [illegible] 4d., was to be paid to his trustees, before the first parties could be called [illegible] divest themselves by granting a conveyance. Till both these things were [illegible] conveyance of any kind was to be granted to the second parties; and for [illegible] reason, that even the property of Dugald M'Phail was by the agreement [illegible] a security to Duncan M'Phail's trustees, for payment of the price of [illegible] subjects belonging to them. There was thus a contingent per-

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The trustee reclaimed, and pleaded;—That there was nothing in this case to take it out of the ordinary rule. The Bank had got a security for their debt. Why, therefore, should they not be bound to value it? Although the subject originally belonged to an individual partner of the firm, that firm had since purchased the subject burdened with that security. Therefore were they not in the same position as the original proprietor? The estate now belonged to them. It was like any ordinary transaction. Although burdened, the estate passed to the purchaser; and the right to it, therefore, being vested in the bankrupt,—had it risen in value the trustee would unquestionably have been entitled to buy it. In regard to the subject which belonged to Dugald M'Phail, that was sold to the firm on conditions which had now been fulfilled. The company were, therefore, entitled to demand a disposition to the estate, and the trustees were bound to grant it. It was immaterial that the estate was conveyed in security to Duncan's trustees. Such a conveyance, being at the request of the firm, was equivalent to

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sonal obligation, whereby the first parties were bound to grant a conveyance to the subjects, or an assignation to the reversion at a future period in the event of all the instalments of the price being paid. But as the instalments were not paid at the bankruptcy, the proposed transaction and sale became inoperative, and the radical right to the subjects remained with the first parties, substantially in the same way as if no such agreement had been made.

"The expression, 'estate of the bankrupt,' in the 37th section, appears to the Lord Ordinary to mean nothing more than the estate carried by the sequestration and available as a fund of division among the creditors. He thinks the principle of the enactment is that no one should be admitted to claim in the sequestration who holds a security over the property of the bankrupt, which but for such security would go to the trustee for general distribution, without valuing and deducting such security from his debt. Here the appellants are not in that situation. They hold no security over any property belonging to the bankrupt firm, of which Angus M'Phail is the sole partner. For the heritable subjects conveyed to them in security belonged to the two elder M'Phails, and the radical right subject to that security remains with their representatives, who in this question may justly be regarded as cautioners to the Bank for the debt of the bankrupts.

"In the argument for the trustee it seems to be assumed that by the minute of agreement the right of the elder M'Phails and their representatives to the subjects in question was voided and extinguished, and that there was a valid and effectual transference of that right to the bankrupts. Nothing, however, can be more erroneous than this notion, which is repugnant to the whole provisions of the deed.

"Suppose there had been no bankruptcy, and that the debt to the Bank, under the cash-credit, had been fully paid,—to whom would they have been bound to reconvey the subjects held by them in security? Not certainly to the firm of Dugald M'Phail and Company, or Angus M'Phail, the sole surviving partner, but to the representatives of the two elder M'Phails, according to the express obligation in the back letters. Again, suppose that in consequence of the bankruptcy of the firm, and of Angus M'Phail, the Bank had compelled the representatives of the two elder M'Phails to pay up the whole debts under the personal obligation in the cash-credit bond,—who would have been entitled to the heritable subjects held in security? Plainly, the representatives of the two elder M'Phails, as the radical right belonged to them, and had never been validly transferred to any other party. Even if the Bank, in place of ranking in the sequestration, had recovered their full debt from other funds of the bankrupts, without trenching on the heritable securities, the result would have been precisely the same. In none of these cases could the Bank reconvey the subjects directly to the bankrupts without violating the express obligation undertaken by them when the securities were granted, and depriving the representatives of the two elder M'Phails of their clear vested rights under the minute of agreement.

"On these grounds the Lord Ordinary thinks the judgment of the trustee is erroneous, and ought to be recalled."

a conveyance by that firm itself, and therefore both on the ground of contract—of the price of the subject having been paid—of possession, and of a conveyance *sub modo*, the trustee was entitled to claim Dugald's estate as part of the estate of the bankrupt. As to Duncan's estate, it no doubt stood in a different position, for only one out of ten instalments of the price had been paid; but suppose the price all paid, the property would belong absolutely to the firm. It belonged to them now, though burdened with the price. And as to the payment or non-payment of the price, the difference was, that in the one case the purchase was made with a condition precedent, in the other it was not. It could not be said that the firm had no right to the property at all. If so, the Bank, holding a security over it, were bound to value and deduct that security.

Pleaded for the Bank of Scotland;—At the date of the bankruptcy the position of parties was this:—Duncan and Dugald M'Phail, senior, having a personal claim, in a certain event, to the subjects conveyed by them in absolute property to the Bank, had entered into a transaction, binding themselves that they would convey or assign over that personal claim in a certain other event, and at a certain after period, to the bankrupt. Now, what was in the bankrupt? Was it possible to say that he had any right whatever to this heritable estate? Section 37 might be so construed as to embrace in it all classes of anomalous cases connected with heritable estates. But the construction of what was "the estate of the bankrupt," could not be made to embrace such a contingent interest, and attach to subjects which would not be carried by the adjudication of the trustee. The statute declares that the adjudication carries all that is vested in the bankrupt; and therefore whatever right was in the bankrupt under this agreement, was necessarily vested in the trustee. What was that right? It was a right to go on and pay the instalments stipulated by this deed of 1854, for the period of ten years; and in the event of his being able and willing to perform this obligation, he would then be entitled, on the lapse of that period, to an assignation to a personal claim for a reconveyance of the subject. That was the whole right vested in the trustee; for it was all that was vested in the bankrupt. It was an abuse of language to say that the Bank had got a security over that right, which was transferred to the trustee by his confirmation. The Bank had got nothing of the kind. They had got a security in the form of an absolute conveyance, which vested them in property to which the trustee had no right; with reference to which he had no title, nor beneficial interest of any kind whatever—no inchoate right, in virtue of which he could demand a conveyance of the estate with or without conditions; and therefore the right vested in him, and which was in the bankrupt, was nothing more than a right depending on the fulfilment of a certain number of conditions, defeasible altogether on the slightest failure to perform them; for the moment an instalment should fall into arrear, the parties to this agreement might proceed to sell, and therefore the right was nothing more than an uncertain, contingent, defeasible, possible, and prospective right to ask for an assignation to a personal right ten years hence. That could not be said to form any part of the real estate of the bankrupt, or to be in any way connected with it. The heritable estate never was in the bankrupt. The extinction of the security in the Bank would not reinvest him. He had no radical interest in it. He never was the owner of the estate over which the security extended. Again, where a creditor holds certain obligants bound to him in several subjects in security of a debt, he is entitled so to deal with them as to charge against them all, and operate payment out of the aggregate obligants and subjects; and provided he does not take more than his debt, he is entitled to exhaust them by stating his debt in full against each. The only exception is where the subject of the security is the estate of

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the bankrupt, or a portion of it; then that security must be valued and deducted, because the whole estate of the bankrupt, of which that security forms part, is a fund for equitable distribution amongst all the creditors; and it would be unfair to them first to exhaust that portion of the estate which forms the security, and then come against the remaining available funds for the whole amount of the debt. If that security does not form a portion of the bankrupt's estate—that is, the estate in the hands of the trustee for distribution—the principle of equity does not apply. Therefore the question comes back—Is the Bank carrying away part of that estate which would be divisible amongst all the creditors, but for their preference? Suppose the Bank were to discharge this security, it would not enlarge the fund for distribution. The security, therefore, was not one which the Bank were bound to value.

Lord President.—This is a question of considerable importance, and of some nicety. The Bank of Scotland are creditors of a sequestrated company, and claim upon the estate for a debt of L.18,596, 2s. The trustee objects to that claim, on the ground that the Bank hold a security for their debt, which security they are bound to value and deduct; and he has refused to rank the Bank on the general estate until they have so valued and deducted that security. The question which we have to decide is, whether that is a security over the estate of the bankrupt, in the sense and meaning of section 37 of the Bankrupt Act? If it be so, then it is not disputed that the Bank are bound to value and deduct it; and in that case it is competent for the trustee and creditors to take the security at the value the Bank put upon it. On the other hand, if it be not a security over the estate of the bankrupt in the sense of section 37, but is a security over a separate estate belonging to another party, or not belonging to the bankrupt, which, for shortness, I may call a collateral security, then it is not contended by the trustee that the Bank are bound to value and deduct it. The history of this transaction appears to be substantially this:—(His Lordship then narrated the facts as above detailed. He then proceeded as follows:—)

The dispositions by Dugald M'Phail, senior, and Duncan M'Phail, senior, to the Bank, formed in their constitution a separate security not over the estate of the company, who were to operate on the cash-credit, but over the estates of Dugald and Duncan M'Phail individually, and as third parties. The property so conveyed to the Bank was then occupied by the company as tenants, and was thereafter occupied by them till 1854, although on what footing or by what title they occupied it from 1853 till 1854, whether they paid rent for that year or not does not distinctly appear, and is not of much consequence—the fact being that the company were in possession of the premises in question at the date of the bankruptcy.

I am inclined to concur in the conclusion at which the Lord Ordinary has arrived. This property was fully vested in Duncan M'Phail, senior. It belonged to him individually. He conveyed it to the Bank by absolute disposition, and there were letters constituting a back-bond, by which the Bank were taken bound, on the company's debt being paid, to reconvey the property to the two elder M'Phails, or their representatives. But the Bank held the property as by absolute conveyance, and the property so conveyed to them was a separate estate from the estate of the company. A security so given is in a different position, and of a different value in the contingency of a bankruptcy, from a security over the property of the bankrupt himself; for it is one which the holder of it is not bound to value and deduct, whereas a security over the property of the bankrupt carries that quality on the face of it. The money difference may be very material; for if the creditor is bound to value and deduct a security in such a claim as this, he can only claim the balance from the bankrupt estate; whereas, if he is not bound to value and deduct the security, he first exhausts the value of the collateral security, and then ranks for the whole debt on the bankrupt estate. Therefore the money difference may be very considerable. In this case the property was vested in Duncan M'Phail, who conveyed it by absolute disposition to the Bank. What follows? The security was applicable to any debt to be contracted, or that

might become due, by any copartnery carrying on business under the firm of Dugald M'Phail and Company, whoever the partners might be, or whatever change of partners might afterwards take place. Therefore it was a security for this debt of L.18,596, 2s.; and, but for the minute of 1854, there can be no question that matters would have remained on this favourable footing for the Bank, that they would have been entitled to avail themselves to the full extent of the security, and, at same time, rank for the whole amount of the debt upon the bankrupt estate. The question then arises, whether the minute entered into in July 1854, along with the possession which the company had of these premises, rendered the subjects of this security, in the sense of the statute, the property of the bankrupt company, and not the separate property of Dugald M'Phail, senior, and Duncan M'Phail, senior, as individuals.

It is so far a favourable circumstance for the trustee, that the first instalment of the price agreed to be paid by the company to Duncan M'Phail's trustees had been paid. But that is only one instalment out of ten. Now what right does the minute give to the company as against Duncan M'Phail, senior? He had conveyed his property by absolute title to the Bank. He then entered into this minute of 1854, or at least his trustees did, whereby they agreed to sell the subjects over which the Bank held their security to the company, but by which they stipulated that they should not be bound to give any title to these subjects, until the whole ten instalments of the price were paid. There is no obligation on them to grant a title to the subjects till that time. That property, as the security was constituted, was Duncan M'Phail's individual property. So far as regards the title, it remains his property still. No doubt there is a right in the company to compel a conveyance in their favour. It is a personal right, which will be exigible when the whole stipulated price of the subjects shall be paid, but, by the agreement, the last instalment of the price is not payable for ten years,—and, so far as we can see, it will never be paid at all. Duncan M'Phail's trustees are entitled to withhold all title to the property, till they get payment of the price. They do withhold it, and the Bank retain their original security over the property.

In that state of matters, it appears to me that the company have not yet got possession of this property as their own property. It does not belong to them. They have a right — looking to all these transactions — to any reversionary sum which may remain after all other rights affecting the property are adjusted. But the property is not theirs. They have a claim to it, but they have not the property itself in the sense of the statute—which, when it speaks of the estate of a bankrupt, does not mean all shades or shapes in which a right to property may arise, but relates to that which is truly the property of the bankrupt. It does not appear to me that the company had such a right as vested the property in them. If the Bank, having got payment of their debt, had proposed to reconvey the property to Duncan M'Phail's trustees, the trustees might then, if they chose, request the Bank to convey it to the firm of Dugald M'Phail and Company. But it is to Duncan M'Phail's trustees that the Bank are bound to reconvey the property. If the trustees have not got payment of their debt, they may take the reconveyance to themselves. They have the radical right to the property. It is they who have right to the reconveyance, and whatever claim the company may have, now or prospectively, they have not acquired the property in the sense of the statute. It did not form part of the company's estate at the date of the bankruptcy.

The property of Dugald M'Phail stands in a somewhat different position from that of Duncan M'Phail, although not so much so as in my opinion to render a different application of the law necesssary in regard to it. There is this difference between the two, that by the transaction with Dugald the price of this property had been satisfied, being credited in the books of the firm as capital advanced by him in the business. But still that was a mere mode of arrangement between those parties. But the same transaction which arranged the price also contained this provision, which was part of the transaction, that no conveyance to the subjects should be granted to the company, but, on the contrary, that Dugald's interest should be conveyed in security to Duncan's trustees, they being the parties who, in the first place, having pro indiviso interest in his estate, and, in the second place, being the parties who were bound for the debt to the Bank. That part of the transaction therefore [illegible] Dugald's estate—as in a question of property with the Company—sub-

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stantially in the same position as the separate estate of Duncan M'Phail. Therefore, upon the whole, I am inclined to agree with the view of this case taken by the Lord Ordinary.

But there are other grounds upon which, as at present advised, I would be very much disposed to rest my judgment. I greatly doubt the power of parties occupying the relative position to each other as in this case, so to operate upon the property disponed in security as to affect the nature and quality of the security which had been granted over it. The security stipulated for by the bank, and given to them, was a security over the separate property of a partner of the company, which was a very different thing from a security over the property of the bankrupt, because of the qualities to which I have alluded. I doubt very much the power of parties by any transaction between themselves, and to which the Bank was no party, to change the nature of that separate and independent security into a security devoid of these qualities, and which the Bank shall be obliged to value and deduct—a transaction, therefore, to their prejudice. The parties were fettered in this respect. A transaction with a *bona fide* purchaser would not affect the interest of the creditor. But as between these parties it just amounts to this, that if at any time the cautioner or party who has granted the security over his property to the Bank—he may be the creditor of the primary debtor or he may not—thus chooses to dispose of his property so conveyed in security at full value, withholding the disposition to it till the price is paid, he, by a stroke of his pen, destroys the value of the security which he has granted over it to the extent of compelling the creditor who holds such security, in ranking upon his debtor's estate, to value and deduct such security. I doubt very much the competency of doing that. No doubt this is a new company, but they are successors of the original company, and the original transaction had reference to any debts which the company might at any time contract. Upon the faith of that security, this company obtained credit, and the original transaction was, by the shape of it, as effectual in reference to the present debts of this company as to those contracted by the original company. Therefore, upon both of these grounds, it appears to me that the creditor here is not bound to value and deduct his security.

Lord Ivory.—This is an important case, and to some extent involving considerations of subtlety and nicety. But, on analysing it, there is no substantial difficulty in its solution. It seems to me, as it has seemed to your Lordship, that upon both grounds referred to by your Lordship, the creditor in this case is not bound to value or deduct the security held by him. The estate over which the security is constituted is not, in the statutory sense, the estate of the bankrupt; and therefore, whether upon the grounds which have been explained by the Lord Ordinary, and still further illustrated by your Lordship, or, upon the larger ground, as to the manner in which this debt was originally constituted, I agree entirely in your Lordship's conclusions.

The primary debtor in the present case is the bankrupt company. The estate over which the security subists is the individual heritage of Dugald M'Phail, and Duncan M'Phail, senior. Their heritage in their proper private capacity is in no ways connected with the company, and, in the independent and separate sense as heritage, would have been the property of no third party, nor in any ways connected with the Bank or company, except by reason of the conveyance. Dugald and Duncan M'Phail, senior, holding each his individual heritage, came forward as third parties to grant a collateral security to the Bank as creditor of the company. Now the company is the primary debtor. In their capacity of disponers, Dugald and Duncan M'Phail came under no personal obligation. That is perhaps not of much importance, but it is well to make the observation, for it shews the distinction between them as individuals and as partners. If a third party comes forward, and, at the instance of the company, for the better security of the Bank, who is a creditor of the company, dispones to the Bank a certain heritable estate belonging to that third party *ex facie* absolutely, though truly not so, such third party must be viewed, and his relation to the question must be taken throughout, on the footing that he is entirely separate from and independent of the company. He, as a third party, is disponing his own individual property in collateral security for a debt due by a separate party. In this way the Bank are not simply creditors of the bankrupt company. They are creditors of the bankrupt company, and its

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partners as their primary debtors, but they are creditors also of the parties who have given the collateral security, as parties entirely distinct from, and independent of, the company; and in the manner in which the transaction was here entered into, it was not so much Dugald and Duncan M'Phail, the proprietors of certain heritage, who were the primary debtors, but it was these real properties themselves which were conveyed that constituted the real debtors, for Dugald and Duncan M'Phail had not bound themselves in their own persons. It was their property, and not themselves, that became indebted to the Bank. This is shewn more clearly by supposing that Dugald and Duncan M'Phail had then made over their interests to a third party, a purchaser. That purchaser would not have been under any personal obligation to the Bank. But the importance of the observation —and which it is essential to keep in view — is that there were two estates, and two debtors, and one creditor, who was creditor of both. The Bank was that creditor. The primary debtor was the company. Their estate was the proper estate of the company as a company estate, and the estates of these individual partners *quasi partners*. But there was a distinct debtor of the Bank, over and above that company, viz., the parties who granted the collateral security, or rather the heritage so conveyed by them, and which heritage became a separate estate in the person of the Bank, to be held by them in security so long as the debt due by the company was unpaid.

Now the form of the security thus granted is *ex facie* absolute. It is also essential to keep that in view, because it is a form of title which divests the party to whom the estate originally belonged, and invests another party in the legal title to the estate, subject to the equitable rights of reversion, but still operates as a divestiture of the party so conveying it. There is a right of reversion. That is in a sense a radical interest still retained by the original proprietor. But that is to be operated through the form of the right which he has given, and that being an absolute right on the face of it, is to receive its full effects. The distinction in this respect between a disposition *ex facie* absolute and the other form of security known to law, was very distinctly brought out in the case of Garden v. The Royal Bank, where the doctrine held by the majority of the Court was not touched by the reversal, viz., that it is of the essence of a title *ex facie* absolute that all the consequences lawfully deducible from such a title should receive effect, and that all other interests are merely dependent and subordinate rights to be extricated in their own particular shape. It is not, as in the case of an ordinary security, where the original investiture of the party granting the security keeps him in the radical right of the estate. There the security is a mere burden on the estate, and the party who holds the primary investiture remains as much proprietor of the estate as he did at first. But if the party proprietor divests himself by disposition *ex facie* absolute, he operates a result the very reverse. He no longer remains radical proprietor of the estate. He has a radical interest in the estate. He has a potential and contingent interest. He has a reversionary right. But he is divested of all rights as proprietor, and it is through the party to whom he has conveyed it that he must seek his reconveyance, and get his own rights rehabilitated by reason of certain principles of equity and otherwise, which formed part of the transaction.

At the date of this transaction the Bank had two estates liable; first, a collateral security, and second, the company's estate, with a general obligation against the partners of the company as a guarantee for the company's debts. If there had been no change of matters at the date of the bankruptcy, nor any attempted conveyance such as formed the subject of the minute of 1854, the Bank was entitled to go against the two estates as jointly and severally liable to them for the debt. They were entitled to have gone against the heritage which they had obtained in security from Dugald and Duncan M'Phail, and exhausted that estate so far as it would go for the company's debt, in respect of which it had been conveyed as a security, and if it was still necessary to go against the company's estate to make good the balance of the debt, they were entitled equally to go against the company, and rank for the full amount of their debt upon the company estate, without any deduction in respect of the collateral security. But between the two estates they could [illegible] ranked for more than the full amount of their debt, and certain [illegible] of equities must have regulated their proceedings. But the [illegible] position is, that the Bank hold certain heritable estates, which

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were not the estate of the bankrupt company, and in which heritages they stand feudally vested as a collateral security for the company's debt. There were two sources of liability—distinct, separate, and independent of each other, and these two sources of liability were both equally available to the Bank. Now, could the Bank have been called on to divest themselves of this collateral security till they had been paid their full debt? Were they not entitled to have sold that estate and applied the price to the extinction of their debt, and to have so applied the price, if sufficient to extinguish their debt, without ranking upon the company estate at all? If, on the other hand, it was not sufficient to pay their debt, then were they not entitled to take as much as they could out of it, and then rank upon the estate of the company as being their joint debtor? They would have been entitled to go against the company estate, keeping the collateral security entirely apart and for their own purposes, and to be applied in extinction of the debt.

That being the situation of the Bank, was there anything which the debtor in the security or the debtor in the primary debt could do without the concurrence of the Bank to alter this position of advantage in which the Bank stood? If the Bank held these two estates to the effect of deriving full payment without valuing or deducting their security, could the proprietor of the subject which had been granted as a collateral security by disposing of that subject to the company, the primary debtor, and placing them in his right, prejudice the interest of the Bank, whose interest necessarily arose by force of law out of the *ex facie* absolute title held by them? It would be a most violent proposition to say, that if I hold a collateral security, any person can effect that right invested in me, or deprive me of the full benefit of it, or prejudice me in any respect whatever without my consent.

But, then, it is said that Dugald and Duncan M'Phail conveyed their interests in their estates—their radical right of reversion — to the company in 1854. What was the estate that the company then took? Did they take the heritage which had been originally vested in Dugald and Duncan M'Phail? No such thing;—that was now vested in the Bank, and could not be touched except by payment of the full debt. They took the right of reversion. They took what remained in the M'Phails,—a right to demand a reconveyance. But the estate, in the sense in which we are to deal with it, as the subject of a security to the Bank, they did not take, for that was already vested in the Bank, and divested of the party who conveyed it to the Bank, and who, therefore, could only now convey to the company what remained in himself. And that brings one nearer to the clause in the statute, for it is said that the Bank is here claiming against the company, who, by this time, were proprietors of the subject of security. If they had truly been proprietors of the subject of security, as an absolute and unlimited and unqualified estate, there might be a good deal to say. But, if they be proprietors of the subject only after a separate estate shall have been carved out of it and conveyed to the Bank, the only thing that could have been conveyed to them, and of which they can now be proprietors, would be the right of reversion; and, therefore, there can be no ranking on any subject of security which was part of the bankrupt estate. The Bank was entitled to exhaust the subject which they had derived from a third party as a separate source of liability altogether, and it was only after the debt was satisfied that—if the subject of security was not exhausted—the company could claim any right of property in it.

I do not enter more deeply into this matter, which has been fully spoken to by your Lordship. But this is a very clear result, that, if you make the Bank value and deduct their security, you in reality make them do that which would, *pro tanto*, cut down the subject of their security altogether. Before the minute of conveyance of 1854, they were entitled to exhaust their security, and were not bound to deal with it as liable to any valuation or deduction whatever. They were entitled, if the property was not sufficient to pay the whole debt, to exhaust the whole of it, and allow no part of it to fall into the estate of the bankrupt at all. But if, having done so, they are bound to value and deduct it, that is making a security available on the one hand unavailable on the other. Holding that view, I am equally well satisfied with the grounds stated by the Lord Ordinary as to the agreement and sale. There, too, the radical point is the absolute title of the Bank in the subject, so far as that subject of security was part of the matters dealt with in that

minute of agreement. In the first place, the contracting parties were the remaining partners and representatives of deceased partners of the company. These are parties who certainly are not entitled to contract to the prejudice of the Bank as regards a right already completed in their person. They are not entitled to contract to the prejudice of the Bank in a transaction the shape of which was to exclude the Bank from all privity to, concurrence in, or knowledge of it.

In the second place, that agreement of 1854 recognises the complete investiture of the Bank in its right to this estate, because the parties, treating between themselves, say, that, if the elements of this agreement shall not be completely extricated as between themselves, there shall be no binding effect in the obligation to convey the estate, and it shall be held a full and sufficient equivalent that the trustees shall give the company right to demand reconveyances from the Bank, in virtue of the dispositions to the Bank, and relative letter of acknowledgment.

That shews that the agreement, even as it was entered into, deals with the right of the Bank as a right exclusive of every other interest.

But, in the next place, there are conditions precedent as between the parties themselves, without which the new company are not even to be placed in a situation to demand or get a conveyance from the trustees of the deceased partners. Until these conditions are purged, the company have got no estate. Until the instalments of the price are paid, they have no right to demand a conveyance. Until the debt is paid, the Bank cannot be called on to divest themselves of the subject of security. Suppose that, at the date of the agreement, the question had arisen to whom the Bank were to reconvey,—their debt being paid, or otherwise extinguished,—in which event their obligation to reconvey was undoubted,—who were the parties entitled to demand such reconveyance? It was the parties from whom the Bank had acquired the estate. It was Dugald and Duncan M'Phail, or the parties to whom they had transferred their right. Their trustees have agreed to transfer the right, but the conditions of transference have not been fulfilled. The company are, therefore, not even entitled to demand a reconveyance. At the date of the agreement the trustees alone were entitled to demand it, but no person was entitled to do so until the debt to the Bank was extinguished.

LORD CURRIEHILL.—The company of Dugald M'Phail and Company, upon whose sequestrated estate the appellants, the Bank of Scotland, are claiming to be ranked for a debt of L.18,596, 2s., was formed in 1853, and was sequestrated in 1856. It was different in its partners, and in its constitution, from a former company, which had carried on business under the same name, from 1850 to 1853, when it was dissolved, and which never was sequestrated. The second company, by its contract of copartnery, undertook the liabilities of the dissolved company. The question raised by the record is, Whether the appellants, in ranking for that debt upon the general estate of the bankrupt company, are exempted from the condition, prescribed by the 37th section of the statute 2 & 3 Victoria, c. 41, of deducting the value of two preferable securities which they held for that debt; in respect that, as they allege, the subjects of these securities are not part of the estate of the bankrupt, according to the true meaning of that enactment?

In order to solve this question, we must ascertain whether or not the subjects of these securities, if they were free from those and similar burdens, would be a part of the sequestrated estate, and as such part of the fund of division among the creditors? If this be the case, these subjects are part of the bankrupt's estate in the meaning of that enactment; the object of which is only to give practical effect to the equitable principle, that a creditor on a bankrupt estate, who, in virtue of a preferable security over one portion of that estate, is entitled to appropriate the same to himself exclusively towards satisfying the debt so secured, shall not likewise get a dividend on the portion of the debt, so to be satisfied, out of the remainder of the estate. It matters not whether or not a bankrupt's title may have been feudalised, or whether his right to the subjects may have been real or personal. If the subject, even although not burdened with securities for his debts, would not have been alienable by him, nor attachable by his creditors (such as a subject held by him in trust, or the fee of an entailed estate), it would not be part of his estate in the [illegible] enactment, although it should be vested in him by a complete feudal title. [illegible] the other hand, the subject, if his right thereto was alienable by him, or [illegible] by his creditors, is transmitted to the trustee as part of the

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divisible fund by the conveyance and adjudication implied in the sequestration, and is part of the bankrupt's estate in the meaning of the statute, whatever may have been the form or nature of his title at the date of the sequestration. This is the sense in which what is described as the estate of the bankrupt is used throughout the statute, and particularly in its 37th section.

The subject of one of the securities consists of the *pro indiviso* half of a tenement in Glasgow, which had been purchased by the bankrupts from Dugald M'Phail in 1853; and I shall first of all inquire, whether or not, at the date of the sequestration, it was part of the bankrupt's estate in the meaning of the enactment. I shall then make a similar inquiry as to the subject of the other security, which consists of the other *pro indiviso* half of that tenement and of other property in Glasgow, which the company at the sametime purchased from the trustees of Duncan M'Phail.

It was stipulated, in the very contract of copartnery by which the company was formed, that the former of these subjects should be purchased as part of its capital stock, from Dugald M'Phail. And effect was given to this stipulation by a separate written contract of sale of the same date, whereby Dugald M'Phail agreed to sell, and the company agreed to purchase these subjects and others at the price therein set forth. And it was farther thereby stipulated between the parties, that the price should be settled by its amount being credited in the company's books to Dugald M'Phail; that on this being done, he should grant a conveyance of the subjects; and that the purchaser's entry to possession was at 16th July 1853, which was also the date of the commencement of the copartnery. That contract likewise set forth that the subjects were to be conveyed to the trustees of Duncan M'Phail in security for a debt contracted by the company to them, as the price of the other subjects purchased from them.

This contract of sale was duly implemented. The price was settled in the stipulated manner by the amount being credited to the seller in the books of the company. The company was put into possession of the subjects, and enjoyed that possession during all the period of its subsistence. Dugald M'Phail denuded himself by a deed of conveyance thereof,—that conveyance having been taken in favour not directly of the company, the purchasers, but of the trustees of Duncan M'Phail, who granted to the company a back-bond declaring that conveyance to be merely a security for the separate debt already mentioned. The personal right to this property which thus belonged to the company, at the time of its sequestration, formed part of its estate in the meaning of the 37th section of the statute. That right, under the burden of any completed securities thereon, may be sold by the trustee in the sequestration, and its price divided among the general creditors, in respect that the company had purchased the property by a formal probative contract of sale, and that that contract had been implemented *hinc inde*.

If the right to these subjects did not then belong to the estate of this bankrupt company, in the meaning of that enactment, to whom did it so belong? No satisfactory answer has been made, or can be made to this question. In the argument there appeared to be different assumptions on this subject,—one being, that the property belongs still to Dugald M'Phail,—another, that it belongs to the appellants themselves, in virtue of their real security over it,—and another, that it belongs to the trustees of Duncan M'Phail, in virtue of the postponed security which they held over it for the debt above mentioned. All these assumptions, besides being inconsistent with each other, are fallacious.

1. I have already shewn that the subjects ceased to belong, in any sense, to Dugald M'Phail, by his having sold them and received the stipulated satisfaction for the price; and by his having placed the purchaser in possession, and by his having denuded himself of the property as above mentioned.

2. The absurdity of holding the appellants themselves to be the owners of the subjects, in virtue of their right in security, is very palpable; because, even if their right in security were held to have become truly a right of property, then the debt which was so secured would also be held to be satisfied to the extent of the value of the subject; and the objection to the ranking of the debt (to the extent to which it would have thus been satisfied) on the general estate, without deducting that value, would be greatly strengthened. But in order to see clearly the fallacy of this assumption, it is proper to attend to the nature of the security held by the

appellants. It was granted by Dugald M'Phail on 7th October 1850 for a cash-credit for L.13,000, which the appellants were to give to the former company, of which Dugald was a partner. It was granted as a security for the liabilities of not only the copartnery then formed, but also of any future copartnery which, being formed under the same firm, might comprehend any of the granters of that bond. That security having been granted in the not uncommon form of a disposition *ex facie* absolute, qualified with a back-writing setting forth that it was granted merely as a security for debt, this peculiarity in its constitution had two effects:—1. It had the effect, so long as the back-bond was not recorded, of vesting the fee in the appellants, and of reducing the granter's title to a personal one. And 2. This security was of a prospective, expansive, and restrictive nature, inasmuch as the debt which it secured might be contracted at any future date, and might from time to time be diminished, extinguished, or enlarged; and the grantees might retain the right so conferred upon them in security of any debt present or future, which might be of the description set forth in the back-bond, or for which the owner of the subject for the time being might become liable to them. But, notwithstanding the peculiarities which thus distinguish securities of this class in the law of Scotland, still the position of the grantees is practically and truly nothing else than that of real creditors on the estate of their debtor. The property, subject to the burdens so created upon it, continues to be part of his estate, in so much that so long as the creditor does not enter into possession in virtue of the security, the owner retains the possession and the administration of the property. If he become a sequestrated bankrupt, his right to the property is part of his sequestrated estate, and may be sold by the trustee for behoof of the creditors; and the reversion of the price, if there be any, forms part of the fund of division among the creditors. The price, so far as it is applied in paying off the debt covered by the security, extinguishes that debt, and saves the other creditors from having their dividends diminished by the ranking of the secured creditor for the debt, so far as it is so satisfied. And the creditor, if in virtue of his security, he withdraws the subject of it from the general fund of division, and appropriates it for payment exclusively of the debt owing to himself, cannot farther rank for that debt upon the other funds of the sequestrated estate, without deducting the value of that security, as being one constituted on the estate of the bankrupt. This would be the case even if the reversionary right remaining in the bankrupt were nothing more than a personal *jus crediti*, such as belongs to a purchaser under a contract of sale or articles of roup. But the right of reversion in cases of this class is of a peculiar and higher description. It admits of being restored to a real right at the pleasure of the owner, because, as stated by Professor Bell (Com. II. 293), "If the back-bond have been recorded, the right (viz., the creditor's right) becomes from that moment a burden or right in security merely—the full right of fee being reinvested in the debtor." Moreover, the creditor's infeftment, although it is held to vest in him the real right or fee of the subjects, is held in law to be the infeftment of the debtor as the owner of the property, subject, of course, to the burden of the debt, as is exemplified by this conclusive test, that in the event of the debtor's death his reversionary interest is subject to his widow's right of terce, although terce is available only out of subjects in which the widow's husband dies infeft. This was expressly the ground of the decision in the case of Bartlett v. Buchanan, 21st Feb. 1811, F.C. And such being the nature of the rights remaining with the granter of a security of this description to the subject of that security, the creditor in the debt so secured is not entitled to rank for that debt upon the general estate of the bankrupt without deducting the value of the preferable security he holds for that debt, in terms of the statutory enactment to that effect.

The reasoning of the appellants appeared to me to proceed on an assumption that the right in security and the right of reversion are two separate subjects,—the former belonging to the creditor and the latter to the debtor,—and that it is securities over the latter of which the value is required to be deducted by the 37th section of the statute. There is a confusion of ideas in this reasoning. Were it sound, the enactment would be inoperative, because, as the [illegible] what remains with the debtor *ultra* all real securities for the debts with [illegible] right is burdened, it never can be burdened with any real securities. The [illegible] reasoning is palpable. The subject of the bankrupt's right of

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reversion is identically the same with the subject of the creditor's right in security, both rights comprehending the whole of the subjects, and the latter right being only a burden upon the former. It is the value of the security created by that burden which the statute requires to be deducted in the ranking upon the general estate.

3. The remaining ground upon which the right to this property is said not to be part of the estate of the bankrupts in terms of the statute, is that it belongs to Duncan M'Phail's trustees, in virtue of the conveyance which was granted to them, as before mentioned. But that conveyance was granted only as a second and postponed security for a debt which the company incurred to these trustees, as the price of the other subjects purchased from them. Although that conveyance also was granted in terms *ex facie* absolute, it also was qualified by a back-bond establishing its true character. And accordingly, for that debt also (subject, of course, to deduction of the value of this secondary security, if indeed it be of any value), the creditors are entitled to be ranked upon and draw a dividend from the general estate. And, on the other hand, the trustee on the sequestrated estate is entitled to sell the property, subject to the burden of the real debts, and to divide the proceeds among the creditors.

Assuming that but for the granting of this postponed security the appellants would have been bound to deduct the value of their preferable security in their ranking for the secured debt upon the general estate, their position, in this respect, cannot possibly be improved, and no exemption from the operation of that enactment can have been created in their favour, by the mere circumstance that a postponed security has been granted over the subjects in favour of a third party. The granting of that postponed security cannot make their own position either worse or better.

Thus the right to this property (subject to the burden of these two securities) is part of the estate of the bankrupts, and is part of the fund of division among their general creditors; and the appellants, in so far as they withdraw this property from that general fund of division by appropriating it to themselves for satisfying their preferable debt thereon, must deduct the amount of their debt to the extent it may thus be preferably satisfied out of what would otherways be part of the general fund of division, when they claim to be ranked with the other creditors on the remainder of that fund of division.

It has been suggested that the appellants are exempted from this statutory obligation upon a different ground, viz. that Duncan M'Phail, the granter of the conveyance, under which the preference is claimed, was not the principal debtor in the debt in question, but only a guarantee or cautioner for it; that the appellants were entitled to be ranked upon the estate of the company, as being the principal debtor, without deducting the value of the heritable security so held by them over an estate belonging, not to that debtor, but to Duncan M'Phail, as cautioner for it; and that their position, in this respect, could not be detrimentally altered by the principal debtor, viz. the company, acquiring, by purchase or otherways, from the cautioner the subject of the heritable security.

There might be cogency in such reasoning, in a case where the principal debtor is not owner of the subject of the security at the time when the debt is incurred, and only acquires right to it thereafter. For example, this might have been the case, if this debt had been incurred to the respondents by the company which subsisted prior to 1853, and had been secured over the subjects in question, while these still belonged to Duncan M'Phail individually, and if *that company* had thereafter purchased it from him, and this ranking had been on its estate. Or, again, if the company which was formed in 1853, and is now bankrupt, had not purchased this property from Duncan M'Phail until after the debt now in dispute had been incurred by this company. So far as I know, the question whether or not the creditor, in such cases, would escape from the operation of the 37th section of the Sequestration Statute, has never occurred for decision, and I reserve my opinion upon it. But even supposing that this reasoning would be sound, in cases of that kind, it is inapplicable to the very different class of cases to which the present belongs; where that debt, which is sought to be ranked upon the general estate was incurred by the principal debtor after, and not before that party acquired the property, upon which the debt is secured, and where

the creditor has never been in the position of holding a security for that debt over property belonging to any party other than the principal debtor. That such is the true description of the present case, appears from comparing the date of the contraction of the debt of the company with the date of the acquisition of the property. Although the dates at which the company contracted this debt of L.18,596, 2s. in question does not appear from the record or printed papers, yet necessarily these dates were subsequent to that of the company which is the debtor having come into existence. And at these dates the property in question did not belong to Duncan M'Phail, or any third party, but to the company itself, because the purchase of this property by the company, as part of its capital stock, was coeval with its formation, and was indeed one of the conditions of its very existence. And this condition was carried into effect by the formal written contract of sale of the property of the same date. Hence there never was a time when the appellants held a security for the debt now in question over property which then belonged to Dugald M'Phail, or any party other than the company, the principal obligant in the debt.

The fallacy in the reasoning of the appellants appears to arise from confounding the date of the title under which they hold their security with the date when the security began to exist. Although the conveyance was granted in 1850, and from the prospective expanding and contracting nature of the security it was capable of covering debts and liabilities not then existing, but to be incurred at a future time, either by the company then existing, or by other companies to be afterwards formed on certain conditions, it had not, and could not have, the effect of actually burdening the property with any such future debts or liabilities, until these should be actually incurred to the appellants by the company in subsistence for the time being. The title which was granted to the appellants in the year 1850 had not, and could not have, the effect of burdening the property, as at that date, with a debt of L.18,596, 2s., which did not exist until several years afterwards. And although, from the peculiar nature of the conveyance, it operated as a security for debts or liabilities which were incurred by the company formed in 1853, yet these debts, so long as they were not incurred, and had no existence, did not, and could not, become burdens upon the property. And as at the dates when they did come into existence, the property over which a security for them then accrued to the appellants belonged to the principal obligant in the debt then incurred, and not to Dugald M'Phail as cautioner therein.

This would have been the case, even if the debt in question had been contracted originally by the former company, which was dissolved in 1853. In that case the debt, although it would have been a real burden upon the property purchased from Dugald M'Phail, could not have been ranked on any footing whatever upon the general estate of the succeeding company, unless that company, when it came into existence, had undertaken an obligation to the appellants to pay the debt. And if it did undertake an obligation to the appellants to pay a debt contracted by the former company, that undertaking itself would be the only ground for its being ranked upon its sequestrated estate. And as the date of such an undertaking by the new company could not be earlier than the date of its own existence, it would still be true that this debt had never been the debt of the bankrupts, before the property over which it is secured became theirs. In the case of a party who purchases an estate, which is burdened with a debt incurred by the seller, and who, instead of paying off the debt, grants a personal bond of corroboration for the creditor—the latter, in the event of the purchaser being afterwards sequestrated, would rank upon his general estate in virtue of the bankrupt's obligation in the bond of corroboration; but such creditor would not be exempted from the statutory condition of deducting the value of his security over the heritable property, on the plea that the subject of the security is not part of the bankrupt's estate. The answer would be conclusive, that the property over which his security is constituted belonged to the bankrupt, when the debt was incurred by the latter; and that, when he avails himself of an obligation granted to him by the partner, who at the time was the owner of that property, to rank upon that party's sequestrated estate, he must do so on the statutory footing of deducting from his claim the value of his security over a portion of the bankrupt's estate. And the present case would be in the [illegible], even if the debt for which the appellants are claiming to

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be ranked on the general estate of the bankrupt had been incurred by a different company, but had been undertaken by the new company after it came into existence, and had become the owner of the subject of the security.

It is not alleged that all or any of the debt of L.18,596, 2s., in dispute, had been contracted by the former company, and that the present company had become liable for the same only by some *ex post facto* obligation. There is no allegation or plea to this effect in the record. And hence the case must be dealt with on the footing that this debt was contracted by the bankrupt company itself after it came into existence, and had become the owners of the property over which a security accrued for this debt at the date of its contraction; and that, consequently, the appellants are not in a position to plead that their debtors' purchase of the subject of the security was made subsequent to the date when this debt became secured upon that property.

I therefore think that the appellants have failed to establish any ground of exemption from the statutory enactment, that, in ranking for this debt on the general estate of the bankrupt, they must deduct the value of the preferable security they hold over that portion of the bankrupt's estate which was purchased from Dugald M'Phail.

I further think that they have failed to establish an exemption from that enactment in reference to the security they hold over the other portion of the bankrupt estate which was purchased from the trustees of Dugald M'Phail. That purchase, in all essential particulars, is in the same predicament as that already mentioned.

1. It was a condition of the contract of copartnery that these subjects also should be purchased by the company as part of its capital stock. 2. The minute of sale above referred to (to which these trustees were parties) set forth that they agreed to sell, and the company agreed to purchase their interest in these subjects and others at the price therein mentioned. 3. It is therein stipulated that the purchaser's entry should be as at the 16th July 1853, and that the price should bear interest from that date. 4. The company was accordingly put into possession of the subjects, and enjoyed that possession as long as it carried on business. 5. The first instalment of the price was duly paid at the stipulated term. 6. The subjects purchased from Dugald were conveyed to Duncan's trustees, as a security for the remainder of the price as above mentioned. And, 7. The purchasers were put into possession of the subjects. The particulars in which this purchase differed were chiefly these:—1. The price was payable by ten annual instalments, on the 16th of July of each year, commencing on 16th July 1854. 2. The conveyance by Duncan's trustees was to be granted to the Company only upon the whole of the price being paid up. And, 3. A separate bond for the price, payable at the times and by the instalments above mentioned, was to be granted by the purchasers to the sellers.

The position of the appellants in reference to these subjects is also the same as that in which they stand in reference to the subjects which were acquired from Dugald M'Phail,—Duncan, the former owner, having also granted a security over these subjects to the appellants, of the same date, in the same form, and for the same liabilities as those in reference to which the security by Dugald was granted. Hence all I have stated in reference to the title on which the appellants hold a right to the subjects purchased from Dugald apply also to the title on which they hold the property which was purchased from Duncan's trustees, and these remarks need not be repeated. But the appellants maintain that these subjects still belong to Duncan's trustees; and that, therefore, they are entitled to be ranked on the estate of the bankrupts without deducting the value of their security thereon. It was, as they allege, a condition precedent of the contract of sale of these subjects, that the whole should be paid; and that, as that alleged condition has not been performed, the sale has never taken effect. And there might have been some force in this reasoning if there had been in the contract of sale either a suspensive condition to the effect that the sale should not be effectual unless and until all the instalments of the price should be paid, or a resolutive condition, to the effect that if all or any of the instalments should not be paid at the stipulated time, the sale should be rescinded. If such had been the case, and if, in consequence thereof, matters were now to be dealt with on the footing of there not being now an existing sale, the sellers would be entitled to have the possession of the subjects restored to them, and would be

obtaining full payment of the balance. This being so, the inference drawn is, that no purchase or transaction between the principal debtors and their cautioners (for so Dugald and Duncan, for the purposes of this argument, may be called) could alter, for the worse, the position of the Bank as creditors, or prevent them from going against each estate to the effect of obtaining full payment, precisely as they might have done before.

To illustrate the principle here involved, suppose Dugald and Duncan, not being themselves in any way liable for the debt, but, as a mere favour to the company, had each handed over to the Bank a chest of plate in security of the company's debt, and had afterwards sold this plate to the company, received payment of the price, and intimated the sale to the Bank:—In such circumstances it seems clear enough—on the principle of the case of Black v. Melrose, 20th February 1840—that, but for the sale of the plate to the company, the Bank would not only have been entitled to rank for their full debt on the sequestrated estate of the company without valuing and deducting their security over the plate, and then to have operated full payment of the balance by disposing of the plate, but would even have been entitled to draw a composition from the sequestrated estate corresponding to the full amount of their debt, to the effect of operating full payment, although they had, in the meantime (subsequent to the sequestration), sold the plate, and thereby realised a considerable portion of their debt. The question there would be, whether the sale of the plate by Dugald and Duncan to the company could injuriously affect the Bank's right of ranking on the company's estate, by compelling them to value and deduct their security over the plate, the effect of which might be to prevent the Bank from operating full payment of their debt as they otherwise would have done. As at present advised, I am inclined to think that, in such a case, the position of the Bank could not be altered for the worse by a sale to which they were no parties, and that they could not be compelled to value and deduct their security over the plate which, but for that sale, they could not have been required to do. But this involves a question of novelty and importance, which, although it may be covered by the pleas in law, was not argued at this bar, any more than it seems to have been before the Lord Ordinary; and I should hesitate to go upon it, without making sure, after argument, that the position of the respective parties was such as to present the question in the same pure form in which it would have occurred in the case which, for the sake of illustration, I have just supposed.

I think the ground relied on by the Lord Ordinary sufficient for judgment, and am contented to rest upon it.

The Court pronounced the following interlocutor:—"Recall the first finding in the interlocutor of the Lord Ordinary submitted to review; and, in room thereof, find that the security which the appellants have, in virtue of the conveyances in their favour by the late Duncan M'Phail, and by him and the late Dugald M'Phail, of the heritable subjects therein specified, is not a security upon which they are bound to put a specified value as a security held by them on the estate of the bankrupts, under the provisions in the 37th section of the statute 2 & 3 Vict. c. 41; and, with this variation, adhere to the interlocutor of the Lord Ordinary reclaimed against, and refuse the reclaiming note: Find the appellants entitled to additional expenses, and remit," &c.

Davidson & Syme, W.S.—Webster & Renny, W.S.—Agents.

No. 131.

Bartholomew Lynch, Pursuer.—*D. F. Inglis*—*F. W. Clark.*
George Haggart, Defender.—*Pattison.*

Process—Issues—Injury to a workman.

Feb. 28, 1857.

1st Division.
Ld. Ardmillan.
C.

See supra, p. 399.

The following issue was now adjusted in this case:—

"Whether, on or about the 6th day of August 1855 years, the pursuer,

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sell. No part of the price was paid at its date. The price of Dugald's portion of the subjects (L.6432, 4s. 6d.) was to be carried to his credit in the books of the company, of which he was a partner. The price of Duncan's portion of the subjects (L.20,445, 6s. 4d.) was to be paid by instalments, of which one only has been actually paid, and the last of which will not be due till July 1863. In the meantime, Dugald's portion of the subjects stands conveyed by him, in terms of the agreement, to the trustees of Duncan, it being stipulated by the agreement that Duncan's trustees are not to be bound to denude of Dugald's portion of the subjects till the whole price of Duncan's portion shall be paid to them, and that they are to be entitled to sell the subjects so conveyed to them, to meet any instalment of the price of Duncan's portion of the subjects which shall remain six months due and unpaid. The effect of all this appears to me to be to place Duncan's trustees substantially in the same position, so far as regards the present question, as if they had been sole proprietors and sellers of the whole subjects now in dispute. Both sets of subjects stand vested in Duncan's trustees; and it is a condition precedent to the company being entitled to demand a disposition to either set of subjects that the whole price of L.20,445 due to these trustees, for their own portion of the subjects, shall be fully paid. At present, therefore, the company, even if solvent, would not be in a situation to demand a disposition to either set of subjects; and unless they shall pay the stipulated price and interest to Duncan's trustees, they never will be so. The trustee in the sequestration does not undertake to pay this price, either now or afterwards. Payment of a composition upon the price will not, of course, entitle the company to a disposition. In this state of matters neither the one set of subjects nor the other can form a fund of division among the creditors of the bankrupt company. And I cannot hold either set of subjects to be the property of the bankrupts in the sense of section 37 of the statute. That there may be a sense in which the subjects may be called their property is not enough if they be not their property in the sense of this enactment. The bankrupts hold no disposition to these subjects, and no pure and absolute right to demand and obtain such a disposition. They have merely a future and contingent claim to a disposition—the contingency being one which, to all present appearance, will never be purified. But it is not over this contingent claim (which is all that belongs to the bankrupts), but over the subjects themselves, which stand vested both legally and equitably in other parties, that the Bank's security extends. It is true there is no condition precedent to the contract of sale. But a contract of sale of heritable subjects does not *per se* pass the property. It is to the passing of the property, whereby the bankrupt company would be enabled to deal with it as theirs, that the condition precedent applies; and so long as that condition is not purified, the property, I think, is not theirs in the sense of section 37 of the statute. I should have arrived at this conclusion although the security to the Bank had been in the form of a bond and disposition in security, in place of an absolute disposition and back-bond. The whole right of the company would still consist in a mere future and contingent claim to become proprietors, and not in a present and absolute right to the subjects themselves. And the observation would still apply, that it is not over this future and contingent claim which belongs to the company, but over the right of property itself, which does not belong to them, that the Bank's security extends.

Another ground of judgment has been suggested by your Lordship and Lord Ivory, which would be applicable even if the subjects could be held to be the property of the bankrupts, in the sense of sect. 37 of the statute. Supposing that the company had obtained a disposition to and stood infeft in the subjects, the Bank would still, according to that view, not be bound to value and deduct their security.

The view, as I understand it, is this:—The debt was the proper debt of the company, and not the debt of Dugald M'Phail or Duncan M'Phail, the individuals who conveyed their own estates to the Bank in security of the debt of the company, for whom they thus, virtually, interposed as cautioners. If in this state of matters, and while there was, as yet, no purchase by the company, the company had become bankrupt, the Bank would have been entitled, without valuing or deducting the security they held over the estates of Dugald and Duncan, to rank on the company estate for their full debt, and then go against these other estates to the effect of

obtaining full payment of the balance. This being so, the inference drawn is, that no purchase or transaction between the principal debtors and their cautioners (for so Dugald and Duncan, for the purposes of this argument, may be called) could alter, for the worse, the position of the Bank as creditors, or prevent them from going against each estate to the effect of obtaining full payment, precisely as they might have done before. No. 130. — Feb. 28, 1857. Lynch v. Haggart.

To illustrate the principle here involved, suppose Dugald and Duncan, not being themselves in any way liable for the debt, but, as a mere favour to the company, had each handed over to the Bank a chest of plate in security of the company's debt, and had afterwards sold this plate to the company, received payment of the price, and intimated the sale to the Bank:—In such circumstances it seems clear enough—on the principle of the case of Black v. Melrose, 20th February 1840—that, but for the sale of the plate to the company, the Bank would not only have been entitled to rank for their full debt on the sequestrated estate of the company without valuing and deducting their security over the plate, and then to have operated full payment of the balance by disposing of the plate, but would even have been entitled to draw a composition from the sequestrated estate corresponding to the full amount of their debt, to the effect of operating full payment, although they had, in the meantime (subsequent to the sequestration), sold the plate, and thereby realised a considerable portion of their debt. The question there would be, whether the sale of the plate by Dugald and Duncan to the company could injuriously affect the Bank's right of ranking on the company's estate, by compelling them to value and deduct their security over the plate, the effect of which might be to prevent the Bank from operating full payment of their debt as they otherwise would have done. As at present advised, I am inclined to think that, in such a case, the position of the Bank could not be altered for the worse by a sale to which they were no parties, and that they could not be compelled to value and deduct their security over the plate which, but for that sale, they could not have been required to do. But this involves a question of novelty and importance, which, although it may be covered by the pleas in law, was not argued at this bar, any more than it seems to have been before the Lord Ordinary; and I should hesitate to go upon it, without making sure, after argument, that the position of the respective parties was such as to present the question in the same pure form in which it would have occurred in the case which, for the sake of illustration, I have just supposed.

I think the ground relied on by the Lord Ordinary sufficient for judgment, and I am contented to rest upon it.

The Court pronounced the following interlocutor:—"Recall the first finding in the interlocutor of the Lord Ordinary submitted to review; and, in room thereof, find that the security which the appellants have, in virtue of the conveyances in their favour by the late Duncan M'Phail, and by him and the late Dugald M'Phail, of the heritable subjects therein specified, is not a security upon which they are bound to put a specified value as a security held by them on the estate of the bankrupts, under the provisions in the 37th section of the statute 2 & 3 Vict. c. 41; and, with this variation, adhere to the interlocutor of the Lord Ordinary reclaimed against, and refuse the reclaiming note: Find the appellants entitled to additional expenses, and remit," &c.

Davidson & Syme, W.S.—Webster & Renny, W.S.—Agents.

Bartholomew Lynch, Pursuer.—*D. F. Inglis—F. W. Clark.* No. 131.
George Haggart, Defender.—*Pattison.*

Process—Issues—Injury to a workman. Feb. 28, 1857. —

See supra, p. 399.

The following issue was now adjusted in this case:— 1st Division. Ld. Ardmillan. C.

"Whether, on or about the 6th day of August 1855 years, the pursuer,

No. 131. while working in the employment of the defender, on a scaffolding at the National Bank in Reform Street, Dundee, received injuries in his person, in consequence of the falling of the said scaffolding, by reason of insufficiency in the fabric and gear, or management thereof, through the fault of the defender, to the loss, injury, and damage of the pursuer?

Mar. 3, 1857. Robertson v. Wilson.

"Damages laid at L.200 sterling."

WILLIAM MACKERSY, W.S.—JOHN ROGERS, S.S.C.—Agents.

No. 132. JOHN ROBERTSON, Petitioner and Advocator.—*D. F. Inglis—Fraser.* GEORGE WILSON AND OTHERS, Respondents.—*Penney—J. Lorimer.*

Process—Sheriff-Court Act, 16 & 17 Vict. cap. 90, sect. 22—Competency of advocation.—A Sheriff-court action, which, in its own nature, it was competent to advocate, fell asleep, and being wakened after many years, resolved into a question of expenses,—*Held,* that the original conclusions of the action determined the value of the cause, and that it was competent still to advocate it on the question of expenses.

Mar. 3, 1857. 1ST DIVISION. Lord Neaves. C. Sheriff-court of Lanarkshire.

THIS action originated in the Sheriff-court of Lanarkshire in an application by Robertson, an ironmaster at Easter Meadowhead, for interdict against Wilsons and Company, of Summerlee Ironworks, carting away certain ironstone until it should be first measured and paid for. The proceedings commenced in 1840. A record was made up and closed in 1841. Proof was allowed; and on 21st January 1842, the Sheriff-substitute pronounced an interlocutor prorogating the diet of the pursuer's proving for three weeks. The process then fell asleep, and on 13th December 1853, was awakened. On 10th March 1854, the Sheriff-substitute (Veitch) pronounced the following interlocutor:—"On the motion for the pursuer craving that the last order be renewed," and on the motion for the defenders craving "that the action be dismissed, and the defenders assoilzied therefrom with costs, in respect of the pursuer having ceased to urge the suit," refuses "the defenders' motion, and renews the period for pursuer proving for three weeks." And, on 28th September 1854, he pronounced the following interlocutor:—"Finds that the pursuer has established that the defenders refused to pay for the stone by measurement, and that the balance due at the time of applying for the interdict was in his the pursuer's favour, and therefore that he was entitled to apply for the same: Finds him therefore entitled to expenses," &c. In a note he stated, that the question of interdict fell to the ground, in consequence of the lease in question coming to an end before the question was settled on the merits, and that of expenses only remained. "According to the view taken by the Sheriff-substitute, the agreement of parties clearly contemplated that the measurement was to be by the quantity of char on the ground, and therefore it remains to be seen, whether the defenders were in advance of payment at the moment the interdict was applied for."

On appeal the Sheriff-depute (Alison) altered this interlocutor, and found "that the relevancy of the demand for the expenses of this action depends entirely upon the question which of the statements for the pursuer or defender is the better founded, and that it is to that point accordingly that the proof is directed: Finds, however, upon the import of the proof, that it does not as yet appear from it which way the balance lay: Finds, that if the demand for expenses had been timeously made at the close of the action on the merits thirteen or fourteen years ago, it might have been incumbent on the Court to investigate how the balance between the parties stood, by a remit to an accountant, or otherways; but that as the parties have allowed so long a period to elapse without moving in the process, during which evidence for the defenders may have been lost or mislaid, the pursuer is not

entitled to succeed in his demand for expenses, unless he could substantiate No. 132.
it at once, by decisive evidence in process, which he has not done; there- Mar. 3, 1857.
fore, as well as because some of the early interlocutors in the cause were in Robertson v.
the defenders' favour, alters the interlocutor complained of: Finds no ex- Wilson.
penses due to or by either party, and decerns."

The pursuer advocated.

The respondents now objected to the competency of the advocation. They *pleaded*;—That the sole subject of dispute between the parties was the question of expenses. The case of Mitchell v. Murray[1] settled that the value of a cause was to be estimated by the decree and not by the summons, and by that test this advocation was incompetent. The case of Hopkirk v. Wilson[2] settled that, in construing the decree, the matter of expenses was not to be taken into consideration at all. According to these judgments, where the subject-matter of the cause was the expenses merely, that was not a subject-matter to be advocated. Here there was nothing but the question of expenses. Therefore the advocation was incompetent.

Pleaded for the pursuer; — This case concludes for damages, and not for a pecuniary amount. It is an action which, in its own nature, is capable of *advocation*. Its value does not depend on pecuniary conclusions, or on the amount of expenses decerned for.

Lord President.—These judgments do not appear to me to touch this question. If the criterion of the competency of an advocation is not affected by the amount of expenses decerned for, how does that touch the competency of this advocation? We must look to the original summons to ascertain whether the objection be well founded: and, doing so, I find that this is an action the value of which is not determined by the money value concluded for, but is an action which, in its own nature, was competent to be advocated. That being my view, I am for repelling this objection.

Lord Ivory.—As an old formalist, I should not have the least difficulty in disposing of this case. My only difficulty arises from the judgment of the Court in the question of interest; and to this hour I cannot reconcile that decision with any practice or principle or decision or statute with which I was before acquainted. *But*, standing that decision, I cannot read it otherwise than as fixing that, in a question of advocation, it is not the value of the cause when it comes into the Court below, but when it comes into this Court, that is to be taken as the value of the cause by which this criterion of competency is to be determined; and, even so reading that decision, I cannot reconcile it with the case of Hopkirk, which says that it is not the value of the cause as at the date of advocation, but its value as it originated in the inferior Court, that is to be looked to. But I can again make my escape, as I did in the case of Hopkirk—not being able to reconcile these two judgments—by going back to the old practice; and, doing so, I have no difficulty in deciding that the value of this cause is to be estimated by the conclusions of the action as it came into Court; and, therefore, I see no serious difficulty in the way of deciding the competency of this advocation.

Lord Curriehill.—I also think that the advocation is competent; and I think it is competent in perfect consistency with both cases referred to. According to the conclusions of this action in the inferior Court, this is a case that, in its own nature, admits of advocation. In neither of these two cases was the action originally competent, and the question there was, whether accruing claims, *pendente lite*, rendered competent an advocation although originally incompetent? That is a totally different question from the present. In the case of Murray accruing interest was included in the decree, and was held to supplement what was originally concluded for, so as to render advocation competent. But whether that decision was right or wrong, there is nothing in it to warrant the Court in holding that an action in which advocation was competent so long as it pended in the inferior Court can

[1] Mitchell v. Murray, 10th March 1855, ante, vol. xvii. p. 682.
[2] Hopkirk v. Wilson, 21st Dec. 1855, ante, vol. xviii. p. 299.

No. 132. — Mar. 3, 1857. Fairlie v. Cuningham.

be rendered incompetent by superseding some of its conclusions. That is a totally different matter, and I know of no authority for saying that the nature of the action can be so far changed as to make advocation now incompetent, when it has all along been competent.

Lord Deas.—I have no doubt of the competency of this advocation, which brings up the whole cause, and necessarily involves a decision of the merits, although it may be that the object of insisting on this decision is mainly or solely to reach the question of expenses. The Sheriff's judgment, accordingly, contains findings on the merits which, if left standing, might, for anything we know, have an important bearing on the rights of parties in other proceedings between them. At all events, we must decide the cause before we can decide the accessorial question of expenses, and the cause is one clearly competent to be advocated. I proceed entirely on the same principle on which, in common with the majority of the Court, I proceeded in Mitchell v. Murray and Hopkirk v. Wilson—namely, the principle (which, if I follow Lord Ivory's observations, he also holds), that the competency of the advocation depends on the conclusions of the original action. It was just because interest was concluded for in Mitchell v. Murray (and, not being an accessory, could not have been given had it not been concluded for) that we held the interest to be part of the cause of action; much in the same way as several terms aliment or several years annuity decerned for, after long litigation, may each form part of the cause of action. And it was just because expenses are a mere incident to the cause, which may be awarded either against pursuer or defender, and do not require to be concluded for at all, that, in Hopkirk v. Wilson, we held them to form no part of the proper conclusions, and consequently no part of the cause of action which fell to be estimated in judging of the value comprehended under these conclusions.

The Court repelled the objections to the competency of the advocation, and appointed the case to be heard on the question of expenses.

Patrick Paul, S.S.C.—J. F. Wilkie, S.S.C.—Agents.

No. 133. Sir Charles Cuningham Fairlie, Pursuer.—*D. F. Inglis—Campbell.*
Percy Arthur Cuningham, Defender.—*Sol.-Gen. Maitland—Moir.*

Entail—Irritancy.—By the prohibitory clause in an entail, heirs were forbid to sell, dispone, wadsett, or impignorate the estate;—*Held* (adhering to the Lord Ordinary's judgment), that the prohibition against disponing was not properly fenced by an irritant clause, which enumerated Acts "with respect to altering the order of succession, selling, or contracting of debt," and the entail declared invalid.

Mar. 3, 1857. — 2d Division. Lord Handyside. I.

This action was brought to set aside the entail of the estate of Fairlie, at the instance of the heir in possession. The ground on which the action was maintained was that the prohibition against disponing and alienation was not duly fenced.

The prohibitory clause was in these terms:—"It is hereby expressly provided and declared that it shall not be lawfull to the heirs-male of my body, &c. to sell, dispone, wadsett, or impignorate the lands and others above disponed, or any part thereof, nor to contract debts," &c.

The irritant clause was in these terms:—"Declaring hereby that if the heirs-male of my body, or any of the other heirs or members of entail above mentioned, substituted to them, shall act and do in the contrary of any of the particulars above specified, with respect to altering the order of succession, selling or contracting debt, then, and in that case, all and every one of such debts, acts, and deeds," &c.

The Lord Ordinary pronounced this interlocutor:—"Finds that the prohibition against disponing the lands not being fenced by a proper irritant clause,

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the deed of entail is invalid and ineffectual: Therefore finds and declares, and decerns in terms of the conclusions of the summons."*

The defender reclaimed, and pleaded;—The prohibitory clause was constructed on the principle of redundancy. In the irritant clause the first only of each class of prohibited acts is specified; and in using the word "selling," in the irritant clause, the intention of the entailer clearly was to include under it all the acts of alienation prohibited, and among them gratuitous alienations. Besides, a gratuitous alienation was in reality an alteration of the order of succession, against which there was a prohibition properly fenced.

The pursuer answered;—The word selling, in the irritant clause, only applied to the prohibition against sale, which is a peculiar mode of alienation, beyond which the fetters of the entail applicable to it could not be extended on a presumption of the entailer's intention.[1]

Lord Justice-Clerk.—I do not differ from the view of the Lord Ordinary. Originally, in the statute 1685, the word "sell" may have been taken more comprehensively; but looking at the whole Act, and the decisions, its meaning must now be held fixed. The entailer has omitted to irritate the prohibition against disponing, and the irritancy is ineffectual.

Lord Murray concurred.

Lord Cowan.—I agree. I think it clear that the word "sell" only being made use of, in this part of the irritant clause, the prohibition against disponing is not irritated, and the entail is defective.

Lord Wood absent.

The Court adhered.

Dundas & Wilson, C.S.—John A. Campbell, C.S.—Agents.

* Note.—"The entail contains the usual prohibitory clauses against altering the order of succession, disponing, and contracting debts. The irritant clause, in specifying the acts of contravention, omits the word 'disponing.' The words in the prohibitory clause are, 'sell, dispone, wadset, or impignorate.' Had the word 'dispone' been omitted in that clause, unless supplied by some word of tantamount force, the prohibition against alienation would have been defective. The Garbethill entail was on this ground found invalid. The omission in the present case to repeat in the irritant clause the word 'dispone,' appears to the Lord Ordinary to be equally fatal. The Cockspow case, as decided in the House of Lords, affirming the judgment of this Court, was referred to. But the omission there in the resolutive clause of the word 'sell,' used in the prohibitory along with the words 'alienate, and dispone,' was held to be covered by the words 'alienating and disponing,' which were construed to be generic, embracing alienation by selling. It would be vain to contend, after the case of Garbethill, that the word 'selling' in the irritant clause covers 'disponing,' nor was that attempted. The suggestion was thrown out that a gratuitous disposition was equivalent to an alteration of the order of succession, and so irritated. But such a view would not only be repugnant to all received canons of construction of entails, but to the terms of the statute 1685, and the Act 11 & 12 Vict., which treat alteration of the order of succession as separate and distinct from alienation. The chief effort to support the entail of Fairlie was directed to show that the words of the irritant clause were intended by the entailer to be taken as referring generally to each class of prohibitions, and so 'selling,' as the first word in one class, was meant to embrace, and is to be construed as embracing the three other modes of alienation which follow. The Lord Ordinary has been unable to see grounds for the intention surmised. But were it otherwise, he conceives that the word 'dispone' is too important and significant to admit of its being taken as transferred in that way into the irritant clause."

[1] Russell v. Russel, 7th Dec. 1852, ante, vol. xv. p. 192; Murray v. Murray, 26th Feb. 1842, ante, vol. iv. p. 803; In House of Lords, 4th Sept. 1844, 3 Bell's Appeals, p. 100; Little Gilmour v. Cadell, 5th July 1838, vol. xvi. S. & D. p. 1261.

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Marnoch.

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1st Division.
L.

JAMES MARNOCH, Petitioner.—*F. W. Clark.*

Cessio bonorum—Process—Personal protection.—Where the *induciæ* of a summons of *cessio* expired during vacation, personal protection granted on caution till the ensuing Session.

THE petitioner raised a summons of *cessio bonorum* against his creditors in terms of the Act 6 & 7 Will. IV. c. 56, and relative Act of Sederunt 24th December 1838. It appeared that the *induciæ* would not expire till after the rising of the Court for the Spring Vacation, and therefore that the case could not be enrolled in terms of section 12* of the statute, and a remit made this Session to the Sheriff to take the petitioner's examination. The petitioner therefore now applied for personal protection till the sittings of the Court in May, against the diligence of certain creditors who had obtained warrant of incarceration against him. He offered to find caution for L.100.

Clark, for the petitioner, submitted that it was held in practice that the Lord Ordinary on the Bills could not deal with the process of *cessio* during vacation.[1] The petitioner would thus be left exposed to diligence for a greater period than he would be protected, without any remedy till the Court resumed its sittings in the ensuing Session in May.

THE COURT pronounced the following interlocutor:—"Grant warrant for the petitioner's personal protection against the execution of diligence until the Court resumes its sittings in the ensuing Session in May next, upon his finding sufficient caution to the extent of L.100, that he shall attend all diets of Court whenever required, and supersede extract till such caution is found."

LINDSAY & PATERSON, W.S.—Agents.

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THE STIRLING AND DUNFERMLINE RAILWAY COMPANY, Pursuers.—*D. F. Inglis—Penney—Bruce.*
THE EDINBURGH AND GLASGOW RAILWAY COMPANY, Defenders.—*Lord Advocate Moncreiff—Patton—Gordon.*

I. *Railway—Lease—Expenditure in excess of statutory powers.*—One railway company was bound, by Act of Parliament, to take on lease another line, paying as rent a per centage on the amount which should be fixed by their own engineer as having been actually expended on it. The sum he fixed exceeded the aggregate of the share capital and sums authorised by the Lessors' Act to be borrowed. Objection by the lessees, that they were not bound to pay the per centage on the sum fixed, so far as in excess of that aggregate (*aff.* judgment of Lord Neaves, *abs.* Lord Wood)—*repelled.*

II. *Process—Summons—Interest.*—Terms of summons under which objection to the competency of a claim for interest on sums concluded for from the dates when they fell due (*alt.* judgment of Lord Neaves, *abs.* Lord Wood)—*repelled.*

One railway company was in 1856 found to have been due rent to another for a lease from 1852, but the amount of the rent was not ascertained till 1856;—*Held* (*alt.* judgment of Lord Neaves, *abs.* Lord Wood), that interest was not due on each term's rent from the term when it fell due.

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* Section 12 of the statute provides—"that on the expiration of the said thirty days the process shall forthwith be enrolled in the Rolls of the Division of the Inner-House specified in the said notice, without the necessity of being called or enrolled in the Outer-House," &c.

[1] Shand's Practice, "*Cessio bonorum*," Anderson, Petitioner, 20th February 1849, ante, vol. xi. p. 679.

The Edinburgh and Glasgow Railway Company reclaimed. They were tenants of a line of which the pursuers were proprietors, and the question between parties was one of rent—it could only be determined by reference to the words of the Leasing Act. Both parties were statutory corporations. They could do nothing except under the Act; and if they had done anything otherwise than under the Act, they had done it illegally. They did not contend that the sum fixed by Mr Miller had not been expended on the Stirling and Dunfermline line, but that the proprietors of that line could not have spent it as a corporation under their Act, and could, as a corporation, have no interest in sums spent in excess of their statutory powers, however those who advanced such sums might. The bargain between the Companies was, that a per centage should be paid not on extraordinary sums that might be raised, but upon those warranted by the Acts of Parliament—*i. e.* upon any sum actually expended on the line, not exceeding the whole capital of the Stirling and Dunfermline Company, and the whole debentures they were authorised to grant. Their capital was L.390,000. Their borrowing power was limited to L.130,000; and any sums borrowed beyond that were illegally borrowed, and at variance with the Railways Regulations Act and Companies Clauses Act. What would be the use of any limitation of the amount of capital, or of the debentures to be granted, if they were allowed to raise more? Parliament would not pass bills unless satisfied that within the capital and powers of borrowing asked the line could be made, and that there is a prospect of the line paying. If more were spent, then it was illegally spent, and not spent by the Company as a corporation. The directors, or even the proprietors, might choose to

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centage which the defenders are to pay as fixed rent. The railway is to be made under the control and to the satisfaction of a certain referee, who is also to ascertain the sum expended in making it, and on that sum so ascertained, whatever it may be, the defenders are to pay four per cent. The referee, a person thus appointed, has seen the railway made and completed, and has reported on the amount of the expenditure, and in this way the conditions of the statute seem to be satisfied.

"The defenders, however, say, that the amount expended, as reported in Mr Miller's present report, together with the sum of expenditure reported by him in the former action, amounts to considerably more than the capital of the Company, even with the addition of the money authorised to be borrowed under their original Acts. The Lord Ordinary cannot see how the mere amount of capital should be any limitation of the expenditure when there is also a borrowing power. But he does not think that the expenditure, which is to be the basis for calculating the rent, can necessarily be confined even to the aggregate amount of the capital and of the authorised debt by borrowing. No doubt if it could be said that it was impossible for the pursuers in fact, or at least in law, to expend more on the railway than their subscribed and loan capital, there might be something in the objection. and the Court might be called upon to refuse its sanction to an allegation of expenditure, which was a statutory impossibility. But there are various ways in which a railway company may expend more than its whole capital and borrowed money. It may contract debt under lawful contracts otherwise than by borrowing. But further, its shareholders, or others interested in its success, may impress money into its hands, which, when thus legitimately acquired, may be legitimately expended in completing the undertaking. The Lord Ordinary does not know whether this has here been done, nor does it seem necessary to inquire. It seems enough if the thing be possible in itself. Mr Miller's report must then be taken as competent and conclusive of the fact, and the amount of expenditure being so ascertained, the amount of the rent to be paid by the Company follows upon simple arithmetical principles.

"In this view the Lord Ordinary has not found it necessary to consider the effect of the statute 1856.

"It seems reasonable that the rent for the portions of railway now in question should be payable at the same terms as those fixed in the first action."



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be ranked on the general estate of the bankrupt had been incurred by a different company, but had been undertaken by the new company after it came into existence, and had become the owner of the subject of the security.

It is not alleged that all or any of the debt of L.18,596, 2s., in dispute, had been contracted by the former company, and that the present company had become liable for the same only by some *ex post facto* obligation. There is no allegation or plea to this effect in the record. And hence the case must be dealt with on the footing that this debt was contracted by the bankrupt company itself after it came into existence, and had become the owners of the property over which a security accrued for this debt at the date of its contraction; and that, consequently, the appellants are not in a position to plead that their debtors' purchase of the subject of the security was made subsequent to the date when this debt became secured upon that property.

I therefore think that the appellants have failed to establish any ground of exemption from the statutory enactment, that, in ranking for this debt on the general estate of the bankrupt, they must deduct the value of the preferable security they hold over that portion of the bankrupt's estate which was purchased from Dugald M'Phail.

I further think that they have failed to establish an exemption from that enactment in reference to the security they hold over the other portion of the bankrupt estate which was purchased from the trustees of Dugald M'Phail. That purchase, in all essential particulars, is in the same predicament as that already mentioned.

1. It was a condition of the contract of copartnery that these subjects also should be purchased by the company as part of its capital stock. 2. The minute of sale above referred to (to which these trustees were parties) set forth that they agreed to sell, and the company agreed to purchase their interest in these subjects and others at the price therein mentioned. 3. It is therein stipulated that the purchaser's entry should be as at the 16th July 1853, and that the price should bear interest from that date. 4. The company was accordingly put into possession of the subjects, and enjoyed that possession as long as it carried on business. 5. The first instalment of the price was duly paid at the stipulated term. 6. The subjects purchased from Dugald were conveyed to Duncan's trustees, as a security for the remainder of the price as above mentioned. And, 7. The purchasers were put into possession of the subjects. The particulars in which this purchase differed were chiefly these:—1. The price was payable by ten annual instalments, on the 16th of July of each year, commencing on 16th July 1854. 2. The conveyance by Duncan's trustees was to be granted to the Company only upon the whole of the price being paid up. And, 3. A separate bond for the price, payable at the times and by the instalments above mentioned, was to be granted by the purchasers to the sellers.

The position of the appellants in reference to these subjects is also the same as that in which they stand in reference to the subjects which were acquired from Dugald M'Phail,—Duncan, the former owner, having also granted a security over these subjects to the appellants, of the same date, in the same form, and for the same liabilities as those in reference to which the security by Dugald was granted. Hence all I have stated in reference to the title on which the appellants hold a right to the subjects purchased from Dugald apply also to the title on which they hold the property which was purchased from Duncan's trustees, and these remarks need not be repeated. But the appellants maintain that these subjects still belong to Duncan's trustees; and that, therefore, they are entitled to be ranked on the estate of the bankrupts without deducting the value of their security thereon. It was, as they allege, a condition precedent of the contract of sale of these subjects, that the whole should be paid; and that, as that alleged condition has not been performed, the sale has never taken effect. And there might have been some force in this reasoning if there had been in the contract of sale either a suspensive condition to the effect that the sale should not be effectual unless and until all the instalments of the price should be paid, or a resolutive condition, to the effect that if all or any of the instalments should not be paid at the stipulated time, the sale should be rescinded. If such had been the case, and if, in consequence thereof, matters were now to be dealt with on the footing of there not being now an existing sale, the sellers would be entitled to have the possession of the subjects restored to them, and would be

bound, on the other hand, to restore the instalment of the price which had been paid to them, and to reconvey to the trustee on the sequestrated estate the subjects which had been conveyed to them as a security for the unpaid instalments of the price. In that case also, the sellers would not have been creditors upon the company estate for these unpaid instalments of the price. But such is not the state of the case. There is no such suspensive or resolutive condition in the contract. The bankruptcy of the purchasers, and the non-payment of the instalments of the price now in arrear, have not put an end to the contract of sale. The remedy for which the sellers stipulated in that contract is, on the contrary, only that which is appropriate for enforcing performance of it. Although they stipulated that their disposition to the purchasers should be withheld until the whole of the price should be paid, this was merely as a security for the price,—and this is just an example of that kind of security which is well known in the practice of Scotland as a real security by reservation. This appears from the farther provision in the contract, that in the event of the buyers failing to pay an instalment of the price, the trustees should be entitled to sell the subjects in the manner prescribed in a power of sale therein set forth; and that they should be bound to hold just count and reckoning with the purchaser for the price which they might realise. 2. The sellers stipulated that their operating upon that security was to be without prejudice to any diligence competent to them for the price of the subjects, in virtue of the bond which was to be granted for the price. And thus under the terms of this subsisting contract, the sellers, besides availing themselves of their reserved security, are entitled to be ranked as creditors upon the sequestrated estate for the full amount of the unpaid balance of the price, subject only to the deduction of the value (if that value be anything), of the above mentioned security by reservation. And 3. The sellers stipulated for, and now hold, the separate security above mentioned over the subjects purchased from Dugald M'Phail for this balance of price. Thus the position of Duncan's trustees is that of being creditors of the company for the unpaid balance of the price of the subjects purchased from them; and their remedies are only such as are competent to creditors. They are not even in the position of sellers who have not parted with possession, and they have reserved no right under which they could resume possession otherways than as creditors for the price, who would be liable to account for their intromissions.

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The assumption, therefore, that this contract of sale has never taken effect, or has been rendered ineffectual by the bankruptcy of the sellers, is quite a mistake. It is probably the reverse of the interest of the sellers to be rid of the contract, if this were in their power; because, were they to do so, they would only have the reversionary interest in the subjects which might remain after satisfying the appellant's preferable claim, and that reversionary interest may probably be worth little or nothing; whereas, by enforcing the contract, they will not only receive the value (if it be of any value) of the residuary right of the company in the subjects purchased from Dugald M'Phail; but also, and at all events, be entitled to draw from the general estate of the bankrupts a dividend on the full amount of the unpaid balance of the price owing under this contract of sale, subject to the deduction only of the value of their security. But, as already stated, the contract of sale was effectual from the first; and the effect of the condition with which it is qualified is to empower the sellers not to rescind it, or to be freed from it in any event, but to enforce performance thereof in the ways above mentioned. And such being the case, the right to the subjects purchased by the company under this subsisting contract of sale is just as effectual as is their right to the other subjects which they purchased from Dugald M'Phail, and they are not entitled to be ranked on the general estate, without deducting the value of both securities.

Lord Deas.—I entirely concur in the Lord Ordinary's note, as well as in his interlocutor.

The question is, whether the subjects over which the Bank's security extends are the property of the bankrupt company, in the sense of sect. 37 of the statute 2 & 3 Vict. c. 41?

To solve this question, it is necessary to attend to the terms of the minute of sale between the company, on the one hand, and Dugald M'Phail and the trustees of Duncan M'Phail, on the other.

The minute contains no conveyance of the subjects. It is a mere agreement to

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sell. No part of the price was paid at its date. The price of Dugald's portion of the subjects (L.6432, 4s. 6d.) was to be carried to his credit in the books of the company, of which he was a partner. The price of Duncan's portion of the subjects (L.20,445, 6s. 4d.) was to be paid by instalments, of which one only has been actually paid, and the last of which will not be due till July 1863. In the meantime, Dugald's portion of the subjects stands conveyed by him, in terms of the agreement, to the trustees of Duncan, it being stipulated by the agreement that Duncan's trustees are not to be bound to denude of Dugald's portion of the subjects till the whole price of Duncan's portion shall be paid to them, and that they are to be entitled to sell the subjects so conveyed to them, to meet any instalment of the price of Duncan's portion of the subjects which shall remain six months due and unpaid. The effect of all this appears to me to be to place Duncan's trustees substantially in the same position, so far as regards the present question, as if they had been sole proprietors and sellers of the whole subjects now in dispute. Both sets of subjects stand vested in Duncan's trustees; and it is a condition precedent to the company being entitled to demand a disposition to either set of subjects that the whole price of L.20,445 due to these trustees, for their own portion of the subjects, shall be fully paid. At present, therefore, the company, even if solvent, would not be in a situation to demand a disposition to either set of subjects; and unless they shall pay the stipulated price and interest to Duncan's trustees, they never will be so. The trustee in the sequestration does not undertake to pay this price, either now or afterwards. Payment of a composition upon the price will not, of course, entitle the company to a disposition. In this state of matters neither the one set of subjects nor the other can form a fund of division among the creditors of the bankrupt company. And I cannot hold either set of subjects to be the property of the bankrupts in the sense of section 37 of the statute. That there may be a sense in which the subjects may be called their property is not enough if they be not their property in the sense of this enactment. The bankrupts hold no disposition to these subjects, and no pure and absolute right to demand and obtain such a disposition. They have merely a future and contingent claim to a disposition—the contingency being one which, to all present appearance, will never be purified. But it is not over this contingent claim (which is all that belongs to the bankrupts), but over the subjects themselves, which stand vested both legally and equitably in other parties, that the Bank's security extends. It is true there is no condition precedent to the contract of sale. But a contract of sale of heritable subjects does not *per se* pass the property. It is to the passing of the property, whereby the bankrupt company would be enabled to deal with it as theirs, that the condition precedent applies; and so long as that condition is not purified, the property, I think, is not theirs in the sense of section 37 of the statute. I should have arrived at this conclusion although the security to the Bank had been in the form of a bond and disposition in security, in place of an absolute disposition and back-bond. The whole right of the company would still consist in a mere future and contingent claim to become proprietors, and not in a present and absolute right to the subjects themselves. And the observation would still apply, that it is not over this future and contingent claim which belongs to the company, but over the right of property itself, which does not belong to them, that the Bank's security extends.

Another ground of judgment has been suggested by your Lordship and Lord Ivory, which would be applicable even if the subjects could be held to be the property of the bankrupts, in the sense of sect. 37 of the statute. Supposing that the company had obtained a disposition to and stood infeft in the subjects, the Bank would still, according to that view, not be bound to value and deduct their security.

The view, as I understand it, is this:—The debt was the proper debt of the company, and not the debt of Dugald M'Phail or Duncan M'Phail, the individuals, who conveyed their own estates to the Bank in security of the debt of the company, for whom they thus, virtually, interposed as cautioners. If in this state of matters, and while there was, as yet, no purchase by the company, the company had become bankrupt, the Bank would have been entitled, without valuing or deducting the security they held over the estates of Dugald and Duncan, to rank on the company estate for their full debt, and then go against these other estates to the effect of

receipts, in respect of the expense of maintaining and working the said main railway, and branch railways, or such portions thereof as aforesaid." No. 135.

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This clause lays on Mr Miller, or the engineer for the time being of the Edinburgh and Glasgow Railway, another but most important duty, viz., to ascertain and fix the amount which shall have been expended in obtaining the Act, and completing the works.

The terms here chosen relate to the actual matter of fact as to the cost of the railway, and in the first instance do not seem to admit of any question. But then, we must more minutely consider them with reference to the plea raised by the Edinburgh and Glasgow Railway. That plea is this:—This is a contract between two Incorporated Railway Companies—the Stirling and Dunfermline Railway Company have no powers but from their statute—They cannot go beyond the powers thereby conferred—The capital is declared to be L.390,000, and they have power to borrow to the extent of L.130,000, in all L.520,000—The liability of the shareholders to pay to the execution of the undertaking, is limited to L.15—Hence more than the above sum, we, the Edinburgh and Glasgow Railway were entitled to hold, the Stirling and Dunfermline Company could not expend, and that therefore came to be part of our contract of lease, and we undertook to pay the rent on an amount of expenditure which we knew could not exceed the above sum—Hence, what was provided for by the appointment of Mr Miller, to fix and ascertain the amount of expenditure, must be taken to have regard solely to the amount expended within or up to that sum of L.520,000, and could not, by the nature and character of this statutory lease, relate to or cover any outlay beyond that sum.

There is no doubt that this is a very plausible and a very taking plea, if we look only to the interests of one party in the event not expected by either, that the railway was not to pay well, and that the Edinburgh and Glasgow Company had made a bad bargain. It refers to what seems at first sight a very natural limitation of the expenditure on which rent is to be paid, and it may plausibly be urged that this implied limit,—for it cannot be said that it is not matter of implication,—really forms a part of the statutory lease. But we must recur to the actual words of the statute, and when the nature of the bargain is considered, the appearance of plausibility soon flies off. The Stirling and Dunfermline Company were to be at the expense of the line, without any limitation, in the bargain with the Edinburgh and Glasgow Company. Estimates had been got no doubt, but it is notorious that such estimates often fall short of the actual expenditure, and the cost of the undertaking often exceeds the capital and borrowed money, and it is necessary to have the same increased during the progress of the work. Now the obligation is absolute that the Stirling and Dunfermline Company shall make and complete the line. It is not said that they are to make it so far as their then capital and power to borrow money will suffice to do so. They are bound, to the Edinburgh and Glasgow Company, to make the line, cost what it may, and of course to get the means, if necessary, by additional powers to do so. It is in vain to say they could not, under their first Act, expend more than L.520,000, for they have in point of fact expended more, and paid for all the works, and the debt is not averred. If bound to make the railway, cost what it might, it cannot reasonably be contended that they are to get nothing in return for the actual and necessary expense, so far as that might exceed their share-capital and power to borrow money. That would be a strange result. If the Stirling and Dunfermline Railway had stopped short in the execution and completion of the line, as soon as they saw that the cost would exceed the original capital and borrowed money, I have no doubt that the Edinburgh and Glasgow Company could have proceeded against them by action to compel them to complete the line, and to go if necessary to Parliament to obtain powers to raise additional capital and to borrow more money. The Edinburgh and Glasgow Company had a right to obtain this line on lease. It was not to remain a waste and fruitless unfinished undertaking. The Edinburgh and Glasgow Company expected great benefit from the lease of it, and in that expectation were entitled to compel the Stirling and Dunfermline Company to complete it. If the Stirling and Dunfermline Company had pleaded deficiency of funds, the answer would have been complete—Go to Parliament for powers, and ask them *bona fide*, or let us ask them in your name,—you will easily get them—None of your shareholders,—all bound to —can [illegible], and Parliament has never left a line unfinished—a useless

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nuisance to the country,—if the company asks for funds to go on, and is willing to complete.

The Stirling and Dunfermline Railway Company were willing to go on without any such compulsitor. They do go on, and however they obtained the funds at first, they got an Act of Parliament which covered all their outlay, so that the railway had been completed, and means obtained exactly in the way they would have proceeded, if, being desirous to stop, the Edinburgh and Glasgow Company had enforced the completion of the undertaking.

But, further, they had a very good reason for insisting that the rent was to be taken on the actual amount expended:—For the whole execution, and therefore the whole cost might have been entirely regulated by Mr Miller, and only some misunderstanding, which the Stirling and Dunfermline Company could not foresee, between him and the Edinburgh and Glasgow Company, and the resolution which the latter soon adopted, to try to throw off the contract of lease, prevented, I suppose, that superintendence by Mr Miller, which in truth the real interest of the Edinburgh and Glasgow Railway would have led them to prescribe. Now, Mr Miller would have had to attend to two considerations if he had so superintended the execution of the line. The Edinburgh and Glasgow Railway were to maintain the works in good and sufficient order for 35 years,—a very onerous burden, and requiring considerable outlay. Now the more completely the work was done,—the more substantially and skilfully,—the less would be the cost of so maintaining the works in good order, and although the amount expended might have been increased on the one hand, the Edinburgh and Glasgow Company might really have been gainers ultimately, by the diminished annual outlay on the line,—always a most important object, with a view to any profit from working the same. Hence, it is plain that if Mr Miller's superintendence and control had been exercised all along, as might have been expected, the Stirling and Dunfermline Company could not have been able to limit the expenditure as they might wish, but must have done, at whatever cost, every thing Mr Miller prescribed, and in the manner he directed; so that, while the expenditure might thus have been prescribed by him; on the other hand, the natural result was to stipulate that the rent should be fixed on the amount actually expended, whatever that might be, as they were bound to make the line.

And again, if Mr Miller was not to superintend and control the actual expenditure, which could not be anticipated, yet, still, if the Stirling and Dunfermline Company themselves were to make the line without such superintendence, the whole works were to be executed and completed to the satisfaction of Mr Miller, whom failing, the engineer for the time being of the Edinburgh and Glasgow Company. And as the lease could not take effect until that approval was obtained, and as the obligation on the Edinburgh and Glasgow Company to maintain thereafter the works in sufficient order was a very important matter for their interests, the Stirling and Dunfermline Company were bound to complete and execute the works in such a superior manner as to pass the examination to which they were to be subjected.

The cost of the undertaking was clearly more uncertain than in any other case. Mr Miller might have insisted, say on bridges of a particular construction, or he might not have passed the bridges (if he was not to superintend), and might have required others to be made. And of whatever was necessary in order to get his final approval, the Stirling and Dunfermline Company must have borne the expense, without any limitation whatever.

They were to be at the cost of the undertaking, and they therefore would naturally stipulate that the rent should be a per centage on the actual cost.

That the Stirling and Dunfermline Company should lay out large sums necessary for making the line, and required, it might be, by the engineer of the Edinburgh and Glasgow Railway, and yet have no return whatever on such sums actually and properly expended in executing and completing the line, is a result which cannot reasonably be held to have been part of the contract of parties.

Now, when we come to the clause, is not the actual cost the measure for the rent directly adopted and expressed? The Edinburgh and Glasgow Company, as tenants, are to pay four per cent on the amount "which shall have been expended in obtaining this Act, and in completing the said works, as the said amount shall

be ascertained and fixed by the said John Miller." "Which shall have been expended"—This distinctly and necessarily refers to what has been actually laid out,—no other element being taken into account. Could Mr Miller, if satisfied that the line cost a certain sum, after striking off any deductions he thought proper, have refused to include sums *bona fide* and necessarily incurred,—nay which might have been all prescribed and required by himself for the due and satisfactory execution of the works, and to ascertain and fix the amount expended, because that amount exceeded the original capital and borrowed money under the first Act? Where would have been his warrant, under the terms already quoted, prescribing his duty to be to ascertain and fix the amount which shall have been expended? Not a word is contained in the section which refers to any limit, or makes the sum to be fixed to depend on any other matter than the actual cost. Then, if the whole outlay is in Mr Miller's certificate, it must be taken in the calculation of the rent. No. 135. — Mar. 4, 1857. Stirling and Dunfermline Railway Co. v. Edinburgh and Glasgow Railway Co.

Then arises the very important and conclusive consideration: if any such limitation had been intended, and if the amount of cost on which the rent was to be fixed, was not the amount which shall have been expended, but in truth a proportion of the fixed capital and borrowed money, why was not reference made to such limit? It was the duty and interest of the Edinburgh and Glasgow Company to have that limit stated if in contemplation, and forming a substantial part of the contract of parties. It is not conceivable, how, on that supposition, that should not have been done in one way or other. It was the natural course to adopt on that supposition. Various forms of words would easily have expressed the object. But the very last course to adopt was to run counter to that understanding and agreement, and to take the amount which shall have been expended, without reference to any other consideration, and without any qualification as to the extent of that expenditure except one, and that a most material qualification, viz., "as the said amount shall be ascertained and fixed by the said John Miller, whom failing, the engineer of the Edinburgh and Glasgow Railway Company for the time being." This qualification, in my opinion, wholly excludes any such implication as the Edinburgh and Glasgow contend for, because it shows that the only thing to be done and attended to was to have this check on the actual expenditure, viz., that their own engineer was to inquire into and ascertain and fix the amount expended. That would have been a proper precaution, even if the agreement of parties had been that the amount on which the rent was to be paid should be only the L.520,000 or any outlay less than that sum. But when the amount which shall have been expended is taken as the sum on which the rent of 4 per cent is to be paid without limitation, then the reference to Mr Miller to fix and ascertain that amount shews that there was only that limitation in view.

The restriction which the Edinburgh and Glasgow Company contend for as part of the contract and agreement of parties could not have led to the use of the terms actually employed, for both parties must have had a totally different object in view. And the party who was not to pay on the amount expended, although fixed by Mr Miller, could not, within the bounds of possibility, be conceived to agree to pay expressly on the amount which shall have been expended without restriction or qualification or declaration. Obviously a totally different form and mode of stating the matter must have been adopted.

The terms are so plain, that it is needless to make farther observations on the subject. But I must add that it is very remarkable that this plea was not brought forward originally. The sum first found, no doubt, did not exceed the L.520,000, but then was the time for the Edinburgh and Glasgow Company to announce and protest, that though that sum might be taken in the first instance, the mere ascertainment of the amount expended by Mr Miller was not the contract of parties, and did not constitute or form their obligation as lessees, or afford the true basis for calculating the rent. The plea now taken seems to have been an afterthought, but it is of itself unsound.

I do not rely much,—indeed, not at all,—on the statute 1856, as raising by itself any separate point. My opinion is summed up in this short sentence—The Stirling and Dunfermline Company were bound to make the line,—the Edinburgh and Glasgow Company bound to take it in lease for a rent,—these obligations were absolute. The Stirling and Dunfermline Company were so bound to make the line

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because the Edinburgh and Glasgow Railway were to pay them rent. The outlay necessary was to be borne by the Stirling and Dunfermline Company, because they were to receive rent. The statute declares that they were to receive rent at 4 per cent on the amount which shall have been expended in completing the works, as that might be fixed by Mr Miller. I cannot read that as importing any sum greatly short of what is so fixed, — that is to say rent, not on the actual and necessary cost of the line as so fixed.

I stated and still feel that we could not have gone behind as it were the certificate of Mr Miller as the action came before us, and that rescissory and declaratory conclusions here as to the certificate being beyond his powers and *ultra vires* were necessary to enable the Edinburgh and Glasgow Company to raise the plea which they have stated to us. But a very serious question would then arise as to the competency of challenging that certificate if in terms of the statutory direction prescribing the duty he had to perform. On the competency of such conclusions I reserve my opinion, as on the merits of the plea urged to us I am in favour of the Stirling and Dunfermline Company, the original pursuers. I do not feel disposed to adhere to all the views or modes of stating the case contained in the Lord Ordinary's note. In the result I concur, and no objections were, I think, stated to the interlocutor as defective or objectionable on the view on which it proceeds.

Lord Murray.—This is a case of very great difficulty and importance. No decisions have been referred to either in this Court, or in the Courts of England, which assist me in the determination of the question on which the case seems to turn; but as the parties have already gone to the House of Lords, we can have little doubt that our decision will be brought under the consideration of the superior tribunal, and that if we go wrong, the error will be corrected.

We have here four Acts of Parliament which must all be considered together and construed, so far as it can be done, as forming one statute, regulating the rights of these two Companies. It is necessary, however, in order to see what was the original agreement of parties, to consider those statutes minutely and separately, as well as together. The first and leading statute is the 9th and 10th of Victoria, which received the Royal assent on the 16th of July 1846. That statute, after declaring that the Companies Clauses Act (Scotland), the Land Clauses Consolidation Act (Scotland), and the Railway Clauses Consolidation Act (Scotland), 1845, shall be incorporated with and form part of the Act, further enacts that the capital of the Company shall be L.390,000, and that it shall be lawful for the Company to borrow L.130,000 after the capital has been subscribed for, and one-half of it actually paid up, giving on the whole to the Company for executing the railway L.520,000.

The main object of this statute appears to have been, to make and to lease out the railway and branch railways authorised to be made by it to the Edinburgh and Glasgow Railway Company. The two Companies are thus combined under the same statute and series of statutes. The one to make and the other to hold in lease, a main and certain branch railways. The whole might have been done by one Company, but here the Acts of Parliament combine the two in the characters of makers of the railway, and holders, and lessees. The whole being the enaction of Acts of Parliament, must be entirely regulated by them. The leasing clauses commence with the 41st section, which provides that the railways and branch railways shall be executed under the superintendence and control, and to the satisfaction of Mr Miller, whom failing, to the engineer for the time being of the Edinburgh and Glasgow Railway Company, and shall on their completion, or on the completion of any part thereof, be leased by the Company hereby incorporated to, and shall be taken and held in lease for the period of thirty-five years after such completion by the Edinburgh and Glasgow Railway Company, and shall during the said period vest in them. The 42d section enacts, that from and after the completion of the said main railway and branch railways, or any part thereof, shall be made to the satisfaction of the engineer mentioned in the Act,—all the powers conferred by the Company shall be exercised by the Edinburgh and Glasgow Railway Company.

The 45th section enacts, that after the completion of the main railway and branch railways, or any part thereof, shall be made to the satisfaction of the engineer mentioned in the Act, the Edinburgh and Glasgow Railway shall, during

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the said period of thirty-five years, maintain the works so completed in good and sufficient order, and shall pay to the Company, herein incorporated, an annual fixed rent or consideration for the use thereof equal to four per cent on the amount which shall have been expended in obtaining this Act, and in completing the works, as the amount shall be ascertained and fixed by Mr Miller, whom failing, by the engineer for the time being of the Edinburgh and Glasgow Company. This clause contains a farther provision for a contingent rent, equal to one-half of the receipts after withdrawing the amount of four per cent, and thirty-five per cent, the expense of working the main and branch railways.

In a former case between these parties, which was appealed to the House of Lords, it was held in affirming the judgment of this Court, that the rent became due from the time when such a part of the railway as could be worked by the Edinburgh and Glasgow Railway was completed, even although the whole line was not completed.

When that question occurred, the capital of the Company, as fixed by the statute, does not appear to have been exceeded. The outlay on this railway afterwards exceeded that amount, and a farther Act was passed upon the 21st July 1856, which refers both to the Act of 1846, and to two other Acts passed in 1848 and in 1849, which authorise certain alterations and deviations for the purpose of improving the railway; and it then sets forth that "Whereas, in the construction and completion of the said railway and works therewith connected, and for the general purposes of the undertaking, a greater amount has been expended than the aggregate of the sums authorised to be raised by the said first recited Act; and it is expedient that in order to provide for the debts and liabilities of the Company, they should be authorised to create and issue additional shares or stock in their undertaking, and to borrow a further sum of money."

This statute authorises the Company to issue new shares to the extent of L.100,000 above the sums authorised by the statute 1846, and to borrow L.33,000 in addition to the sum they are authorised to borrow, subject to the Companies Lands Clauses Consolidation Act.

Section 19 of the statute contains the following clause, which will afterwards require special consideration:—"Provided always that nothing in this Act contained shall be held or taken to affect or alter the rights and liabilities of the said Stirling and Dunfermline Railway Company, and the Edinburgh and Glasgow Railway Company, as between themselves."

The first question which occurs is, whether, if the case had depended upon the statute 1846 alone, the Edinburgh and Glasgow Railway Company could be called upon to pay rent upon a larger sum than the whole capital and borrowing power given by that statute, amounting altogether to L.520,000?

I have come to be of opinion that the total capital fixed by statute must be considered as forming the maximum, which the company was entitled by law to expend; and that therefore the Glasgow Railway Company would have a right to maintain under that statute that the maximum sum upon which, according to statute, they were to pay rent was L.520,000, which was all that the Stirling and Dunfermline Railway Company was authorised to expend by the statute.

I do not see how the Court can get rid of the capital fixed by the statute, as forming the maximum outlay that the Stirling and Dunfermline Railway Company were legally authorised to make. The lease formed a part of that same statute, and the one corporation was authorised to expend that sum, and the other was to pay a rent on the sum expended. It seems a necessary deduction from the statute that the money should have been expended in conformity with the powers given by the Act of Parliament. I do not therefore see how, if the whole case had rested on the statute 1846, the Edinburgh and Glasgow Railway Company could ever have been called upon to pay rent on a larger sum than the maximum legal expenditure of the corporation with whom they were dealing could make.

It is not uncommon for parties in such undertakings greatly to underrate the expenses, which afterwards are found to be necessary to complete the works. They perhaps thought the sum of L.520,000 greatly more than sufficient to cover every possible expense; but be that as it may, the statute fixed the maximum of legal expenditure so long as it continued to be the ruling statute.

The question comes next to be, whether the capital of the Company having been

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increased by the statute passed in the year 1856, to the amount of L.100,000, with a farther power of borrowing to the amount of L.33,000, making the whole capital L.653,000, the Edinburgh and Glasgow Railway Company are bound to pay rent upon that sum? It appears to me that they are, unless the saving clause afterwards to be considered alters the matter. The Edinburgh and Glasgow Railway Company were to pay originally a rent of four per cent on an outlay approved of by their engineer, and certified by him, which, however, would not be legal outlay beyond the capital authorised by statute. That, however, was enlarged by the statute 1856; and as it was enlarged generally, the other clauses for the expenditure being made under the supervision of Mr Miller, or the engineer of the Edinburgh and Glasgow Railway Company for the time being, so long as the other provisions of the statute remain in full force, they get a railway which, though it cost more than the parties originally expected, has been approved of by the engineer whom they named, and confirmed by Parliament.

The lease still subsists, although the capital is enlarged, and the object contemplated by the different Acts, considering them as one, is supposed to be attained in the best manner, under the superintendence of Mr Miller. If that must have been decided in the general case, the question comes to be, whether it is different under the saving clause? I feel that a question of very great difficulty, but I have not been able to find any ground on which the Edinburgh and Glasgow Railway Company can maintain that they are to have this railway constructed under the superintendence of their engineer, at a less rate than four per cent on the outlay certified by their engineer.

There is no special clause in any one of the four statutes fixing the amount of outlay for which the railway should be constructed, and on which the Edinburgh and Glasgow Railway were to pay rent. There was no direct provision that the railway should be constructed for any particular sum.

It is only by implication that I arrive at the conclusion that the capital of the Stirling and Dunfermline Railway Company formed a maximum of their outlay; but as soon as that capital was enlarged, I have no longer that rule to go by, and I am unable to substitute any other. The Act, 1856, might have provided that the lease should be at an end, in consequence of its being necessary to enlarge the capital of the Company, but it does not do so. It might have provided that the Edinburgh and Glasgow Railway Company should have paid a rent of three per cent., or three and a-half per cent., instead of four per cent., but the Court has no power of doing so, and left, as we are, to deal with this enlargement of the capital. I feel myself bound to construe the capital, as always being what it now is, viz., L.653,000, and that upon that, the Edinburgh and Glasgow Railway Company are bound to pay the only rent of four per cent. on their outlay certified by their engineer.

Lord Wood was absent.

Lord Cowan.—The objections raising the question, which the interlocutor in the action at the instance of the defenders has disposed of, were lodged in process on 17th November 1856. I do not see that the general point argued before us was raised at any earlier date. Then, in aid of those objections, this action of declarator was instituted by the pursuers on 29th November 1856.

These dates are important, because, prior to such judicial statement, the Act 1856 had passed. It received the Royal Assent 1st August 1856.

The primary question is under the statute 1846.

The construction contended for by the pursuers, the Edinburgh and Glasgow Railway Company, is, that section 45 is to be read so as to limit the rent payable under it to four per cent. on the amount of capital and of borrowed money or loan—forming the whole funds of the company—no matter though the "money expended" may exceed that amount.

The words of the clause do not sanction that reading of the provision, but, on the contrary, the terms employed are such as apply to the whole expenditure, whatever may be its amount. And to entertain this view of the statutory provision, it is necessary to insert into it by implication, a condition that, while the four per cent may be payable on a sum less than the aggregate capital or funds of the Company, the per centage shall in no case be calculated on any greater amount.

The foundation of the argument, accordingly, is implied contract.

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Had the agreement been with an ordinary joint stock company, united for purposes of trade and profit, the partners in which were subject to unlimited liability, there could not have been room for implication. On the one hand, a railway was to be made and given over in a complete state. On the other, the consideration to be given is a per centage annually on the money expended in the completion of the railway. With proper precautions in the contract against unnecessary expenditure in the works, such a transaction presents no features either unusual or unfair. The capitalist provides the funds for the undertaking,—the party conducting it for his own profit, pays an annual return for the capital expended. The benefit is reciprocal. The obligations mutual. There is no room for implying conditions in such a case—the words being express—and full justice being secured by the very terms of the arrangement.

The contracting parties, however, being statutory companies, with limited funds at their disposal, and limited liabilities on the part of their shareholders, the contention of the pursuers is, that when the defenders undertook to make this railway, and the pursuers undertook to receive it and pay a per centage on its cost as rent, there was inherent in the transaction from the very position of the companies, a condition that the money expended was in no case to exceed the aggregate capital of the expending company, and the per centage in no event to be payable on a greater amount. This is the implication on which the argument rests.

That there is plausibility in the reasoning of the pursuers cannot be disputed; but I think that plausibility arises not less from a disregard of the terms of the 45th section than of its purpose and character.

The previous sections of the statute had constituted the Company, declared its capital, and the extent of its borrowing powers, and made this important provision (sect. 41), that the works were to be executed and completed "under the superintendence and control, and to the satisfaction" of the engineer of the pursuers' railway for the time being. Then, following out the preamble as to the railway being to be taken on lease by the pursuers, there follow the statutory provisions which constitute the lease. So soon as completed at sight of their engineer, the pursuers were (sect. 41) declared bound to take over the works in lease for the period of thirty-five years, and which were declared to vest in them, "subject to the conditions" contained in the Act. And there follows the rent clause, sect. 45, containing one of those conditions. Its sole object was to fix the annual consideration to be paid by the lessees to the lessors. This might have been a certain determinate amount, without reference to money actually expended. It was deemed, no doubt, more equitable that the annual payments should correspond to the actual outlay. Hence it is provided that the annual fixed rent or consideration for the use of the railway should be "equal to four per cent on the amount which shall have been expended" in obtaining the Act and in completing the works, the amount to be ascertained and fixed by the engineer of the pursuers' company, just as the works were to be executed and completed at his sight. This was the mode agreed to beforehand for fixing the rent. Elements are given to the calculator, and from these he is to ascertain the amount. This being done his duty is over. The 45th section, in so far as concerns the fixed rent, is thereafter to be treated precisely as if, in place of the elements for the calculation, it set forth the result. That result becomes the regulator of the fixed money consideration to be paid yearly. So soon as the amount is ascertained, the functions of the clause are over as directory, excepting as regards the additional fluctuating returns made dependent on the profits of the line.

Where, then, in all this, is there room for implying a condition so very material as that contended for by the pursuers? Its effect is to alter essentially, in one state of matters, the elements furnished to the engineer for calculating the rent. So long as the expenditure is within the available funds, then the clause is to have full operation, and the pursuers are benefited. But as soon as the expenditure, in completing the works, although laid out at the sight and under the control and superintendence of their own official, is found to go beyond the aggregate capital, the operation of the clause must cease. The amount expended is no longer to be ascertained as the *regula regulans* of the rent. The expenditure is to be inquired into, merely for the purpose of shewing that more than the aggregate capital has been expended. That being ascertained, the pursuers insist that there shall be

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no further inquiry into the amount of the expenditure, and that the rent must at once be fixed at four per cent on the aggregate capital, and not at four per cent on the money actually expended, as provided by the statutory words. This is virtually to supersede, in one state of circumstances, the operation of the rent clause, and to substitute implication for express enactment.

It cannot but be felt, that if the understanding of the parties really was to the effect stated, this would have been in terms declared. Your Lordship in the chair has put that in a point of view in which I quite concur. This apart, however, certainly if there was a statutory disability in the parties, or either of them, to undertake the contract, viewed in the light contended for by the pursuers, it might present the case in a different aspect. But was there really any such disability? Very possible it might be that the works would cost more than estimated, and in that case the aggregate capital prove insufficient,—more possible, I fear, in every such undertaking, than that the cost would be less. With this possibility before them, the defenders might well be careful to provide in general terms that the rent to be received should be proportioned to the actual cost of the works. There was no impropriety in the terms of the rent-clause being so framed, nor any legal disability on the part of the Company availing themselves of its terms, when the possibility which it provided against became a reality. But if so, with a statutory provision actually expressed in the very terms suited to the emergency, why should it be implied as a condition of this mutual contract that the aggregate capital of the Company was, in the case that has occurred, to be the measure of the sum for calculating the per centage? The special object and purpose of the incorporated Company, and the extent of the statutory capital, with the limited liabilities of the shareholders, are very important in all questions affecting either the character of the contracts which the Company may legitimately undertake, or the extent of responsibility legally attaching to its shareholders. But it is truly matter with which parties, so situated as the pursuers, have no concern to inquire into the source from which the funds may have been derived, that the Company make available to carry through their statutory undertaking. On the one hand, the pursuers in getting the works tendered to them in a perfet state, and in all respects satisfactory to their own engineer, get precisely what the statute declared they were to take over in lease. And on the other hand, the "money expended" legitimately in their formation, as reported by the same official, forms the sole basis for the ascertainment of the rent under the statute. In no other way would the *bona fides* of the statutory contract be preserved, or justice be done between the parties.

Any other view might lead to great confusion, and cause great injustice. The aggregate capital of the company might have been exhausted while the railway was yet in an incomplete state. What was to be the consequence in such circumstances? The expenditure of capital has been properly made on the works under the control and at the sight of the pursuer's engineer, but the funds are exhausted and the railway not finished. On the one hand, the pursuers can not be compelled to take in lease an incomplete railway, or portion of railway, and to pay rent for it at four per cent on the aggregate capital. On the other hand, the defenders are not to be left in the predicament of expending their capital in works useless and unprofitable, with their hands tied up from taking measures to obtain the necessary command of additional funds, so as to complete the railway, and place themselves in a situation to obtain the benefit of the statutory lease. I apprehend, that if the pursuers had felt it for their interest, they must have been entitled to insist on the railway being completed by the defenders. At all events, it seems clear to me that to avoid such a predicament as I have supposed, of the works being left incomplete and profitless, the defenders might have taken means to obtain additional funds. I see no legal objection to their having obtained for that purpose advances from bankers or others, or to their having incurred debts and liabilities in finishing the works, for repayment of which, at the moment, they might not have adequate capital. And were these modes of attaining the object of doubtful competency, I think it free of doubt that an application to Parliament to sanction an increase of capital would have been a perfectly legitimate measure. Nay, if other sources for obtaining funds were not available, this legislative application was the proper remedy in the circumstances. Its adoption was called for by the relative position of the two companies. I think even that the pursuers might haverequired it to be taken; and in answer to any

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demur on the part of the defenders, they could have pointed to the 45th section, and met the objection to the expenditure of additional capital so to be obtained, by the agreement that the rent was to be proportioned to the money actually expended, whether original aggregate capital, or the addition thereto rendered requisite by the excess of cost over estimate. The generality of the terms employed in this rent-clause precisely met the case, and may fairly be held to have been purposely employed to meet such emergency.

On the whole, as regards the plea of implied contract, I do not think that this is a case in which it can be entertained, either in justice to the other contracting party, or in consistency with the statutory provisions.

But then it was contended that there was an impossibility on the part of the defenders having funds to any greater amount than their aggregate capital; and that irrespective of the plea of implied contract, there was an insuperable obstacle in the way of their asserting that they had expended more in the statutory works. As a corporation with a limited capital, it is said they could not be listened to in demanding four per cent upon any greater sum than the amount of that capital; and that it would be a violation of the condition of their statutory existence, to demand or to receive more than 4 per cent upon that amount; otherwise there would be recognised in them a right to draw a per centage on capital which they are not entitled so hold.

Now, whatever there might have been in the objection,—and I do not think there would have been much weight in it for reasons already explained,—it seems to me *effectually* obviated by the statute 1856, to the provisions of which Lord Murray has particularly referred. That statute was obtained before this question was stirred by the pursuers. Its preamble specially sets forth the necessity that existed for increasing the capital of the company in order to meet the debts and liabilities incurred in completing the railway and relative works. The Act then provides for the requisite addition of L.100,000 to the already existing funds of the company, by the creation and issue of new shares, with the relative power to borrow to the usual extent. And this addition to the capital, it is specially declared, "shall be considered as part of the general capital of the company, with all the rights and privileges thereof;" and it is farther provided, that the sums thus authorised to be raised "shall be applied in payment of the costs of this Act, and the debts and liabilities of the company, incurred or to be incurred, in carrying into effect the objects and purposes of the said recited Act, and for no other purpose whatsoever." Ample funds have thus been placed at the command of the defenders as a statutory company, to meet the whole expenditure in completing this railway. Any supposed difficulty that might have existed from the alleged impossibility of the statutory company receiving a per centage on capital which they were not entitled to hold, is effectually obviated. The incapacity, if it ever existed, no longer exists.

The pursuers say that the increased capital provided for by the statute of 1856 ought not to affect the argument, because of the saving clause, that nothing in the Act contained was to be held or taken to affect, or alter the rights and liabilities of the two Companies as between themselves. Could the pursuers successfully maintain their plea of implied contract under the Act 1846, there would be a great deal in this view to require consideration. In that case they might say they stood virtually in the same position, as if the 45th section of the Act 1846 had, in express terms, made it a condition that they were in no event to pay more than four per cent on the original aggregate capital. I will not say to what effect the saving clause in the Act 1856 might, in that view, have been entitled. It is enough for the purposes of this argument to say that, discarding that plea, as I think it ought to be, the saving clause does not in its terms interfere with the power of the defenders to add to their available capital, in terms of the statute. This being done, the hindrance is removed that was supposed to be in the way, on the one hand, of providing for the debts and liabilities incurred in completing the works, and, on the other hand, of their receiving that full implement of the statutory contract from the pursuers, which they are entitled to demand.

I do not think that this statute, although passed in 1856, after the deficiency in the original aggregate capital was ascertained, is entitled to any less effect, than if a similar enactment had been applied for and obtained in 1847 in supplement of the Act of 1846, at a time when the formation of the railway was only being com-

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menced, and when deficiency in the funds, available under the Act 1846, was merely conjectural. The effect of the legislative measure, whether precautionary or remedial, on the legal relations of the parties, must be judged of on the same principles.

Altogether I am of opinion, that in the action at the instance of the defenders, the fourth and fifth objections stated to Mr Miller's report should not be sustained, but the interlocutor of the Lord Ordinary adhered to dismissing them; and that, in the action of declarator, decree ought to be pronounced in favour of the defenders.

THE COURT pronounced the following interlocutor :—" *Edinburgh, 27th February* 1857.—The Lords having heard parties' procurators on the reclaiming note, by the Edinburgh and Glasgow Railway Company, against Lord Neaves' interlocutor, in the action against them, at the instance of the Stirling and Dunfermline Railway Company;—and having at the same time heard the same counsel for the parties, on the merits of the action of declarator, at the instance of the Edinburgh and Glasgow Railway Company, against the Stirling and Dunfermline Railway Company, ... Conjoin the said actions: Adhere to the interlocutor of the Lord Ordinary in the first mentioned action, except in so far as it repels the objections to Mr Miller's report or certificate, which finding the Lords recall; and find that the pleas maintained by the defenders, and stated in these objections, cannot be entertained in the form of objections to Mr Miller's certificate or report, as the said report did not truly proceed on a judicial remit to Mr Miller, as a party appointed by the Court to report, and that such objections are in themselves unfounded on the merits: Refuse the prayer of the said reclaiming note, and decern: Find the reclaimers liable in expenses since the date of the Lord Ordinary's interlocutor: And in the action at the instance of the Edinburgh and Glasgow Railway Company, repel the first plea in law stated by the pursuers; sustain the third and fourth pleas in defence stated by the Stirling and Dunfermline Railway Company, and therefore assoilzie the said Stirling and Dunfermline Railway Company, and decern: Find the Edinburgh and Glasgow Railway Company liable in the expenses incurred in that action; allow the accounts to be given in, but on the footing that there is to be one account only for the discussion on the reclaiming note, and on the merits of the action at the instance of the Edinburgh and Glasgow Railway Company; and remit the accounts when lodged to the Auditor to tax and to report: And *quoad ultra*, on the motion of the Stirling and Dunfermline Railway Company, that the questions of interest and expenses of process still remaining to be disposed of, under the said interlocutor of the Lord Ordinary, should now be taken up by the Court, with a view to a final judgment on the whole points in the cause, without further delay, instead of remitting the cause back to the Lord Ordinary,—in respect that the said motion is not opposed by the Edinburgh and Glasgow Railway Company, appoint parties' procurators to be heard before the Court on the questions not disposed of, and allow this decree to be extracted *ad interim*."

II. A discussion now took place upon the claim for interest on the several arrears of rent fixed by the Lord Ordinary, and adhered to by the Court.

The manner in which the question arose under the summons is thus stated by the Lord Justice-Clerk :—

" In this case a portion of the Stirling and Dunfermline Railway was completed, according to the certificate of Mr Miller, on the 4th of December

1850. And it is fixed and decided, that the Edinburgh and Glasgow Railway Company were bound to have taken possession of that portion of the railway, under the statutory lease to them as at that date, and to pay termly the rent fixed on the expenditure when the latter should be ascertained in the manner prescribed by statute. In like manner two other portions were completed and certified in the same manner as on the 21st of June 1852, and the 29th of October 1852 respectively, and ought, on these dates, to have been taken possession of under the lease by the Edinburgh and Glasgow Railway Company, and that the rent, when the expenditure is fixed, shall be paid termly from these dates for these two portions.

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"The amount of the expenditure was fixed by Mr Miller's certificate on the 20th of May 1856.

"As to these two latter portions, to which the present action refers, the question arises,—which has not been decided as to the portion first completed,—whether the defenders are to pay interest on the instalments of rents now payable for the terms during which the Edinburgh and Glasgow Railway Company ought to have been in possession, and also during which, since August 1853, they have been in possession. I see no reason, in the view I take of this question, for delaying its decision, until an action now in dependence, claiming interest in like manner on the rent due in regard to the portion first completed, shall be prepared and brought forward for discussion. If the claim is the same and there are no specialties as to that portion, the point will follow the decision of the question in this action. If there are specialties, then these will be separately considered,—but as the question is ready for decision in the present action, it is much better to dispose of the matter at once.

"The present action concludes for interest on the rent applicable to the two portions last finished; but the terms of the conclusions require attention.

"There is first a conclusion that 'it ought and should be found and declared, that the said defenders are, during the period prescribed by the said Acts, bound to take and hold in lease the said branch railways and the said portion of the main line of the said railway, respectively above mentioned, and to maintain the works so completed in good and sufficient order, and to pay to the pursuers an annual fixed rent or consideration for the use thereof, at the rate of four per cent on the whole amount expended by the pursuers in completing the said branch railways and portion of the main line of railway, as the said amount shall be ascertained and fixed by John Miller, civil engineer in Edinburgh, whom failing, by the engineer of the Edinburgh and Glasgow Railway Company, for the time being, and also to pay to the pursuers a further fluctuating and contingent rent or consideration, equal to one-half of the whole receipts which shall appear from the books of the said defenders to have been drawn by them during each preceding year, in respect of the traffic of the said branch railways and portion of the main line of railways, after deducting the said fixed rent of four per cent, and a sum equal to 35 per cent on such gross receipts, in respect of the expense of maintaining and working the same; and for the purpose of ascertaining the said amount expended by the pursuers in completing the said branch railways and portion of the main line of railway as aforesaid,' and then a conclusion occurs for a remit shewing that there were then no data for ascertaining the rent to be paid.

"From this part of the summons it is plain that the pursuers had not put themselves in a situation to say, or at all events were not able to say, this is the sum payable each term by the tenant, L.3000 or L.4000, or any other sum whatever.

"Then the summons concludes, that 'the said defenders ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuers, by equal moieties, on the 4th day of December and the 4th day of

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June yearly, commencing the first payment on the 4th day of December 1852, for what may be then due, and the next payment on the 4th day of June following, for the half-year preceding, and so on thereafter termly and proportionally or otherwise, commencing at such other date and payable at such other times or terms as may be fixed by our said Lords, of the sum of L.8000 sterling, or such other sum as may be ascertained in the course of this process to be the amount of a fixed yearly rent, calculated at the rate of four per centum per annum, on the amount expended by the pursuers in completing the said branch railways and portion of the main line of railway respectively, ascertained and fixed as aforesaid, the terms of payment of the said fixed rent being always first come and bygone, with the legal interest upon each of the said termly and proportional payments from the time when the same respectively become payable, and thereafter during the not payment thereof: And it further ought and should be found and declared, by decree foresaid, that the said defenders were bound, as upon the said 21st day of June 1852, to enter into possession of the said branch railways, and that they were bound, as upon the said 29th day of October 1852, to enter into possession of the said portion of the main line of railway, and thereafter during the said period prescribed by the said Acts, to exercise all the powers and authorities thereby conferred on the pursuers with respect to the maintenance, protection, and use of the said branch railways and portion of the main line of railway respectively, subject to the same provisions, rules, and regulations, as are by the said Acts imposed on the pursuers,'" &c.

The Edinburgh and Glasgow Company denied that interest was due; it was not specially stipulated for in the contract between the parties in the 45th section of the Act of 1846, and therefore could not be exacted; moreover, the analogy of common law was against the claim. They had not been *in mora* till the date of the last report by Mr Miller, and it was not due *ex lege*. There could be no debt till the amount of the expenditure was fixed, which it was only in 1856. Ground-annuals, and feu-duties, and other fixed annual payments, did not bear interest; the case of rent had never been subject of decision; but the same principles which applied to feu-duties would apply to rent also. There could be no doubt but this was a case of lease and rent due under it, and not a case of transfer. Even where the lease was for 999 years, as in the case of the Barrhead Railway, the two companies were held to stand to each other in the relation of landlord and tenant.[1]

The Stirling and Dunfermline Company, on the other hand, maintained, that the principles to be applied to the case were those that regulated questions not between landlord and tenant, but between seller and purchaser. For this was a transfer quite beyond that of an ordinary lease, and embraced not merely the ground, but the whole corporate character and privileges of the lessors. Suppose the lease to have been for 999 years, and the consideration an annual payment, would that annual payment not be simply the price? The lessees had used and enjoyed for years the several sums found due, as well as the subjects, for which they were the price; therefore, on equitable grounds, they were bound to pay interest. It had been said by the Edinburgh and Glasgow Company that they had not been *in mora*, as the lessors had been the parties who allowed these sums to accumulate, but

[1] Bell's Principles, section 32; Hunter on Landlord and Tenant, vol. ii. p. 499; Edinburgh and Glasgow Canal Company v. Carmichael, 27th May 1843, Bell's App. vol. i. p. 316; Lord Dundas v. Scott Moncrieff, 24th Nov. 1835, F.C.; Hurlet and Campsie Alum Company v. Earl of Glasgow, 19th Dec. 1850, ante, vol. xiii. p. 370; Barrhead Railway Company v. Caledonian Railway Company, 20th July 1855, ante, vol. xvii. p. 1148; Durie, M. p. 542; Stirling, M. p. 544; Hamilton v. Geddes, 26th Feb. 1805, Paton's App. vol. iv. p. 657.

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truly they had no alternative but to do so, while the Edinburgh and Glasgow Company maintained an action in which they denied all liability.[1]

LORD JUSTICE-CLERK.—(After the narrative quoted above, p. 614)—The summons, then, did not and could not conclude for any one sum as actually due—for no sums had been fixed as the year's rent. The conclusion is for interest, when each of the termly payments respectively become payable. But no sums became payable till the date of Mr Miller's certificate on the 20th May 1856. No sum could, until that date, be said to be the rent. No sum before that date could be demanded.

It is very doubtful to me, whether the conclusion is rightly framed to give effect to the claim for interests on the rents due for the possession before the date of Mr Miller's certificate, for I think it should specially have concluded for the sums payable for the bye-gone terms since June and October 1852, and with the interests thereon respectively, from and after the terms to which such payments apply—whereas the conclusion (framed no doubt chiefly with a view to future years) claims interest on these sums, when the same became payable, and none were payable until 20th May 1856.

But passing over this objection, the question arises—Now that the amount of expenditure has been fixed and the rent payable each term at the rate of four per cent on that amount ascertained, is interest due and exigible on the rents for the terms before 1856?

It is quite clear from the conclusion of this action that no sum was become, or could be stated as the particular rent due on each term's possession,—while on the other hand, the pursuers were (as well entitled) pressing on the defenders to take possession from the date of the certificate, as to completion of these portions of the line, severally without regard to the fixing the amount of expenditure in making the line.

Then the fact is, that when the pursuers called on the defenders to take possession of these portions of the undertaking as completed in terms of the obligations incumbent on the Stirling and Dunfermline Railway Company, and, therefore, entitled to call on the Edinburgh and Glasgow Railway Company to take possession under the lease, the Stirling and Dunfermline Railway Company had not ascertained the expense, and therefore had not been able to fix the yearly rent. No doubt the Edinburgh and Glasgow Railway Company were bound, as has been decided, to take possession of the subject of the statutory lease, so far as completed, whenever certified. But the Stirling and Dunfermline Railway Company were not bound to call on them to take possession before the amount of the expenditure was fixed by Mr Miller. But they did call on the Edinburgh and Glasgow Railway Company to take possession before they had been able to get the expenditure fixed, and therefore before there were materials for ascertaining the yearly rent.

The Stirling and Dunfermline Railway Company were entitled to take that step if they chose, and to call on the Edinburgh and Glasgow Railway Company to take possession as tenants, from the dates when the portions of the railway were certified respectively to have been completed. They were entitled to do so,—but then that was at a time when not only the rent was not ascertained, but when no data had been established on which any demand could have been made for any specific yearly rent.

In fact, the pursuers have not been able to ascertain the rent till the 20th of May 1856, as they did not, till that date, get the amount of their expenditure ascertained. I do not enter into any question as to the party who is to blame for this delay.

The pursuers have not shown, and have not averred that the defenders are the parties responsible for the lapse of six years before the amount of expenditure was fixed. The matter of fact is, that the pursuers could not obtain the certificate as to the expense until 1856.

Are they then entitled to claim the interest on the sums now found to be due as the yearly rent from the 21st June and the 29th October 1852 respectively?

[1] Ersk. Inst. iii. 3, 79; Bell's Comm. vol. i. p. 647.

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The pursuers claim interest from the terms for possession from which the sums are payable.

I decline in this case to enter into any discussion as to the general principles applicable to the cases at common law, where one party is in the possession of the subject sold or let at a particular date, drawing the fruits on the one hand, while he has not paid the price, because not ascertained.

I take the case as depending upon a statutory contract, to which it would be very hazardous to apply any common law rules as to matters respecting which the statute is silent. Parties entering into ordinary contracts must be held to have in view all the obligations as well as rights resulting at common law out of such contracts, although not expressed therein,—but I cannot adopt any implication or inferences as to such a statutory lease, as the present. On this ground I took the plain words of the statute as my rule in the previous question, as to the expenditure on which the rent at the rate of four per cent was to be fixed. I take the same rule as my guide in this case. The Statute does not say that interest is to be payable on rents due for the possession during the terms which might elapse before the amount of rent was ascertained.

Very little foresight was necessary to make the Stirling and Dunfermline Railway Company fully aware that the ascertainment of the expenditure might be matter of considerable difficulty, and might occupy considerable time:—Further, by the terms of the contract, portions of the railway were to be taken in lease, though the whole was not completed.

Now it was a line, which, in the course of its execution, gave communication in its progress between different *termini*, though the remainder was not completed,—and the branch railway was a separate undertaking in point of work, although all falling under the statutory contract. Hence it was manifest that portions of the line would be the subject of the lease, and taken possession of long before the rent could be fixed:—Further, the statute declares that the rent is to be four per cent upon the amount expended in completing the line. It is not provided that the rent is to be four per cent on the amount of outlay on the different portions of the line, which might be successively finished and handed over to the tenants. Until the line was completed, the ascertainment of the cost could not take place,—hence of necessity portions would be given to the tenants, and they would be in possession at different periods, long before the whole line was completed, and long before the rent therefore could be fixed; that is to say, it was obvious that possession would be had more or less by the tenants under the contract of lease, before the rent payable could be ascertained for portions, or for the whole of the subject,—yet it is not provided that interest shall be paid on the rent which may be afterwards fixed for the possession had by the tenants, before the rent is fixed,—that, however, was a matter which required to be provided for, and which, if contemplated, ought to have been expressly stipulated. I may have some doubts indeed, but the parties have raised no such point, whether Mr Miller has proceeded quite accurately under the 45th section, which takes the completion of the railway as the term when the expenditure is to be ascertained, and the rent fixed.

Now there is a portion, as I understand, not ascertained,—and I doubt whether the whole expenditure ought not to have been ascertained at one time, and in one certificate;—at all events, passing over that point, the rent is not given on the expense of making these several portions;—I am somewhat apprehensive whether there has not been an oversight in the interlocutor of the Lord Ordinary, to which we have adhered in regard to the whole of this matter.

The Ordinary fixes a rent for the branch railways, and a portion of the main line, on the sums stated, in this last certificate, to have been expended on these portions of the undertaking.

Neither party called attention to this point,—but four per cent on the cost of making these portions may not be four per cent on the sum expended on the whole line, and there may require to be some after adjustment,—a matter not very reconcileable with the statute.

If either party suffers, it is their own fault; for objection, if well founded, was not hinted at by either. It may be that in the result the rent will be pretty equally balanced, but certainly I do not see that three different fixtures of rent is what the statute contemplates.

If the course followed is regular and competent under the statute, it would only the more follow that interest on the rents for the different portions to be finished at different times, should have been stipulated for. No. 135. — Mar. 4, 1857. Stirling and Dunfermline Railway Co. v. Edinburgh and Glasgow Railway Co.

But, however, on every view, the nature of the contract by which possession was to be had under the lease of portions of the line, obviously pointed to the necessity of a stipulation, that interest on the rent should be paid for the possession had before the rent could be fixed,—if that was the agreement of parties. The statute contains no provision to that effect.

I cannot introduce by implication,—indeed grounds for an implication to that effect, there are not,—neither can I proceed to apply, to this statutory lease, any rules applicable at common law to ordinary contracts, in regard to matters not provided for in the statutory enactment.

The claim for interest then cannot be sustained.

Lord Murray.—This case has been very fully and ably argued, but it appears to me, that the Edinburgh and Glasgow Railway Company is not liable to pay interest upon the rent due by them until after the amount of that rent was ascertained by Mr Miller's certificate, on 20th May 1856, unless on special grounds which are not urged.

Until rent is ascertained, or the sum to be paid ascertained, the party may always allege that he was willing to pay the sum, and to pay the interest. Then it rested with the Stirling and Dunfermline Railway Company to produce their accounts to Mr Miller, to state what was the rent and the sum due, which was by Act of Parliament four per cent. on the outlay. All the necessary documents must have been in the possession of the Stirling and Dunfermline Railway Company, and there does not appear to have been any delay interposed on the part of Mr Miller. It was, therefore, apparently owing to the Dunfermline Railway Company alone, that the expenditure on the railway was not sooner ascertained, and the rent in consequence made current soon after the respective portions of the main or branch railways were completed.

It has, however, been strongly argued, that if a person is put in possession of any subject, he is bound to pay rent from the time of possession, but I know of no authority to that effect. There are very early decisions, that interest or annualrent is due by those who are *lucrati*, by having had the use of money or subjects belonging to others. There is a decision to that effect, "Durie v. Lord Ramsay," in 1624, where the Court found that the defender ought to pay the principal sum with the profits since the term appointed for payment, notwithstanding an arrestment by the pursuer's creditors, "in respect he had bruiked the lands continually since the alienation of the same to him, and also hath retained the money which was the price thereof in his own hands."

Another decision to the same effect was pronounced three years afterwards (1627), Stirling v. Paunter. The price was not paid "because certain deeds were not fulfilled to him." The Court there held, that the party was obliged to pay the pursuer, either the profit of the money retained, or the profit of the lands, and gave the purchaser of the lands his option. These decisions are all stated by Lord Kaimes in his dictionary, which the older Judges and lawyers consider the best of his works, under the head of annualrent, "Due by those who are *lucrati* as having had the use of other people's money;" and he adduces six decisions to that effect, at the head of which he places the case of Hume v. Renton, reported by Spottiswood, under the head of usury, and includes among them the cases I have referred to.

A most equitable principle with reference to the payment of interest appears, therefore, to have been laid down by this Court upwards of two hundred years ago, and I see no reason for departing from the principles expounded very clearly in those decisions, and so admirably abridged by Lord Kaimes, and I know of no decision whatever that derogates from it. If the Dunfermline Railway had chosen to allege that the Edinburgh and Glasgow were *lucrati* from the profits they were entitled to have, they might be allowed to make such a claim under the principle of those most equitable decisions. But that was not urged, or it was not maintained that the Edinburgh and Glasgow were *lucrati* by any possession they actually had.

I have gone upon what I conceive to be the rules established in the law of this country, but with your Lordship I come to the same conclusion as arising from the provisions of the statute, into which it is not necessary that I should go after the opinion which your Lordship has stated with reference to them.

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Lord Cowan.—The summons is dated 1st December 1852. Founding on the certificates of Mr Miller, it concludes to have it declared that the defenders are bound to take possession of the railway works from the date of their completion, and to make payment of such fixed yearly rent or consideration for the use thereof as should be ascertained, yearly and termly on the 4th December and 4th June, commencing the first payment on the 4th December 1852, or at such other date, and payable at such terms as might be fixed by the Court, "With the legal interest upon each of the said termly and proportional payments, from the time when the same respectively became payable, and thereafter during the not payment thereof."

After the record was closed, and subsequent to the affirmance by the House of Lords of the similar judgment which had been pronounced in the first action, the Court found, by their interlocutor 19th July 1853, that the defenders *inter alia* were bound to pay to the pursuers an annual fixed rent or consideration at the rate of four per cent. per annum "on the whole amount expended by the pursuers in completing" the railway works, "as the said amount shall be ascertained and fixed" by Mr Miller, to whom remit was made to ascertain and fix the amount accordingly.

The report of Mr Miller was obtained and lodged in process on 20th–26th May 1856.

The interlocutor recently pronounced, has fixed the amount of the yearly rent or consideration, to which the pursuers are entitled termly and proportionally, from and after the completion of the railway during the period of the lease; and it remains for determination whether the claim now advanced for interest on the termly payments which became due, prior to the date of Mr Miller's certificate, be well founded.

This claim is within the conclusions of the summons; and I do not think, having regard to the procedure in the action, that the mode taken to have the expenditure fixed and ascertained, so as to determine the amount of the fixed annual rent or consideration to be paid by the defenders, is objectionable.

In the first action the pursuers were held entitled to insist upon the defenders taking possession of the portion of the railway first completed; and this seems to me to have carried along with it the corresponding obligation to pay rent for its use proportionate to the money expended as fixed and ascertained by Mr Miller. Such accordingly was the course adopted in the first action without objection on the part of the defenders. In the same manner here, the expenditure upon the other parts of the railway works, to which this action relates, has been reported on, and the additional rent payable by the defenders been thereby fixed. In this I am unable to see any irregularity or incompetency under the statutory provisions, and no objection of the kind has been taken. The defenders have joined issue with the pursuers on the only point which now remains to be decided,—the claim of the pursuers for interest; and which, as I think, is duly and properly raised by the summons and record.

This claim mainly, if not altogether, depends on the special terms of the provisions embodying the statutory lease. These are contained in the 45th and 48th sections of the statute. The former provides that the defenders shall during the period of the lease maintain the works after their completion, and shall pay "an annual fixed rent or consideration for the use thereof equal to four per cent. on the amount which shall have been expended in obtaining this Act and in completing the said works, as the said amount shall be ascertained and fixed" by Mr Miller, and so forth. And the latter section enacts that the rent or consideration so to be paid shall form a charge on the railway works, and be recoverable in the same way as mortgage and loan debts; and farther provides that it shall be lawful for the companies or their directors "to make agreements among themselves as to the periods when and the instalments by which the said rent shall be paid, and fixing the mode in which the surplus profits from the railway shall be ascertained.

This last provision was not acted on by either of the parties; but it is not unimportant, shewing as it does that it was at the time contemplated that some agreement might be necessary to fix the periods when and the instalments by which the rent should be paid.

The material thing to be observed is that the amount of rent, payable by the 45th section annually, is by the statute left for ascertainment by Mr Miller; and

this could scarcely be expected to take place till *after* the works were completed and possession taken,—and until such ascertainment did take place, the amount of rent payable was necessarily left an unknown quantity. The pursuers could expect no rent to be voluntarily paid, and could demand none except as payment to account, till the examination of the expenditure took place, on which the ascertainment of its amount depended. Not that for the period preceding such ascertainment, the rent when ascertained did not become exigible; but that no demand for any particular sum as the fixed annual consideration could possibly be made. Then, when the sum was ascertained so as to put it in the power of the lessees to pay the amount and obtain a discharge,—such payment being made, exhausted the statutory obligations, in so far certainly as the express terms of this rent clause are concerned. There is no provision that in addition to the rents, when ascertained and fixed, interest was to be paid from the close of the term or year for which they were due, until actual payment.

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Now those parts of the Railway to which this action relates, were completed according to the certificate issued by Mr Miller, on 21st June, and 29th October 1852; and by the interlocutor of July 1853, the obligation of the defenders to take possession as at these dates was declared; but the report by Mr Miller was not obtained until 20th May 1856. The annual fixed sum payable by the defenders then became, for the first time, a known amount, capable of being settled and discharged.

It cannot, in my opinion, be held in this state of matters that there is liability on the part of the defenders, for the interest claimed. There are no express words to that effect, to make it in terms due *vi statuti;* and there is no legal ground for holding it impliedly due under the statutory contract. Where there is express statutory enactment, the obligations thereby imposed, cannot be added to, or enlarged by implication.

This is itself sufficient for the disposal of the claim; but it will be proper to advert to the more material views, so strongly pressed in the argument for the pursuers.

It was contended that the possession, which the defenders have had of the railway since 1st August 1853, and which they might and ought to have taken in 1852, carried with it both in equity and in law, an obligation to pay not merely the fixed annual rent or consideration becoming due between 1852 and 1856, but also interest on these yearly sums, from and after the successive terms at which they would have been payable, had the amount been ascertained.

In support of this view, reference was made to the rule recognised by the institutional writers, and by decisions of the Court, in cases of purchase and sale—viz., that where the purchaser has obtained possession of the subjects, he is bound to pay the price with interest from the date of his possession. The principle on which that rule rests is very obvious. It would be contrary to all equity, to allow the purchaser to possess the subjects with their fruits, without acounting for interest on the price which he has continued to hold in his hands. The interest is equivalent for the fruits, and drawing the one he must pay the other. But there is obviously no analogy between the present contract, and one of purchase and sale. This is the case of a lease for payment of rent or consideration for the use of the works leased, the amount payable as rent being unascertained. A totally different principle is applicable to such a case. There is the possession of the subjects leased, no doubt, but payment of the rent or consideration, when the amount becomes liquid by being ascertained, is the proper return for such possession.

Even where the consideration payable by the possessor is fixed and known, possession does not necessarily infer liability for interest on accruing duties or rent charges, when demand for payment has not been made, and these payments have fallen into arrear. This has been ruled in repeated decisions with regard to feu duties; and there is much weight in the view pressed by the defenders that rents are essentially in the same predicament. We are not called on to determine that question; but as I have examined the session papers in the case of Lord Dundas, the decision in which is very shortly given in the reports, I may explain, that there were tack duties payable in money, to a great extent in arrear, when the summonses for payment were instituted,—that in the conclusions interest was demanded from each term of those duties becoming exigible,—that under a remit to an accountant,

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various views were given of the balance due, according to the principle that might be applied to the claim for interest,—and that the interlocutor of the Lord Ordinary, adhered to by the Court, gave interest only from the date of citation, thereby disallowing a large sum which would have been due on the money tack duties, which were in arrear at the date of the demand for payment by action.

Whether this principle may be applicable generally to arrears of rents of known amount and liquid but not demanded, it is not necessary here to inquire. The case of Lord Dundas was attended with peculiarities, and the decision may have been influenced by the specialties. In the present case the amount due was altogether unascertained. The rent or consideration to be annually paid, was left for subsequent ascertainment by the very terms of the contract. Payment could not be made termly by the defenders while the amount payable was unknown. The statute is silent as to liability for interest on arrears. As there was thus no claim for interest either *ex lege* or *ex pacto* express or implied, the only other ground of liability, *ex mora*, also fails. There could be no default in payment, until the sum could be paid and be effectually discharged.

No doubt it was urged that there might have been an interim payment tendered; but to this it was rejoined, and I think with success, that if there was room for interim payment it was for the pursuers to have made the demand, which they never did, either judicially or extrajudicially. The adjustment goes on before Mr Miller, and was not terminated until May 1856, when for the first time the amount of rent became known and can be held liquidated debt.

The case of the Union Canal Company, in the House of Lords, is an important authority for the defenders, as will at once be seen by contrasting the decision in this Court with the speeches delivered by the learned Lords who concurred in its reversal. And the decision of the House of Lords, in the case of Geddes, to which reference was made in the argument, also seems to me to be an authority much to the same effect.

Altogether, I am of opinion, that the interest claimed by the pursuers ought not to be allowed.

The Court pronounced the following interlocutor:—"The Lords, in respect of the interlocutor dated the 27th day of February last, having heard parties' procurators on the motion made by the Stirling and Dunfermline Railway Company for decree for interest on the sums found due by the Lord Ordinary, as the half-yearly payments of rent from and after the 4th day of December 1852, respectively for the years subsequent thereto, and prior to the 20th May 1856, being the date of Mr Miller's certificate, on the ground that the terms of payment are come and byegone, and no rent was paid for these years,—Refuse the said motion, and find that no interest is due on any of the sums of rent found due by the Lord Ordinary before the date of the said certificate of Mr Miller fixing the sum on which the rent was to be calculated, and assoilzie the defenders from that conclusion of the summons; but find that interest at the rate of five per cent is due from and after the said 20th May 1856, on all the half-yearly payments found due by the said interlocutor as rent for the terms specified in said interlocutor, and on the same half-yearly payments to fall due during the subsistence of the lease, the terms of payment being always first come and bygone, and decern: and allow this decreet to be extracted *ad interim*: On the motions of the parties for expenses, find the pursuers entitled to the expenses of process to the date of 21st February last inclusive: Find the defenders entitled to the expense of the discussion of the claim by the pursuers for interest on the sums of rent due as aforesaid; allow accounts of expenses to be given in, and remit to the Auditor to tax the same, and to report."

A. I. Dickson, S.S.C.—Smith & Kinnear, W.S.—Agents.

Hugh M'Farlane and Others (M'Arthur's Trustees), Pursuers.—*Penney*—*Moir.* No. 136.

Alexander Campbell, Defender.—*Macfarlane*—*A. Mure.* Mar. 4, 1857. M'Farlane v. Campbell.

Sheriff-court—Competency—Right in security—Removing.—A creditor under a bond and disposition in security, containing power to output "possessors," is not entitled, after requisition, to eject a landlord in possession by a summary process of removing before the Sheriff.

Hugh M'Farlane and others, as trust-disponees of the late Alexander M'Arthur, were in right of an assignation of a bond and disposition in security of heritable subjects belonging to Alexander Campbell, on which infeftment had followed in favour of M'Arthur. That bond contained a clause of sale, for the purpose of bringing the subjects to sale after premonition in the ordinary form. It also contained a clause (not always to be found in bonds of this description), whereby the defender, as granter of the bond, granted power and authority in very sweeping and comprehensive terms to the grantee and his successors to enter into possession of the subjects. The clause in question is expressed in these terms, "with full power, warrant, and commission to the said Alexander M'Arthur and his foresaids to intromit with, uplift and receive the same," (rents, &c.) "and in the event of the interest of the said principal sum not being regularly paid at the respective terms when the same shall become due, to enter into possession of the said subjects and others, and to appoint a factor, grant tacks or leases, output and input possessors, uplift, receive, and discharge the rents and profits, and give up possession, and receive the same at pleasure," &c. 2d Division. Ld. Benholme. R.

Campbell himself being in possession of the subjects, paid neither capital nor interest; and the pursuers served upon him a notarial intimation and requisition with a view to a sale, and afterwards exposed the subjects; but no purchaser could be got, as was alleged, in consequence of Campbell's being in possession, and determined not to quit voluntarily. The present action of summary removal under the bond was accordingly brought against him in the Sheriff-court of Argyleshire.

It was pleaded in defence;—1. That the action was incompetent in the inferior Court, as truly involving a competition of heritable rights. 2. That it was incompetent in a summary process of removing (especially as there had been no decree of maills and duties), to invert the legal and actual possession held by the defender of his own property.

The Sheriff-substitute (Maclaurin) decerned in the removing, but, on appeal, the Sheriff-depute pronounced the following interlocutor:—"Finds that the present action being brought by the creditor under a bond and disposition in security for the summary removing of the proprietor in the natural possession of the subject disponed, is incompetent, at least in the Sheriff-court, therefore sustains the defences and dismisses the action: Finds the defender entitled to expenses," &c. *

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* "Note.—The Sheriff has considered this case, and examined the authorities with much attention and anxiety, and it is with great reluctance that he feels compelled to arrive at a different conclusion from the Sheriff-substitute.

"The Sheriff is asked to remove a proprietor from the natural possession of an heritable subject, at the instance of a creditor holding a bond and disposition in security over it. There is no doubt that the interest is in arrear, and that the creditor is entitled to sell under the power of sale, and to enter into possession by process of maills and duties, were that appropriate in the circumstances, and also to use the diligence of poinding the ground. But the pursuers in this action seek to have the defender removed summarily from the natural possession. They have not, however, been able to point to a single precedent for this course, and it appears to be inconsistent with the broad legal principles, as to the remedies of an heritable creditor by bond and disposition in security, laid down by Lord Rutherfurd, in the

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The pursuers presented a note of advocation.

The Lord Ordinary pronounced the following interlocutor:—"Repels the

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case of Blair v. Galloway, 21st December 1853. In that case, the Second Division ultimately decerned in the removing, on the ground that the proprietors (marriage-contract trustees) were not truly in the natural possession, but were allowing a beneficiary to possess, without payment of rent, in order to defeat the heritable creditor's remedy, by maills and duties. But no dissent was intimated from the doctrine laid down by Lord Rutherfurd, that the creditor's power, under a bond and disposition in security, to enter into possession, does not include a right to oust the proprietor himself, if found in the natural possession. The Sheriff humbly thinks this doctrine to be correct in principle, and he has not found a trace either of authority or precedent to the contrary.

"It is urged, however, that the bond in the present case, contains a clause of an unusual description, and which must be viewed as equivalent to an obligation by the debtor, to remove and cede possession to the creditor, should the interest fall into arrear. The Sheriff has carefully considered this clause in all its parts, but cannot find sufficient ground for giving it the effect contended for. It consists first of the general power to enter to possession, 'with power in the event of the interest not being regularly paid to enter into possession of the said subjects.' This is no more than the power implied in the usual form of the bond and disposition in security, with assignation to rents, see 10 & 11 Vict. cap. 50, sect. 2. That power, whether express or implied, appears applicable only to the case of subjects let to the tenant, and is made effectual by the process of maills and duties, but it includes no power to grant leases or to remove tenants. But then the clause proceeds,—'and to grant tacks, output and input tenants and possessors.' There is nothing, as it appears to the Sheriff, in these words, necessarily extending the possession beyond the case of subjects under lease or left vacant voluntarily by the proprietor. They confer a power not included in the mere right to enter to possession and draw the rents, but they do not seem to extend the legal effect of the power to enter into possession as regards subjects retained in the natural possession of the proprietor.

"In the case of Forsyth v. Aird, December, 13, 1853, there was a power given to the heritable creditor to enter into possession, and output and input tenants; and it is important to observe how that clause was dealt with by the Court. It was regarded as an assignation by a landlord of his personal right and privilege to output and input tenants, and to pursue removings. This view could scarcely be consistent with that now pressed, that such a clause gives power to remove the landlord himself, should he be found in the natural possession.

"The addition of the word 'possessors' does not seem to strengthen the pursuer's argument. It can never be held to include the proprietor himself possessing under his infeftment, and it plainly only applies to vitious possessors—parties intruding without a title, or whose title by tenancy has expired.

"On these grounds the Sheriff is of opinion that there are no grounds for decerning in this removing. The case of tenants coming under an obligation to remove without warning, at a certain date, or on a certain event, such as bankruptcy, has been referred to; but that case seems to the Sheriff to be in marked contrast to the present. Here there is no express undertaking on the part of the defender to remove, or agreement that his right should on a certain event become void and null. It was on such very express and very pointed stipulations that the Court proceeded in the cases of Stevenson, 1 Shaw, p. 84; Hall v. Grant, 9 Shaw, p. 612; Forbes v. Duncan, 2d June 1812; and Gordon v. Copland, 1805, Morrison's Appendix, Tack, No. 11.

"The Sheriff further conceives that, even if an argument could be maintained that under his bond the defender is bound to concur with the pursuers in granting a tack of his house, and remove himself to make way for the tenant, it would be necessary to establish this in a declaratory action before the Court of Session. The defender is in possession under an infeftment as proprietor undivested, and the Sheriff knows of no precedent for a summary removing by the local judge in such circumstances. Such removings are only granted by the Sheriff where parties are possessing without any title, such as a setter after the term of entry in the disposition who is divested, or the heirs of a liferenter after the death of a liferenter, who

reasons of advocation, remits the case *simpliciter* to the Sheriff, and decerns: Finds the advocators liable in expenses, appoints an account," &c.* No. 136.

The pursuers reclaimed, arguing that the terms of their bond were quite unusual and peculiar, and must therefore have been intended to convey extraordinary powers;—They imply power to enter against the landlord as well as against the tenants, and such being the conventional stipulation, no declarator was required. Sometimes that is required, but there is a whole class of cases like that of Gordon on the subject of tack, where a conventional irritancy has been held sufficient.[1] It was said that they had under the clause in the deed merely a right to a process of maills and duties, but that would not avail where there were no tenants. There was such a process in Forsyth's case, but the Court held that to be quite unimportant; and in Blair's case there was no power of entry whatever, but a mere assignation of rents, so that these cases could not rule the present one. Mar. 4, 1857. M'Farlane v. Campbell.

The defender replied;—That in the deed the word "possessor" was not to be read as applying to the landlord, but rather to kinds of possession more limited than ordinary tenancy. But apart from any question arising under the terms of the deed, the matter is one which the Sheriff could not deal with, having no jurisdiction but that conferred by the Act of Sederunt, which did not cover the present case. The pursuers' remedy was to exercise their power of sale.[2]

The LORD JUSTICE-CLERK stated, that he adhered to the Lord Ordinary's interlocutor, on the ground that a summary action of removing against a proprietor who was feudally infeft, was clearly incompetent in the Sheriff Court. I limit myself to that ground.

LORD MURRAY concurred.

LORD WOOD absent.

LORD COWAN.—I am content to acquiesce in the ground of judgment proposed by your Lordship. A great deal might be said upon the meaning of the clause in the bond and disposition founded on by the advocator, as to whether it includes the proprietor of the subjects or not. But assuming—not admitting—that to certain effects the proprietor might be included within it, I am of opinion that its terms were not intended to confer, and did not confer, power on the heritable creditor by summary process of removing before the Sheriff Court, to remove from possession the proprietor by whom the bond was granted.

THE COURT pronounced the following interlocutor:—" Refuse the said

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mere intruders, or a tenant who has agreed that his right shall become null and void upon his committing an act of bankruptcy, and that he may be removed thereupon without warning.

The defender here, on the contrary, is not divested, and has granted no express obligation to remove; and the question, therefore, seems to resolve into a competition of heritable rights, which is incompetent in the Sheriff Court. The dicta in the case of Waterston v. Mason, 30th June 1846, bear very strongly on this point.

The Sheriff can quite understand that the pursuers may have good reasons for wishing to oust the defender, notwithstanding the power of sale, and that they might thus turn the security to much better account. But these are not considerations for the Court, and the creditor must just make the best of the security on which he lent his money, according to the legal effect of the deed by which it is constituted."

NOTE.—" The Lord Ordinary agrees with the views of the Sheriff so clearly expressed in his note to the interlocutor of 5th April 1856."

[1] Gordon, 7th Dec. 1805, Mor. Tack, App. No. 11.

[2] A. of S., 14th Dec. 1756.; Ersk. Inst. ii. vi. 50; Blair v. Galloway, 21st Dec. 1853, ante, vol. xvi. p. 291; Forsyth v. Aird, 13th Dec. 1853, ante, vol. xvi. p. 197.

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reclaiming note, and adhere to the interlocutor reclaimed against, and find the advocators liable in additional expenses," &c.

John Ross, S.S.C.—Malcolm M'Gregor, S.S.C.—Agents.

No. 137. Patrick Graham Barns and Others, Pursuers.—*D. F. Inglis—Young.*
Mrs Margaret Hill or Tait and Others (Barns' Trustees), Defenders. —*Penney—Gordon—Macfarlane—Cook—Boyle.*

Prescription—Statutes 1469, *cap.* 28; 1474, *cap.* 54; 1617, *cap.* 12—*Trust.*—A truster, who died in 1791, directed his trustees to invest the free residue of his estate in land, to be entailed in favour of the same series of heirs, and on the same conditions with those specified in a deed of entail, to which he referred. Having realised the trust-estate, the trustees, with the concurrence of the then beneficiaries, purchased an estate, the price of which exceeded the amount of the trust-funds by L.4000. The first instalment of the price was paid, and possession taken, at Martinmas 1812. But it was only in 1815 they obtained a disposition to the lands, which they took in their own favour. No deed of denudation and tailzie was ever executed by them. They accounted to the heirs for the free annual proceeds down till 1850. In 1853, being more than forty years after the first payment of the price, but not forty years after the completion of the transaction, the heir and beneficiaries raised an action of count, reckoning, and payment against the trustees, calling on them to account for and invest the balance of the trust-funds in terms of the directions in the trust-deed, and challenging, by a declaratory conclusion, the purchase in 1812, as *ultra vires*, in respect of the excess of the price over the funds. The estate purchased in 1812 was now greatly depreciated in value. The subsistence of the trust was admitted, and the trust-accounts were produced;—*Held* (*diss.* Lord Ivory), that the trustees were entitled to plead the negative prescription against a challenge of the transaction in 1812.

1st Division. Lord Deas. L.

This action was raised by the beneficiaries under the trust-disposition and settlement of the deceased John Barns. It was directed against Lawrence Hill, sole surviving and acting trustee under the settlement, and against the representatives of the deceased trustees. The summons concluded for count and reckoning, in order that the balance and residue of the trust-fund should be invested in the purchase of lands in terms of the trust-deed, and, in the event of failure so to count and reckon, then the summons concluded for payment of L.10,000, as the balance of the trust-funds remaining to be invested, and, when so invested, that the titles to the lands so purchased should be taken in favour of the pursuers, according to the conditions of the trust-settlement. Lastly, it contained the following declaratory conclusions:—Farther, it ought and should be found and declared, by decree foresaid, that no power is conferred by the said trust-disposition and settlement on the trustees thereby nominated and assumed in virtue thereof, to borrow money or to grant security upon any land purchased or to be purchased for the said trust-estate, or to take any conveyances in their own names; and that any transaction or purchase made, or conveyances taken otherwise, or securities granted by the said trustees, were and are *ultra vires* of the said trustees, and illegal and unwarranted, and that the same cannot be binding on or affect the said trust-estate, or the funds and property thereof.

Art. 11 of the pursuer's condescendence was as follows:—"The pursuer, the said Patrick Graham Barns, has not received payment of any part of the annual return from, or free proceeds of, the residue of the said trust-estate of the said John Barns, though he has made frequent applications for the same. The pursuers have been unable to obtain any satisfactory

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account of the funds and property left by the said John Barns, and forming the subject of his said trust-disposition and settlement, or of the intromissions of any of the said trustees, original and assumed, who accepted and acted as aforesaid, or of any factors or agents or others employed by them, with the said trust-estate. The pursuers have been informed of a transaction to which, under reservation of their right to state all competent objections to any accounts that may be given in and rendered by the defenders, or any of them, they have now specially to object as altogether unwarranted and illegal, and as having occasioned an undue application of the funds of the trust. The following are the particulars of the said transaction, so far as known to the pursuers."

That transaction was a purchase of the estate of Hobsland, in Ayrshire, by the trustees in 1812. In art. 19, the pursuers "objected to the transaction as incompetent, illegal, and unwarranted by the trust-disposition and settlement of the said John Barns, and to the application of the said trust-funds thereto."

The following narrative is taken from the note appended by the Lord Ordinary to his interlocutor:—"This action is raised at the instance of the existing beneficiaries, under a trust-disposition and settlement executed by Mr John Barns, who died, without issue, in May 1791. He had executed a deed of tailzie, of even date with his trust-deed, of the lands of Kirkhill, in Ayrshire; and, by the trust-deed, he conveyed his whole remaining means and estate to his trustees, for payment of debts and legacies, a jointure of L.300 a-year to his widow, a life annuity of L.100 to John Deans, and, in the last place, he appointed his trustees to denude of such part of his heritable estate as they might think proper to keep unsold, and to invest the free residue of his whole other heritable and moveable estate in the purchase of lands, to be entailed in favour of the same series of heirs, and under the same conditions, with those specified in the entail of Kirkhill,—the annuities to his widow and to John Deans being to be secured by way of liferent locality, upon the lands to be so entailed.

"The widow died in 1795, and John Deans in 1800. In this last-mentioned year, a multiplepoinding was raised, in order to determine whether a sum of L.1729, 9s. 2¾d. of accruing interest, fell to be paid to James Stevenson, afterwards Sir James Stevenson Barns, the heir in possession under the entail of Kirkhill, or to be accumulated with the capital, for the purchase and entail of additional lands. The heir in possession was preferred, by interlocutor of date 3d June 1802. By this time, or soon afterwards, the trust-estate appears to have been fully realised, and there was found to remain, in the hands of the trustees, a balance, available for the purchase of lands, of L.7800. After (it is said) a variety of unsuccessful efforts to find a suitable property, corresponding in price to this sum, the trustees, in 1812, purchased certain lands in Ayrshire, called Hobsland, at the price of L.12,000, and obtained a disposition thereto, in their own favour, as trustees, for the purposes of the trust. This disposition is dated in May, July, and August 1814, and February 1815, with entry as at Martinmas 1811. Of the stipulated price, L.2200 was allowed to remain secured upon the lands purchased: and the balance of L.2200 was raised, under a personal bond granted by them, it is understood, in their character of trustees.

"The free annual proceeds of the lands thus purchased, from the date of the purchase down to the death of Sir James Stevenson Barns in 1850, appear to have been accounted for to Sir James, the heir of entail in possession of Kirkhill, who succeeded upon the death of the entailer in 1791, and to his representatives.

"*No deed of* denudation and tailzie of Hobsland has, however, hitherto

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been executed by the trustees. Mr Patrick Graham Barns, the heir in possession, who succeeded on the death of Sir James, and the substitute heirs, now attempt to repudiate this purchase, and call upon the trustees to invest the foresaid sum of L.7800, or whatever the just balance may appear to be, in the purchase of lands,—taking the burden of Hobsland, which is now greatly depreciated in value, on themselves. Such, it was explained at the bar, is the leading object of the present action; and it was agreed that the question thus raised should be in the first instance decided, before going into the particulars of the accounting, or into the question upon which of the trustees, or their representatives, any liability, which may have been incurred, ought to fall.

"There are two difficulties in the way of vindicating the trust-management —the excess of the price over the funds, and the delay in re-selling the surplus to pay off the debt thus contracted.

As to the excess of price, it is said on behalf of the trustees, that they could not find, and could not be expected to find, a suitable property at a price precisely equal to the fund in their hands, and that, to have bought at a price less than the fund, would have resulted in leaving a balance unemployed. As to the delay in re-selling the surplus, it is said, that since the depreciation of land at the peace in 1814-15, there has never been a time at which a re-sale could have been advantageously effected, and that the value of land at present is higher than it has been during the intermediate period. If, therefore, there was any prejudicial delay at all, this, it is said, could only have occurred during the short interval between the purchase and the peace, against the consequences of which delay the trustees are fully protected by the declaration in the trust-deed, that they 'shall not be liable for omissions.'

"It is further said that both objections are now excluded by delay, taciturnity, and homologation.

"In order to judge of this last mentioned plea, it is necessary to attend to the following circumstances:—

"The first heir of entail who succeeded on the death of the truster, in 1791, was, as already mentioned, Mr James Stevenson, sometime a colonel in the army, who afterwards became Sir James Stevenson Barns. He attained majority in 1795. The next *nominatim* substitute was his elder brother, Mr John Stevenson, one of the trustees, who died in 1815. Then his sister, Jean, or Jane, born in or about 1770, who died in 1827. Then Mr Alexander Graham, born in or about 1763, who died in 1820; and then his son, the leading pursuer, Mr Patrick Graham Barns, born in 1793, who is the heir of entail at present in possession, having succeeded in 1850. It will be observed that all these *nominatim* substitutes, as well as the heir in possession, were of full age at and prior to the purchase of Hobsland in 1812, with the exception of Mr Patrick Graham Barns, who attained majority in 1813. The others, however, predeceased Sir James, and, of course, never attained possession.

"The only acting trustees in 1812 were Mr John Stevenson and Dr Hope. It is clear enough, from the correspondence, that Sir James, who was occasionally absent with his regiment, entrusted his interests, and the power of giving instructions in his affairs, a good deal to his brother John, who made considerable advances to him. It is equally clear that both of them, in all matters connected with the purchase and management of land, had great confidence in their relative, Mr Alexander Graham, a person of undoubted skill and experience in such matters, and who was the father of the whole of the present pursuers, except Mr Patrick Graham, W.S., and his family, who are also related to him, although they do not represent him, as his own family do.

"It appears from a letter from Mr Alexander Graham to Mr James Hope, the agent under the trust, dated 4th April 1811, that Sir James, (then Colonel Barns) had been in personal communication with Mr Alexander Graham about the purchase of an estate, obviously with the trust-funds, for Sir James had no other means, and that Sir James had 'carried' Mr Graham to look, with that view, at a place called Muirkirk, which Mr Graham did not approve of. This led Mr Alexander Graham to look out for other and more suitable properties, one of which, situated in Renfrewshire, he brought under the notice of the trustees by a letter to their agent, Mr James Hope, dated 30th December 1811. Mr Hope answered on 7th January 1812, that Mr John Stevenson, then in Ayrshire, had been written to on the subject, and added, 'Mr Stevenson's answer in regard to the lands in question shall be communicated to you, and I am sure that both he and Dr Hope will be much influenced by your opinion in any purchase which presents itself.' This was followed by another letter from Mr Hope, bearing that Mr Stevenson joined in requesting that Mr Graham would examine the lands he had mentioned, which Mr Graham accordingly did, and on 1st February 1812, wrote, recommending them as an eligible purchase at L.14,000, but at sametime proposed to inspect Hobsland, which had, by this time, come into the market at a similar price.

"This being acceded to, Mr Graham wrote, on 19th February 1812, 'I consider Hobsland, &c., to be a most eligible purchase,' so much so, that, if the trustees will not do so, 'I intend to try to secure it for myself, or a friend. It is a fine situation, good climate, with the privilege of seaware, and produces crops of the best quality,' &c. This letter was communicated to Mr John Stevenson, who wrote, on 28th February 1812, 'I had gone over them some time ago, with a view to a purchase for my brother, and consider them, on the whole, an eligible purchase, if they could be got at a moderate price;' and as Mr Graham's opinion had been so strongly expressed, 'I am convinced we may rely with safety on the purchase being a favourable one, and Dr Hope has my full concurrence in directing it to be immediately made. As the difference between the price and the extent of the trust-funds is considerable, it will be necessary to make arrangements to that amount, either with sellers, or with some of the banks, till the final adjustment of the objects of the trust, or till some change takes place in my affairs, when it, perhaps, may be in my power to be of use to my brother.' The lands were accordingly purchased at L.12,000; and, on 19th March 1812, Mr Alexander Graham wrote to the agent under the trust, 'I congratulate you and all concerned on the purchase of Hobsland, which, I must say, you have managed well.' On 26th March 1812, he wrote that some detached land, comprehended in the entail of Kirkhill, 'might be exchanged and sold, which I think a much preferable plan to selling any part of the last purchase.' Mr John Stevenson, on behalf of his brother, seems to have concurred in this view; for, on 27th March 1812, he wrote, 'In the course of the next three months we shall have time to consider what part of my brother's lands it will be most judicious to part with.' The agent wrote to Mr Graham on 8th April 1812, 'My own opinion certainly is, that it would be desirable to retain as much of these lands as possible, the whole if possible, and to part with everything that is detached.'

"Awaiting, apparently, an opportunity of this kind, to suit at once the views of the heir in possession, and the interests of all concerned, the matter lay over till the price of land fell, which it is well known to have done at the termination of the war, and a re-sale seems then to have been found impracticable, except at a sacrifice which the parties were not willing to make.

"It is material to observe, that during all this time, as well as subsequently, Mr James Hope, the agent under the trust, was factor and com-

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missioner for Sir James Stevenson Barns, under a registered factory and commission dated 20th December 1800, which does not appear ever to have been recalled.

"It appears, from a letter from Mr John Stevenson to Mr James Hope, of 26th April 1812, as well as from subsequent documents, that, upon the purchase of Hobsland being completed, Mr John Stevenson, on behalf of his brother, who was not then in Ayrshire, but with whom he was in correspondence, took possession of the farm of Hobsland, then unlet, and purchased and placed upon it the necessary stocking, with a view to reap the crop of that year, which was accordingly done: and his whole actings in the matter were fully adopted by his brother, Sir James, as appears from a letter addressed by Sir James, after his return home, to Mr James Hope, of date 22d December 1812, with relative state thereto prefixed. These documents likewise shew that Mr James Hope was then acting on behalf of Sir James Stevenson Barns.

"In the meantime, in the course of the summer and autumn of 1812, a correspondence had taken place between Mr Robert Nicholson, on the one hand, and Mr John Stevenson and Mr James Hope, on the other, with a view to Mr Nicholson becoming tenant of the farm of Hobsland, in the course of which (as the letters shew), Mr John Stevenson likewise corresponded with his brother on the subject. Sir James had returned to Ayrshire before this negotiation was concluded, and had a personal interview with Nicholson on the subject, as appears from Nicholson's letter to Mr James Hope, of 16th December 1812. The negotiation seems to have been, about that time, completed; for, in a postscript to his letter already mentioned, to Mr Hope, of 22d December 1812, Sir James says, 'The tenant at Hobsland is desirous of having the scroll of the tack.'

"Accordingly, Nicholson entered into possession as at Martinmas 1812: but it appears from Mr Hope's business account and relative letters, that the tack, although prepared in January 1813, was not actually extended and signed till May or June 1815. On 2d January 1815, Sir James writes to Mr Hope, 'I have been several times at Hobsland, which is in good order. I beg you will send me any plan there is of it, as Mr Oswald has requested that two people should be named to decide upon the march between his estate and mine,'—meaning, obviously, the estate of Hobsland. He adds, 'I have arranged with Mr Dunlop, that he is immediately to open the gate he had shut up to prevent the tenant at Hobsland from going for seaware.' On 13th May 1815, Sir James writes to Mr Hope, 'I expected to have been able to transmit the tack of Hobsland to-day, but Mr Nicholson was unwell, and could not keep his appointment this morning.' On 14th May 1815, he writes, 'We go over to Hobsland on Monday, and I hope to be able to send you the tack on Tuesday.' On the 16th, he writes, 'I expect to be able to send you the scroll of the lease in a day or two.' Accordingly, on 21st May 1815, he writes, 'I send you the scroll of Hobsland tack, which Richard Campbell settled with Mr Nicholson's brother.' 'When the tack is made out, pray send the scroll with it to me.'

"The scroll tack thus referred to is produced, and has the following docquet appended to it:—'1815. *May* 19.—The preceding lease was this day revised by us for behoof of the parties. (Signed) Richard Campbell, John Nicholson.' Campbell appears to have been a country agent, employed by Sir James Stevenson, who was a consenting party to this lease.

"The lease bore to be entered into between Mr John Stevenson and Dr Hope as trustees, and 'Colonel James Stevenson Barns of Kirkhill, for his right and interest in the foresaid trust, on the one part, and Robert Nicholson, in Hobsland, upon the other part;'—the endurance to be for nineteen years after Martinmas 1812, as to the arable lands, and after Whitsunday 1813 as to the houses and grass; and the rent, for the first six years, to be

L.349, 5s., and thereafter L.383, 12s. per annum. Mr Hope's business No. 137.
account contains an entry under date 27th May 1815, 'Writing Colonel —
Barns with do. (*i.e.*, the tack) for signature.' The principal tack has not Mar. 5, 1857
been recovered, but there can be no doubt that it was executed, for it is Barns v. Barns'
referred to in a letter (to be afterwards noticed), as to be given up to the Trustees.
tenant, who fell into bad health, and agreed to remove at Martinmas 1817, on which occasion Sir James arranged with him about the straw, the rent, and the allowance to be made for the houses and fences.

"It is here necessary to notice that, in May 1815, Sir James appointed Mr Thomas Ranken, residing in Ayr, to be his local factor, and that Ranken, as appears from the account between him and Sir James (No. 71 of process), for some years thereafter collected the rents of the estate of Hobsland for behoof of Sir James, along with the rents of Kirkhill, and paid the public and parochial burdens applicable to both estates. Ranken's management included the rouping off of Nicholson's crop, and the realisation of the proceeds towards liquidation of the rents, &c., on his leaving the farm of Hobsland, and likewise the superintendence of the farm of Fairlies, let to John Gibson at a rent of L.68, or thereby, being the only other farm of which the estate of Hobsland consisted.

"This arrangement, in consequence, probably, of Sir James leaving the country, was altered in 1820, as appears from a letter dated 9th August of that year, from Mr Ranken to Mr James Hope, bearing, 'I, the other day, received a letter from Colonel Barns desiring me to remit you, in future, the rents of Hobsland and Fairlies. I shall attend to this when a payment is made. I sent the Colonel a state shewing how the tenants stand, which I presume he has communicated to you.' The same letter shews that there was now a difficulty in getting more than L.180 of rent for the farm of Hobsland. The appropriation of the whole rents for some years by Sir James, and thereafter the diminution in their amount, gave rise to a balance in favour of Mr James Hope, who continued to pay the interest of the money borrowed, and to make other disbursements, which balance went on increasing till it amounted, with interest, on 7th March 1843, to L.3581, 12s., when Sir James paid it off, as appears from a letter from him to Mr James Hope, of that date, No. 89 of process. The balance of the rents subsequently arising appears to have been settled with Sir James' executors.

"It is not alleged that Sir James, at any period of his long life, objected to or repudiated the purchase of Hobsland, either upon the ground that the price paid for it exceeded the capital of the trust-funds, or upon any other ground. On the contrary, with perfect access, through his commissioner and his brother, as well as personally, to a knowledge of the state of the trust-accounts, from the date of the multiplepoinding in which he was a successful claimant, in 1802, downwards, as well as full access to know the whole other circumstances, it is quite clear that Sir James homologated and approved of that purchase.

"Neither is it alleged that any of the substitute heirs ever made any objection to the purchase till the present action was raised in June 1853. Nor that either they or Sir James ever required the trustees to re-sell any part of the lands.

"It is not denied that the purchase was made at a fair price, and that it would have been a proper and expedient investment at the time, had the amount of the capital of the trust-estate been equal to the price. The question now is, Can the pursuers, the substitute heirs of entail, at this distance of time, and after all that has taken place, repudiate the purchase on the ground that the price exceeded, to the extent already mentioned, the free amount of the trust-funds, or upon the ground that the trustees have unduly delayed to re-sell the surplus so as to equalise the price and the capital of the trust-estate?

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The Lord Ordinary, on 27th January 1855, pronounced the following Interlocutor:—"Finds, that the pursuers are not now entitled to challenge or repudiate the purchase of the lands of Hobsland and others, made in 1812 by the trustees of the late John Barns, for behoof of his trust-estate: Finds, that these lands must now be held to be vested in the trustees, or surviving and acting trustee, of the said John Barns, for the purposes of the trust specified in the trust-deed and settlement, dated 4th June 1789; and, with these findings, appoints the cause to be enrolled, that the same may be applied, and that parties may state in what manner they respectively propose that the cause shall be proceeded with, and prepared for ultimate judgment."*

* "NOTE.—(After the above narrative), The question now is, Can the pursuers, the substitute heirs of entail, at this distance of time, and after all that has taken place, repudiate the purchase on the ground that the price exceeded, to the extent already mentioned, the free amount of the trust funds, or upon the ground that the trustees have unduly delayed to re-sell the surplus so as to equalise the price and the capital of the trust estate? The Lord Ordinary thinks not.

Take the case in the first instance, as it had occurred with fee simple beneficiaries. Suppose the estate, in place of being to be entailed, had been directed to be conveyed to Sir James Stevenson Barns, and his heirs, in fee simple, it seems clear enough that neither Sir James nor his heirs could, in that case, have repudiated the purchase, or thrown liability upon the trustees upon either of the grounds just mentioned.

This leaves only the question, Whether the case be substantially different in respect Sir James Stevenson Barns and his successors were tailzied in place of fee simple beneficiaries?

The late case of Macpherson, 16th July 1841, establishes, that in reference to the trust-estate and trust-management, the position of Sir James Stevenson Barns was substantially that of an heir of entail in possession.

Sir James might have docqueted the trust-accounts, discharged the trustees, and accepted of a deed of entail of Hobsland; and had he done so fairly, and in *bona fide*, none of the substitute heirs could ever have made any objection.

The truster did not contemplate that the lands to be purchased and entailed should be free of all burdens; on the contrary, he intended them to be burdened with his widow's jointure, and with the annuity to John Deans. Now, suppose the debt incurred in making the purchase had been, at once, converted into the form of a redeemable bond of annuity, and the contemplated deed of entail had been executed, and accepted, recorded, and feudalised in 1812 under the burden of that bond, could the substitute heirs of entail, under this summons, raised in June 1853, more than forty years afterwards, have challenged any part of that transaction?

Or, to take what is perhaps a more unexceptionable case, because more analogous to what now falls to be done, suppose that after waiting for a few years,—say till 1820, or at any time between that date and his death in 1850,—Sir James Stevenson Barns, despairing of a more favourable market, had required the trustees to sell as much of Hobsland as would pay the debt, and to execute an entail, in terms of the trust-deed, of what remained, and this had accordingly been done, and the entail duly recorded and feudalised, and the trustees discharged, all in perfect good faith upon his part,—could the substitute heirs afterwards have challenged this transaction, or made any further claim against the trustees? The Lord Ordinary apprehends they could not.

But if Sir James, had he been now alive, and requiring the trust to be wound up, could not have thrown liability upon the trustees, but must have accepted an entail of the remaining lands after selling as much as would pay the debt, and, if this acceptance would have bound all the substitute heirs, upon what principle can these substitute heirs be in a better position by raising this question after his death, than if it had been raised in his lifetime?

They can only be so, by holding that from 1791 to 1850,—a period of about sixty years, during which Sir James was the heir in possession of Kirkhill,—there was nobody to represent the beneficial interest in the trust-estate, to the effect of

The pursuers reclaimed, and prayed the Court to find that they were entitled to challenge or repudiate the purchase of the lands of Hobsland, as an

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sanctioning the trust-management and administration, a proposition which can hardly be maintained.

Not only the heir in possession of Kirkhill, but any of the substitute heirs, if they could have shewn that the heir in possession was improperly neglecting their interests, might, the Lord Ordinary apprehends, at any time after the truster's death, have competently instituted an action to have the trust-purposes implemented, and the trust wound up. Mr John Stevenson, one of the trustees, was the next substitute, up to his death in 1815; then Jean his sister, till her death in 1827; and then the pursuer, Mr Patrick Graham Barns, who came into actual possession in 1850, but brought no action till June 1853. Every one of these substitute heirs was, as already mentioned, of full age, and therefore *sui juris* in 1812, except the pursuer, Mr Patrick Graham Barns, who attained majority in 1813, before the price of Hobsland had been fully paid, or the disposition granted. The other pursuers, with the exception of the children of Mr Patrick Graham, W.S., were likewise of full age during the greater part of the intervening period. But all of them acquiesced in the purchase, and in the postponement of a re-sale, up to the date of the present action. If the price of land had risen, they would, doubtless, have claimed and been entitled to the benefit; and the Lord Ordinary does not think that, *post tantum temporis*, and under all the circumstances, they can succeed in this action because the price of land has fallen.

The pleas now maintained have still less equity to recommend them in the mouths of the children of Mr Alexander Graham (who admittedly represent their father), upon whose earnest recommendation the purchase was made and the whole retained, than at the instance of their relative, Mr Patrick Graham, W.S., and his family. But the Lord Ordinary does not proceed upon the ground of personal representation as regards any of the parties. He considers it sufficient to hold them bound by the acts, taciturnity and homologation, of those possessing the right of challenge for the time being, to the same extent and effect as heirs of entail are usually so bound.

Each heir of entail in possession is proprietor in his order, and entitled to bind his successors in the estate in every thing not expressly prohibited. Wherever prescription runs against him, it runs also against the substitute heirs without deduction of their minorities, on the principle that the whole are a collective or aggregate body, represented by the heir in possession,—a principle without which there would be no safety for third parties or the public.

Nor does the Lord Ordinary think it necessary to proceed upon the plea, insisted in at the bar, but not to be found in the record, that the pursuers' right of action is cut off by the long negative prescription, although this plea may deserve attention, if it be necessary to resort to it. It was not explained whether the plea is rested upon the statute 1617, cap. 12, or upon the older statutes 1469, cap. 28, and 1474, cap. 54. The only authority referred to in support of it was Kinloch, &c., *v.* Rocheid, (M. Ap. Prescrip., Nos. 4 and 7); which certainly affords an instance of the negative prescription being sustained upon some points in an accounting, although not upon all; but the case itself related to a direct claim against an heir of entail for money which it was said he had failed to invest, and was therefore different from the present. Many of the authorities on this branch of the law are cited in the well-known case of Paul *v.* Reid, 8th February 1814, F. C.

It appears to the Lord Ordinary, however, that neither the claim for an accounting, nor the alleged liability for delay in re-selling the surplus lands, can be held to be excluded by the negative prescription. It may be a nicer question whether the substantive objection to the act of purchasing Hobsland in 1812, as altogether *ultra vires* of the trustees, can still form a ground of action, although more than forty years have elapsed since that purchase was made.

In any view, the Lord Ordinary does not see how the pursuers could get decree in terms of the only declaratory conclusion in their summons, which is in very sweeping and abstract terms; and he must observe that not only the summons, but the statements and pleas on both sides, are less precise and satisfactory than might have been expected in a case of this anxiety and importance. He has, however, taken the case in its substance, upon the footing that parties, although they have

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act of administration or management under the trust-deed and settlement; to decern in terms of the declaratory conclusions of the summons; and to find that the pursuers were entitled to have a full and particular accounting of the whole funds and estate contained in the trust-disposition and settlement, and on the same being ascertained, that the defender, Mr Laurence Hill, the sole surviving and acting trustee, was bound to lay out, invest, and secure the residue, in terms of the trust-deed; to remit the process to the Lord Ordinary, &c.

The case was called for debate in June 1856. The defenders then pleaded the negative prescription, which they maintained cut off all right of action as regards the purchase of the estate of Hobsland. The case was then of consent continued, to allow parties to amend the record by adding pleas in law applicable to that defence.

The additional plea in law for the defenders was as follows:—"The present action and demand are excluded by the negative prescription established in the law of Scotland, and enacted by the statutes 1469, c. 28, 1474, c. 54, and 1617, c. 12. More particularly, any claim founded upon the allegation and plea that the purchase of Hobsland in 1812 was *ultra vires* of the trustees, or in breach of the trust, is so excluded."

The following were the additional pleas in law for the pursuers:—"7. The defenders are not entitled to tender, nor are the pursuers bound to receive, a conveyance of the estate of Hobsland, or any portion thereof, as a fulfilment of the directions and purposes of the trust, or any part thereof.

8. The defenders are bound to account for the whole of the trust-funds in their hands after the fulfilment of the directions of the trust, other than those applicable to residue, and, in particular, for the sum of L.7800 of residue, which was admittedly in their hands in 1811, and to apply the same, in terms of the directions of the trust applicable to residue, except in so far as they may be able to shew that the same have already been so applied.

9. The plea of prescription is inapplicable and untenable, in respect, 1st, the defenders have never accounted for their intromissions as trustees; 2d, the extent or amount of the free residue in their hands, now, or at any former period, has never been ascertained; and, 3d, the defenders have never fulfilled, or even professed to fulfil, the directions and purposes of the trust with respect to residue, the whole of which remain to be fulfilled under the compulsitor of this action, after the amount of the free residue shall have been ascertained in the accounting, which has not yet taken place."

The case was again called for debate in November 1856.

The defenders then pleaded, that the effect of the negative prescription was to cut off all right of action otherwise competent. That proposition had no qualification. There was no instance to the contrary.[1] The case of Porterfield shewed in what circumstances the plea of *non valentia* would be repelled. The case of Allan v. Brander shewed how far the principle would be sustained. The purchaser, at a judicial sale in 1792, granted a bond to pay the price at Martinmas 1792, with interest from Martinmas 1791, "together also with the interest of the principal sum from and after the said term of payment, so long as the same shall remain unpaid,

not formally renounced probation, are desirous to avoid superfluous investigation and expense; and taking it so, he has found enough to enable him to dispose, satisfactorily to his own mind, of the leading question which it was agreed at the bar should, in the first instance, be decided."

[1]Bell's Pr. sect. 606; More's Notes, vol. 1, p. 265; Paul v. Reid, 8th February, 1814, F. C.; Opinion of Lord Corehouse in Coulson v. Hislop, 29th November 1837, 16 S., p. 112; Dundonald v. Boyes's Trustees, 12th May 1836, 14 S., p. 737; Allan v. Brander, 8th March 1839, ante, vol. 1, p. 678; H. L., 7th March, 1842; Porterfield v. Porterfield, 6th December 1771, Dict. 10,698; Trinity Hospital v. South Leith, 20th Dec. 1848, ante, vol. xi. p. 266.

and that to those who shall be found to have right thereto by the decreet of ranking and scheme of division" to follow thereon; the bond was lodged in process, and the purchaser entered into possession of the subject; no demand either for consignation or otherwise was made on the bond for more than forty years; and it was held that the demand had suffered the negative prescription. It was also held that the plea of prescription was not elided, though some of the creditors were in minority during part of the period; and although a long term of years elapsed after the death of the first common agent in the ranking before the appointment of another common agent. The principles contained in these cases were applicable to claims arising under a trust-deed as well as to other claims. It being clear that at a particular date the claim had arisen, the mere source of that claim as having emerged from a trust would not make any difference in the application of the principle, if the claimants and the trustees stood to each other in the position of debtor and creditor, and the right of action then existed, and had continued for forty years. The claim might be for payment or investment of the funds; but if it did arise at a particular date, and was capable of then being made a ground of action, and forty years had elapsed without the action being raised, then the principle clearly applied. There were direct authorities on that point.[1]

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Pleaded for the pursuers;—The general proposition as to the effect of the negative prescription admits of no dispute. In order to make out a case for the application of the statute, it was not only quite indispensable that the relation of debtor and creditor should exist for forty years, but that during the whole period there should be on the part of the creditor a pure and complete *jus exigendi*, a claim to which no good answer could be made at the time it was brought forward. But there were exceptions to the general proposition. In a right of reversion there subsisted a right to redemand a conveyance on certain conditions, and an obligation to make that reconveyance when demanded. There was a subsisting relation of debtor and creditor *ad factum præstandum*, and yet that would not suffer the negative prescription. Again, many rights of a continuous character never could be lost by the operation of the negative prescription,—for example, the right of a titular to teinds,—a pensioner to his pension,—where, no doubt, every annual payment which fell due suffered prescription, but where the right never was lost. It therefore greatly tended to looseness in argument to take the general proposition as unqualified, that the mere existence of the relation of debtor and creditor for forty years, without any demand on the part of the creditor, necessarily let in the operation of the statute.

The Scotch law of trust was founded on the Roman law of deposit. Could a depository say that, because no demand had been made for forty years, he was entitled to defend himself against a claim for restitution? The only exception that could be pleaded to such a claim was, that restitution had already been made, or that the party demanding the subject was not the true owner. The principle was, that it was totally inconsistent with the first notions of justice, that a man should at one and the same time admit that he was in possession of the property of his neighbour, entrusted to him in good faith, and in the belief that it would be furthcoming when demanded, and yet that he would not restore the property entrusted to him. The doctrine proceeded on the fact, admitted or not, that the deposit was made; and that being so, the depository had no answer except that restitution had been made. Now here the trust was admitted, and was the essential foundation of the case between the parties, but by reason of the lapse of time, the defenders denied all liability to account. That plea amounted to this, that

[1] Pollock v. Porterfield, 28th Jan. 1778, Dict. 10,702, H. L. 2 Paton, p. 495; Kinloch v. Rocheid, Dict. No. 4 App. Prescription; H. L. v. Paton, p. 35.

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if any trustee shall possess the subject of a trust for forty years from the death of the truster, he shall be entitled, from that period, to keep the estate for himself. Such was the necessary consequence of the argument. Possession for forty years, on a title qualified by a trust, would become an absolute fee. But what was the possession of these defenders? It was the pursuers' possession. It was the possession of the beneficiaries, just as much as the possession of the factor was the possession of the owner, or the tenant that of the landlord; and yet the effect of this possession was to destroy the rights of the beneficiaries, for whom the trustees were administering, and for whose benefit alone they were possessing the estate.

This was a case to which the negative prescription could not apply. The negative prescription was founded on two presumptions—first, the presumption of payment of the debtor; second, the presumption of abandonment or dereliction of the claim on the part of the creditor. In the present case, could there be a presumption of payment on the part of trustees who admitted having received the money, and did not say that they had paid it? Again, how could dereliction apply to a man who had not got possession of the subject, but had allowed his trustee to possess the estate for him? In point of fact, the person who was thus presumed to have abandoned his claim had all along been possessing through his trustee. Let a trustee *divest* himself of the subject, no matter whether he gives it to the right or wrong person, and from that time let the forty years elapse, and then the negative prescription applies. That was the only case in which it could apply. His conduct was not then challengeable, and that was the principle upon which the cases referred to proceeded. But that was quite different from the present case, where the trustees have not even yet denuded, where their only title to possess was the trust for behoof of the pursuers, whose possession therefore was that of the pursuers, and whose liability therefore to account could not be affected by the negative prescription.

Lord President.—This action is brought by the beneficiaries under the trust-deed of the late Mr Barns against the trustees who have been acting under that deed. The original trustees are none of them now extant. But their successors in office are brought into Court by this action, which calls upon them to exhibit their accounts, pay over any balance that may be found due thereon, and requires the investment of that balance in the terms desired by the trust as the investment of the residue of the trust-fund. The summons also contains conclusions applicable to a certain transaction, which it is the object of this action to set aside as being *ultra vires* of the trustees, and to have it declared that it is illegal and unwarranted, and cannot be binding on or affect the trust-estate, or the funds and property thereof.

The trust-deed under which this claim arises was made in 1789. Mr Barns, who made it, died in 1791. He was then succeeded by Sir James Stevenson Barns, who died in 1850. The succession then opened to the pursuer, Patrick Graham Barns.

One object of the trust—and indeed the main object we have now to deal with—was the purchase of lands to be settled in a certain way. It appears that, on 12th March, in the year 1812, the trustees purchased the estate of Hobsland, by letters which passed between their agent acting for them and the parties interested in the sale.

The first instalment of the price was due at Martinmas 1812. It was duly paid, as was also the second instalment at Whitsunday 1813. Money was borrowed for the remainder of the price, which was afterwards paid,—a portion of it being made a burden on the estate. The title to the estate was taken, not as a settlement of the estate in terms of the directions of the trust-deed, but was taken to the trustees themselves. It has so remained ever since. It farther appears that the purchase was made in the knowledge and with the concurrence of the beneficiaries chiefly interested at that time, and with the advice of some of them. Possession of the estate was taken immediately after the purchase, and it has been held as the invest-

ment of the trust-funds from that date down to the present time. But there has been no final adjustment of the trust-accounts. The trust itself has gone on. The management has continued, and has devolved more or less on the beneficiaries, who have enjoyed the rents of the estate; and the object of the present action is to have the trust brought to a conclusion, by compelling the trustees to execute the purposes of the trust, exhibit their accounts, and apply the balance in the purchase of an estate, to be settled, not on the trustees, but in terms of the trust-deed; and that action, while it so calls on the trustees, notices very particularly the purchase of Hobsland in 1812. In the summons and in the record the question is raised as to the validity and legality of that purchase. That is the real subject of contention between the parties. It is the main and leading subject throughout the record, and was the main subject of the argument which was addressed to us.

It is contended, on the part of the beneficiaries, that that purchase was altogether *ultra vires* of the trustees, and illegal, and that it has not been so recognised as to make it incumbent on them to accept it as the execution of the trust. They object to take an estate, for which L.12,000 was paid, and which is now burdened to a great amount, as implement of the trust; and, now that the estate has turned out to be worth but a small sum, when the burdens are deducted, they decline to have anything to do with that transaction. They maintain that they are entitled to get a free estate, capable of being effectually settled in terms of the trust-deed.

In the summons there are declaratory conclusions which I regard as of great importance. The record also contains statements which are intended to follow out and support that conclusion of the summons, more particularly in art. 11 and also in art. 19 of the pursuer's condescendence. These are—(see supra, pp. 626, 627.) There is thus a direct challenge, by declarator, of the legality of the transaction as *ultra vires* of the trustees.

The pleas in law for the pursuers also repudiate the transaction. When the case was before the Lord Ordinary, the grounds on which it was argued were, as noticed in his Lordship's note, that by acquiescence or adoption or homologation the parties interested in the proceedings of the trustees were barred from challenging this act of management, or of mismanagement, whichever it may be. When the case came before us, the argument—which appears to have been merely alluded to before the Lord Ordinary—was maintained that the challenge of the transaction was precluded by the negative prescription. But, it being very doubtful whether the pleas in law on record were so shaped as to meet that defence, we allowed pleas in law to be added applicable to it; which having been done, we had additional argument on that special question as to the application of the negative prescription to this case.

That plea of the negative prescription, as first argued to us, seemed to be directed, in the first place, against any liability whatever to account. It was contended that the negative prescription was a good objection to any plea for bringing the trustees to account, and that the beneficiaries had no alternative but to take the trust-accounts just as the trustees chose to give them. A case was referred to, which it was said established that the right to call for a general accounting was cut off, if forty years had elapsed since the trustees might have been originally called on to account. That was the case of Kinloch v. Rocheid. I was at first a good deal startled by that proposition; but I cannot say that I have found authority for it. It is not recognised by that case; nor do I see how such a principle could apply to a general accounting in this case, seeing that the trustees have been confessedly all along acting, and have been holding this estate on titles which are part of the effects of the trust, and, moreover, are not now disputing their liability to account. In the case of Kinloch there is no such broad proposition announced. It is a puzzling case to read, because there are expressions in it used in various senses, and even judicially so used, as well as in argument. The expression which has puzzled me most is "general accounting." But I do not think that it is there meant to express what a general accounting was meant to imply in this case. The case of Kinloch only went to this, that where there was a right, but a right connected with an obligation to do something, that obligation could not be enforced after the lapse of forty years. That is the principle of the case, and the word general accounting is there used in this way. The Court held that in regard to funds which had not been uplifted or possessed beyond the forty years, the obliga-

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tion could be enforced to account for them; but in regard to those which had been recovered or possessed beyond the forty years, the obligation to compel the application of them to trust purposes had been lost, and the word "general accounting" was used to comprehend the whole funds, both those uplifted and those that were not; and it was held that there was not to be such general accounting, but only an accounting for those funds possessed on the original securities. It is not a peculiar case in regard to that principle; far from it. But that is what I am inclined to hold as the true view of that case. It is quite a different question from a general accounting in the sense in which that expression was here used.

The next question is, does the negative prescription apply in a more limited sense? Does it apply to an action founded on a particular transaction, it may be, in professed execution of the trust, but which is challenged as being illegal, and *ultra vires* of the trustees? It does not embarrass me that this question arises in an action of accounting, because there is a distinct declaratory conclusion in the summons, which the pursuers felt to be necessary to clear away, as preliminary to ascertaining the basis on which the accounting was to take place; and the question stands as clear as if there had been a separate and distinct action of declarator to that effect. Had there been such an action, the question which would then have arisen, and which arises here, is, does the negative prescription apply to a challenge of this particular transaction? The purchase of Hobsland was made in 1812. Possession was then taken. The first instalment of the price was paid at Martinmas 1812, and the second instalment at Whitsunday 1813. The present summons was brought in June 1853. Therefore, so far as the lapse of time is concerned, the prescriptive period has elapsed since the date of the transaction, if the principle of the negative prescription apply, because the transaction took place in 1812, and was quite complete as a purchase in that year. The second instalment of the price, paid in 1813, is more than forty years ago. The obligation was undertaken by the trustees. The purchase was made by them in the character of trustees. That transaction is now challenged as *ultra vires* and illegal. The question comes to be, whether that investment of the trust-funds in 1812 can now, at this distance of time, be challenged as *ultra vires* and illegal, which is tantamount to saying that the trustees must take the burden of that transaction upon themselves, and must now account to the beneficiaries under the trust, as if no such transaction had taken place.

I have said that the time that has elapsed since the date of the transaction is long enough to admit of the plea, if the principle of the negative prescription applies. It is very clear that if the transaction was illegal and *ultra vires* of the trustees, it was perfectly competent for the benificiaries to have challenged it in 1812. The transaction is not alleged to have been effected in secret. It was a most open and avowed proceeding. That could only be; for the purchase was effected in communication with the beneficiaries, and has been held out by the trustees as the investment of the trust-funds, in compliance with the directions in the trust-deed, from that day to this. But if it was *ultra vires* and illegal, it might competently have been challenged then. It was not challenged. Therefore, why should not the negative prescription now apply? The statutes cut off all right of action, except for error in particular cases; and is there anything in this action of declarator to have it found that the transaction was illegal and *ultra vires*, which shall make it an exception to the general rule? That the claim arises out of a trust does not appear to me to establish the proposition that it is an exception. The ground of action is the accountability of the trustees, and the object of the action is to set aside a thing done in professed execution of the trust. The principle of the case of Kinloch there applies. I have said that that case did not stand alone. The principle of that case was the same upon which it has been found that an obligation to execute an entail prescribes, and that the circumstance of its arising out of a trust does not form a ground of exception. There again I think the case of Pollok is a direct authority. The negative prescription was there held to be a complete protection. Therefore I see no good ground for holding that the negative prescription does not here apply. I had difficulty, in the way the case was at first presented to us, in seeing that this was anything else than a demand for an accounting, and that the trustees proposed to place on the one side of the account the sum paid for Hobsland, and hold it to be part of the estate, and

that their accounts were objected to on the other, on certain grounds, which only raised a question of accounting between the parties, and nothing else. But it is a *separate* transaction, and is so dealt with by the parties.

I do not know that it is necessary for me to go farther into this matter. I think that the principle by which an action such as I have referred to against a party to compel him to execute an entail, as in the case of Porterfield—an action against a trustee, as in the case of Pollok—a question raised in a sort of *quasi* trust, in the case of Kinloch—the principle on which all such actions have been cut off, seems to me to apply to this case, and to make it very clear, looking to the shape in which this challenge is brought, that the plea of negative prescription is an answer to the declaratory conclusion of this summons. What may be the effect of that on the accounting is not a question that I propose to deal with now. The first question is, whether the defence of prescription is a good defence? The other questions, as to what the trustees should have done in the exercise of their duty and discretion, after they had got that purchase into their hands, are matters into which I do not propose to go. The judgement of the Lord Ordinary is rested on other considerations, as to which I am not at present prepared to give so much effect as his Lordship has done; that is, supposing that forty years had not elapsed, and that the transaction is held to be *ultra vires* and illegal. I am not prepared to hold that those things founded on are sufficient to prevent the raising of the question here, or to bar the beneficiaries in the trust from challenging the transaction. But my view of the case is that the challenge is met by the plea of prescription, and that we ought to sustain this plea for the trustees, and then proceed to deal with the accounting as to Hobsland on that footing.

Lord Ivory.—After the best consideration which I have been able to give to this case, and impressed very deeply as my mind has been with the desire to favour as much as possible the policy of the trustees, I have been wholly unable, on legal grounds, to sustain the plea of negative prescription under the circumstances in which it arises here. I take that question of the negative prescription as the only, and, at all events, the main question we have at present to deal with. It was that chiefly argued in the debate, and it must be cleared away before we can properly get into the after questions that will arise, according as it is sustained or repelled.

The plea divides itself into two heads. It is—"The present action and demand are excluded by the negative prescription established in the law of Scotland, and enacted by the statutes 1469, c. 28, 1474, c. 54, and 1617, c. 12. More particularly, any claim founded upon the allegation and plea that the purchase of Hobsland in 1812 was *ultra vires* of the trustees, or in breach of the trust, is so excluded." That forces one to inquire at the outset what is the action and demand; and it raises and gives very great importance to that principle of action contained in the last and declaratory conclusion of the summons to which your Lordship has adverted. But I am not prepared to deal with that declaratory action as the main substance of this action, or as anything else than a declaratory conclusion, and second to that which is the main conclusion.

The action divides itself into four parts. 1st, A demand for accounting, in order that the balance of the funds may be ascertained, and being ascertained, that they may be thereafter invested in terms of the instructions in the trust-deed. The second is the usual alternative in a count and reckoning—viz. that failing the accounting, a certain random sum—here L.10,000—shall be taken as the balance of the accounting, and then that it shall be so invested and secured. The third conclusion is a somewhat special application of the more general conclusion for investment—that is, that the present trustees shall be ordained to see the sum so laid out, and the titles to the lands so purchased conceived in favour of the pursuer, Patrick Graham Barns; whom failing, the other heirs and substitutes specified in the deed of tailzie. And further, "to make payment to the pursuer, Patrick Graham Barns, in terms of the said trust-disposition and settlement, and deed of tailzie therein referred to, of the sum of L.1500 sterling, or such other sum, less or more, as, upon a just calculation may be found to be the free annual proceeds or interest at the rate of five per cent per annum, of the amount of the free residue and remainder of the price and proceeds of the said John Barns' estate, heritable and moveable, remaining to be invested, laid out, and secured as aforesaid, from the 5th day of October 1850, the date when the pursuer, Patrick Graham Barns,

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succeeded, in virtue of the said deed of tailzie, to the benefit thereof, till payment of the said annual proceeds or interest foresaid." That does not extend to the other and prior conclusions in any respect; and therefore the action up to this point is an action for accounting against the trustees for the trust-estate, and their intromissions with it. The declaratory conclusion covers all these, and it is in these words:—(See supra, p. 626.)

That declaratory conclusion seems to me, as I have already said, to be purely ancillary to the question of accounting. It is anticipative of the plea which may be stated in defence. It is not a ground of any demand against the trustees. It is a declarator, that the specific defence shall not be entertained as an answer to the demand for accounting. But the demand in the action is explicitly and exclusively a demand for accounting, and to have the balance of the trust-estate ascertained; and this declarator is only intended to cast out of the way any particular pleas of defence which may be brought forward in reply to that demand. Accordingly this declarator is not followed by any conclusions of personal obligation. It is a declarator that certain actings of the trustees—if these are pleaded against the demand for a general accounting—are of none avail, and insufficient to affect the trust-estate. It leaves the defence where it finds it. It leaves the defenders with the onus of proving that defence; but it shews the way in which it is to be met by the pursuers—viz. that it cannot be supported on the ground of the trustees having powers to do that which they are said to have done.

Such is my reading of the summons; and, if right, it is an important reading, because it shews the proper demand of the pursuers to be a demand for accounting and investment of the ascertained balance of the funds; and it leaves the declarator as not entering into that which is the proper demand so made, but only subordinate and ancillary to it.

When I refer to the record, I find that this reading is supported throughout. The record sets forth the title of the trustees, and the administration of the estate as a trust-estate. It alleges that the pursuer, Patrick Graham Barns, has received no account of that estate, nor since his succession even payment of its annual proceeds. But, in the third place, it says—" But the pursuers have been informed of a transaction to which, under reservation of their right to state all competent objections to any accounts that may be given in and rendered by the defenders, or any of them, they have now specially to object as altogether unwarranted and illegal, and as having occasioned an undue application of the funds of the trust. The following are the particulars of the said transaction, so far as known to the pursuers." And, again, winding this particular up in the close of article 19, it says (p. 20) that the pursuers object " to said transaction as incompetent, illegal, and unwarranted by the trust-disposition and settlement of the said John Barns, and to the application of the said trust-funds thereto." In other words, they are informed of something that is to be stated by the trustees in defence against their claim for accounting. They say, well be it so; we shall object that that something is beyond the powers of the trustees. We hold the accounting to be a separate matter altogether, and this to be a defence against the accounting,—and they so deal with it. This declaratory conclusion, therefore, is to be applied to the extrication of this matter of accounting. The pleas are more awkward. The first plea is, that the parties are liable in accounting; but there is this plea, which, if it were to be made the ground of a substantial judgment of the Court, might require some delicacy in dealing with. It is the second plea—" The defender, Mr Laurence Hill, as the sole surviving and acting trustee, is bound to account fully to the pursuers for the whole proceedings, actings, and intromissions under the trust, and he is personally liable for any misapplication of the funds or estate to which he was a party, or which occurred during his trusteeship." And that personal liability seems to be re-asserted in the third plea, which is this—" The representatives of the deceased trustees ought to be made parties to the accounting, and they are liable for the intromissions of the parties whom they respectively represent, and for any misapplication of the trust-funds or estate to which the said deceased trustees respectively were parties, or which occurred while they were trustees."

Now, if it were necessary to found the action on any ground of personal liability to repeat or replace that which had been taken out of the trust-estate, there might be some difficulty in dealing with it; and I fairly confess, that if that were the

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shape in which it was necessary to deal with the matter, I might have had some difficulty in holding that as against that plea of personal liability there might not be a ground for applying the negative prescription. But I do not think that the case comes before us on that footing. There is a third head, which shews that that is not meant to be directed to the shape of the action as a declaratory action, for the pursuers' fifth plea is this:—"The declaratory conclusions of the summons are warranted by the terms of the trust-deed." That is to say, you must look to the terms of the trust-deed for the powers of the parties; and therefore, in so far as they may rest their defence upon actings which are beyond the powers conferred by the trust-deed, the declarator is only intended to take that defence out of the way.

Now the demand of the pursuers is this. It is, as I hold it, primarily, if not exclusively, a demand for a general accounting, and the declaratory conclusions and the pleas in law have no meaning or force except in so far as they explicate and extricate that demand for accounting. The original defences in the action acknowledge the trust. There were produced with the defences a large body of accounts, and audit of them was challenged. Personal intromission with the funds of the trust-estate is denied on the part of the representatives of the deceased trustees; but the body of accounts now before us is sufficient to show that the trustees were not standing on any non-liability to account. Now, as I understand the original defence, no objection is taken from beginning to end to the charge side of the account. Every item in the charge side of the account is acknowledged. Every intromission therefore with the estate is admitted. The special defence is rested on that item alone which the declaratory conclusions of the summons had anticipated would be made the ground of defence—an item in the discharge side of the accounts where the trustees take credit for a certain payment on account of the purchase of the estate of Hobsland. So far, therefore, as regards any question of general accountability, it is not raised by the parties. The continuance of the trust actings is set forth and admitted on both sides.

There was no defence stated, at this stage, of negative prescription, nor was it till after the Lord Ordinary's interlocutor that such a plea was entered on the record. I mention that, without intending to express any doubt as to the sufficiency of that defence, if otherwise well founded; but I am pointing to the manner in which the action has been dealt with as an action of accounting, in which the liability to account was admitted, in which no specific objection was taken to the charge side of the account, and in which the only objection taken was to an article of the discharge. But, now that the negative prescription has been pleaded, what does it prove? It is not a mode of raising up any after questions. It is an exclusion of the demand on the part of the creditors. It implies that there is a situation of debtor on the one hand and creditor on the other hand. It implies merely this; and it can operate no further than as an answer to a claim for the performance of an obligation, on the ground that that obligation has been extinguished by the lapse of time. I can perfectly well understand how that answer to a demand for accounting would have been insuperable. In the first place, if the constitution of the trust had been denied, and if there had been a denial of intromissions with this trust property, or a denial of all liability to perform the office of trustees, I can perfectly well understand the plea that the trust was cut off by the lapse of time, and that the trustees were not bound to execute their office even if they had originally accepted it, or to give any account of what they had done in regard to the trust. They might have stood on their silence, as in the case of Lockhart, and made the other party prove everything. The terminus for the running of the negative prescription would then have been the date of the constitution of the trust, and the demand cut off would have been a demand by the beneficiaries for the performance of the office of trustees. Or there is another shape in which the point might have arisen, not in regard to the constitution of the trust, but the subsistence of trust liabilities,—which I can perfectly well understand might also have been made the subject of a plea of negative prescription. The whole trust estate might have been realised, as at a particular date beyond the forty years, and the trustees might from that time have kept possession without accounting at all for what they had so realised, and when a demand was made upon them to account for their intromissions, they might say,—"No, we are not bound to account, although we were bound to do so as at the date of the intromissions; and we say generally, the law presumes that we

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have accounted, and we intend to take the benefit of that legal presumption. We have either accounted, or all claim against us is cut off." There the terminus *a quo* would have been the date of the realisation of the trust estate. But here the trustees refuse to admit their liability for a particular portion of the trust estate, as an estate still existing, and the claim sought to be cut off is a claim that they shall account for trust money which they have diverted to other purposes than those specified in the trust deed. The strength of the trustees in all such cases lies in their privilege of standing absolutely silent, in saying the demand against them has been cut off and in refusing to give any explanation whatever in regard to it. "According to your own account," they are entitled to say, "this demand, if good against us, was a good forty years ago as now, and as you did not assert it at that period, you cannot make it good against us now. It is cut off by the negative prescription." That is not the position they have taken up here.

There is a third case, where in consequence of certain things done by trustees and which they may be alleged to have done in virtue of their office, the trust itself has *de facto* ceased. They may have paid over the funds to a party to whom, perhaps, they ought not to have paid, but they no longer have the funds in their hands, and that other party may stand fortified by possession for forty years. He holds the estate, it may be, in *pleno jure*, and may be fortified by the positive prescription in so holding it. The demand against the trustees is, "you had no business to pay to this man." But the answer is, "true, we had no right to do so, but we have not had any part of the trust funds in our hands for forty years." There, too, I can understand the case to be one where the defence of negative prescription is perfectly good, for the demand is not made for accountability for the charge side of the trust accounts down to the moment that the demand is made against the trustees, but it is a demand against them on the footing that they no longer holding the trust fund, having parted with it forty years ago, must out of their own pockets now repay what they have so misapplied. If there be here such a demand for repetition—as seems to have been intended to a certain extent, under the second and third pleas—I can perfectly well understand that such a claim may be cut off by the negative prescription, and so far the principle upon which my opinion is rested entir[ely] coincides with some of the principles announced and relied upon by your Lords[hips]. But here again it is not made clear to my mind that such is the precise quest[ion] that we have now to deal with.

The cases referred to I do not wish to examine at any length. The case [of] Lockhart is an example of what I am now stating. The trustees there would [give] no account of anything they had done from the date of the trust. They would [not] admit anything. They said, our liability to account existed at a particular ti[me,] if it existed at all, and you not having then called us to account, cannot call us [to] account now. The negative prescription wiped off the earlier intromissions, as [to] which there was no explanation. But as to the intromissions within the forty ye[ars,] the negative prescription was repelled, in so far as excluding trust-liability, [the] that trust-liability being acknowledged as the ground on which the intromis[sions] had been made, and the lapse of time not having run since the date of the in[tro]missions, the negative prescription, as a defence, was repelled. So in Pollock [and] Porterfield. They are equally explainable. The case of Pollock was a ca[se] which Lady Forfar, as trustee, denuded in favour of the party first favoured b[y] trust-deed handing over the whole funds to and obtaining a discharge from party. Now that party having got possession of the estate, forty years el[apsed,] and, when thus fortified by prescription, other parties interested brought an a[ction] against Lady Forfar's representatives, on the ground that he had no busi[ness to] give away the estate, so making the trustee personally the debtor in that d[emand.] The demand was not for performance of the trust. The trust was gone, and t[here]fore they claimed and asked to be indemnified for the loss and injury so sust[ained.] The answer was, that the right to make the demand existed forty years ag[o,] not having been made could not now be enforced. But that was not an act[ion of] accounting for the trust-estate. So also in the case of Porterfield. The est[ate was] conveyed over in fee-simple,—that is to say, the title was made up in fe[e] absolute and unlimited. But certain provisions had been made, that the party so invested, should proceed to execute an entail. He did not do so. Th[ere] there was an action *ad factum præstandum*. The answer was:—The ob[ligation]

worked off by force of the negative prescription, and the fee-simple title is fortified by the positive prescription. No. 137.

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Now, that is a shape of things which I think is wholly discordant with the *species facti* of this case. This is a very curious case, and I am not sure that I have mastered it, for I have been more or less puzzled at various times with different branches of it, and with the cases referred to. I cannot say that I have much respect for the case of Kinloch, from what I have seen of it. I have seen the opinions of the Judges, and have examined the session papers, and there is an utter impossibility of reconciling the opinions with one another, and I should be more disposed to hold the view of the law as indicated by the Lord Chancellor, as being sound, than that which some of the Judges adopted when the case came back to this Court. The difference of opinion on the bench was very great. Altogether, I think that the general accounting was excluded, but the matter with which the Court dealt being within the forty years, it has no very great application to this case.

But suppose we had been free from all the embarrassments as to the purchase of this property, and had been dealing with the general question of accounting with the trustees—there being nothing arising from the transaction of Hobsland to embarrass us—it is perfectly clear that the trustees could not have said that their liability to account as trustees was excluded by the negative prescription, nor that the amount of the realisation of the trust-estate, and the intromissions for which the trustees were called to account, were destroyed and extinguished by the negative prescription. The accounts which the trustees have rendered—the continuous character of their office, and their admissions on record that they are liable and bound to account, would have made them answerable for the whole charge side of their accounts, and would not have warranted a defence on the special ground on which their case is rested now. They must, in their capacity of trustees, have accounted for and invested to the last shilling of the trust-fund, with which they admitted they had had intromission.

It would be very much the same thing in this other shape. Suppose that when this action was brought into Court, the trustees had rendered their accounts, and produced them, and accounted for every one of their intromissions down to the present day, and set off on the other side their discharge, with the vouchers of their discharge. If that had been done, and there had been objectionable credits in the accounts so rendered, or if the accounts were defective on other grounds, could the trustees have separated their charge side of the account from the discharge side of the account, which was liable to no objection, and pleaded the negative prescription? There would have been this peculiar circumstance, viz., the want of evidence in support of that side of the accounts, the *onus* of supporting which lies on them trustees. The consequences of all that they must have borne, and that is the strength of the case against them now.

But it is said that Hobsland being a purchase under the trust, makes a total alteration of the case. Now there is no terminus for the running of the negative prescription from 1789, the date of the trust-deed, or from the death of the truster in '91, or the realisation of the charge side of the account before 1812. But there is a transaction in 1812 in which the terminus *a quo* is to be found, and it is said that that transaction being *ultra vires*, permitted instant challenge, which challenge being delayed, is now cut off. Now, as said in some of the cases, if the money had been paid away to a party from whom it could not be recovered, and the claim against the trustees resolved into a claim for personal repetition out of their private estate, of the amount so wrongfully paid away by them, perhaps from the moment when that demand existed there might be room for the application of the negative prescription, and the terminus *a quo* might arise from that time. But it is not the shape of the case in various respects. In the first place, it is not said that all claims against the trustees are extinguished by the negative prescription. The subsisting trust is admitted. Hobsland itself, as averred, is an altered shape of the trust-estate. The question is not whether there is a liability in the trustees to account? The answer they make is,—" we fulfil our liability to account, in [illegible] by offering you Hobsland." Therefore, the liability is not cut off the ground of claim *in toto*. It is attempted to substitute one form of performance for another. But whether the creditor is bound so to accept the performance

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in that particular shape—that is a question which does not seem to come within the proper application of the doctrine of the negative prescription.

Then, again, the transaction as to Hobsland was never completed. Hobsland, as it was purchased, is not even now offered *simpliciter* as a *surrogatum* for the trust-money. It has been strangely complicated with matters foreign to the trust. It was purchased with a farther amount of money than the trustees had at their disposal, and part of the price was made a burden on the estate, while the balance was raised under a personal bond granted by the trustees in that character. Again, I doubt how far we can here apply the doctrine of the negative prescription. If the trustees had said,—"There is Hobsland. That is the subject we got for your fund. That is the *surrogatum* for your money," the case might have been different. But they never have said so. There would have been a common estate then to be divided, with liabilities to contingent loss. But suppose the whole L.12,000 to be lost, could the trustees, who borrowed the money, not having the power to do so, have thrown the loss accruing to their individual interest on the trust-estate? Shall the trust-estate be liable for the whole loss? I mention that to show that it is not a satisfactory transaction we have here to deal with, and I doubt exceedingly whether, whilst it is yet to be ascertained how Hobsland is to be dealt with, we are in a condition to deal with it is as a satisfactory investment of the trust-money.

Then there is L.4000 borrowed. The liability for that is proposed to be thrown on the trust. Suppose there had been no other objection to the transaction than that this money had been borrowed and lost, and suppose it were clear that the negative prescription prevented all claim for repetition of the L.8000 which had been misapplied, could the trustees have said that the negative prescription supported the transaction to such an extent as not only to apply to the L.8000, but to cut off relief for the L.4000? Is the trust to bear the loss not only of the L.8000 of trust money, but also of the L.4000 borrowed by the trustees? That is not only to cut off all claim against the trustees, but to enable them to rear up a counter claim against the trust.

It is an important feature in this case also to notice that the present value of Hobsland is said to be L.6000. There is a debt still upon it of L.4200. The available value which these trustees offer as the amount of the trust-estate is therefore L.1800. The free fund available for investment in 1812 was L.7800. The loss to the trust-estate is L.6000. Now I do not very well see how, in any view, the trust-estate is to be saddled with the whole of this heavy loss. It is not proposed to divide the estate and apportion the loss upon the trustees. But they borrow L.4000, and, thereby endangering the estate, not only shelter themselves under cover of the negative prescription against all liability for so acting, but go farther, and say, we, having done all this, shall get back the L.4000 which we had no right to borrow, and make the trust-estate wholly liable for the loss that has occurred. That makes the matter so complicated that it is not one of those simple cases in which the negative prescription can run.

One view of the matter is, that the purchase was within the powers of the trustees: that it was impossible to get a property exactly commensurate with the amount of the funds for investment, and that it was therefore necessary that the trustees should purchase either in excess of that amount or below it: that the excess in regard to Hobsland was not unreasonable, and that, by the sale of a portion of the estate, all might have been well. I shall take for granted that the trustees had the power of making the purchase, though larger than the amount of the trust-fund in their hands, if so be that they had corrected what was in excess, and afterwards brought it within the measure of the funds. But, if so, surely the terminus a quo for the running of the negative prescription is not to be taken from the date of the act which is assumed to be within their powers. The moment you take that as the source of liability, you are within the forty years, for the summons is raised in 1853, and the disposition to the estate was not got till 1815. It must have been at the latter date—in 1815—that the failure to bring matters back to their proper course took place. The mal-administration, therefore, comes within the forty years; and, in that view, it seems to me not easy to find a ground for the application of the doctrine of the negative prescription.

Another defence is raised on adoption and homologation. That I shall not go

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into; but I should doubt—if there had been actual adoption and homologation—whether that of itself would not have interfered with the application of the negative prescription, for it would have rested on the power of Sir James Stevenson Barns to adopt or homologate; and something also would have rested on this, whether, having the power, Sir James could bind those after him? But, if the parties had reduced the matter to a contract and agreement, it seems to me that from the moment it was put on that footing there was no dereliction on the part of the trustees. They then might have stood or fallen on the credit of that transaction. But I lay no stress on that part of the case; and I have only to make a single observation further,—which, however, is of some importance,—as to the terminus *a quo*. It is not at all clear, looking at the dates, that the substantial matter in dispute really falls beyond the years of prescription. I take the transaction as it happened. In the first place, there was an agreement to buy Hobsland in 1812. Suppose the matter had rested on that agreement now, and that the agreement left the trust-funds untouched; The transaction might or might not be good. It might be a transaction which the trustees might or might not be entitled to enforce against the beneficiaries. But, so long as it rested on the mere obligation of the trustees, there was no paying away of the trust means; and, so long as the funds remained in the hands of the trustees, they remained the subject of the trust, and of no extraneous contract and sale into which the trustees might enter. But then the payment was made under this agreement. But how? In the first place, only L.5000 was paid before Whitsunday 1813. I am not very sure that there was so much, but I am willing to take it that there was L.5000 so applied before June 1813. That is, no doubt, beyond the forty years, but then there is L.7000 of the price not paid beyond the years of prescription. Now, before the negative prescription can apply, the funds must have parted out of the hands of the trustees; because, if they remain, that is just the case of Lockhart with regard to special intromission. The title of the trustees for holding the money was the trust. Their possession of it was within the forty years, and they were bound to account for it under the title under which they possessed it; but their non-accountability is not a thing which they can make good by pleading the negative prescription, but only by proving their right to enter into the transaction. They can only plead the negative prescription by shewing that the money was given before the negative prescription began to run. And so, if the plea of the negative prescription be sustained in the broad way in which it is proposed to deal with it, your Lordship applies it to the proportion of the trust-money which, within the prescriptive period, had all its proper character of trust-money attached to it. The disposition of Hobsland bears date a year within the prescriptive period, and it is taken to the trustees themselves. It is made trust-estate. Until there was that separation between that portion of the estate which was to remain trust-estate and that which was to pay off the excess, they are not entitled to speak of Hobsland at all, for till this hour it is impossible to say which specific portion of that estate is trust and which not.

Upon the whole case, as it stands, I am not satisfied that there are safe materials for sustaining the plea of the negative prescription,—least of all that there is any safe ground upon which that negative prescription can be sustained as regards a sum of trust-money not paid out of the trust-estate until within the prescriptive period of forty years.

Lord Curriehill.—This action contains a set of conclusions calling upon a surviving trustee, and the representatives of certain deceased trustees of the late John Barns, to account for the trust estate left by him, and to invest the free residue thereof in the purchase of land, and to entail the same in terms of the directions in the trust deed. The summons further concludes to have it found and declared that the trustees had no power to borrow money or grant security on lands purchased for the trust estate, or to take conveyances in their own names; and that any such transactions, conveyances or securities, were and are *ultra vires* of them, illegal and unwarranted, and cannot be binding on or affect the trust estate. The particular transaction against which this declaratory conclusion is directed, although it is not specified in the conclusion, is condescended upon in the 12th, 19th, and intervening articles of the revised condescendence to be this,—that in 1812 the then acting trustees purchased the lands called Hobsland, at the price of L.12,000; that the sum of L.7800 of the trust funds was applied towards payment of that

No. 137. price; that the remainder of the purchase money was provided for by a loan of L.2000, and by L.2200 being created a real burden by the disposition; that that disposition was granted to the trustees themselves and their assignees; that no entail of the subject has ever been granted; that the property is not worth the price paid for it, and a loss of L.6000 has been created by the transaction; and that "the pursuers object to the said transaction as incompetent, illegal, and unwarranted by the said trust disposition and settlement of the said John Barns, and to the application of the said trust funds thereto."

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At a late stage of the discussion in this action the defenders, by permission of the Court, stated the plea that the present action and demand are excluded by the negative prescription; and more particularly, any claim founded on the allegation and plea that the purchase of Hobsland was *ultra vires* and in breach of the trust is so excluded. The question of prescription thus raised is the only one now to be disposed of.

The negative prescription is pleaded by the defenders, in the first place, as entirely excluding the present action and demand. I am of opinion that this plea cannot be effectually maintained to that extent. The defenders admit that the trust has been carried on by the successive trustees from the time of the truster's death until the present time; that the free yearly revenue of the trust estate has been regularly paid to the beneficiary entitled to receive the same for the time; and that the lands of Hobsland, always since the purchase thereof, have been, and still are held under the trust, and the surviving trustee is ready to dispose thereof, in conformity with the directions in the trust deed, in whatever manner may be deemed advantageous. As the negative prescription of a debt owing by bond or otherwise is interrupted by every payment of interest thereon by the debtor, so the negative prescription of the general obligation to account for the trust estate and its proceeds and revenues has been interrupted by every payment made by the trustees to the beneficiary for the time of what they held to be the free yearly revenue, and indeed by every act done by them, or their factor in their name, in the exercise of their power, or in the performance of their duties under the trust. Hence their general obligation to account for the trust funds is not extinguished by the negative prescription.

But the question remains, whether the special objection which the pursuers, by the declaratory conclusion of this action, as explained by the above-mentioned statements in the record, have raised to the purchase of Hobsland, and to the application of a large amount of trust funds towards paying the price thereof, has been cut off by the negative prescription? The ground, as already mentioned, on which the pursuers object to that proceeding in the conclusion of the summons, and in the record, is that it was *ultra vires* of the trustees, illegal, unwarranted, and cannot be binding upon nor affect the trust estate. As the question whether or not the transaction was truly of that character has not yet been discussed before us, it cannot at present be decided by us. But in disposing of the defender's plea of the negative prescription we must assume this to have been truly the character of the proceeding.

And, assuming this to have been the case, the proceeding was from the first challengeable by the beneficiaries, and by any one of them. An action concluding like the present to have the proceeding judicially found and declared to be *ultra vires* of the trustees, illegal, unwarrantable, and not capable of binding or affecting the trust estate, might have been raised at the instance of all or any one of the beneficiaries existing in the year 1812, or at any time subsequent to the date of that proceeding. Or an action might have been instituted before 18th June 1813 (being forty years before the date of the summons in this action), concluding that the trustees personally should restore the L.5000 previously paid—viz., the L.3000 paid at Martinmas 1812, and the L.2000 paid at Whitsunday 1813, and to interdict them from implementing their obligation to pay L.4800 at Whitsunday 1814, and to burden the trust estate with the remaining L.2200 of the price. Hence the date of that purchase was the term from which the currency of the negative prescription commenced; and nothing is stated in the record which could operate as an interruption of that prescription, for the receipt by the beneficiary for the time of the yearly revenue of the property so purchased was the reverse of a challenge of that purchase. The more clearly the proceeding is held to be illegal and challengeable, so much the more clearly was a challenge of it competent by all or any of the beneficiaries ever since its date; and since none of them instituted any such challenge until more

than forty years thereafter elapsed, the right to insist in such a challenge has now been cut off by the negative prescription. No. 137.

This view of the matter appears to me to be not only clear upon principle, but also to be established by authority. In Pollock v. Porterfield, 28th January 1778, Mor. p. 10,702, a party holding money under trust to employ it in the purchase of lands to be entailed on a series of persons to whom it was destined, misapplied it by paying it to the party who was to be the institute. After the lapse of forty years, an action was instituted by the substitute heir against the representatives of the trustee, and of the institute, who had received the money,—both of whom had died in the meanwhile,—concluding to have it found that the pursuer was entitled to the benefit of the trust, and to have the defenders ordained to pay over the capital to a person to be named by the Court to purchase and entail the lands in terms of the trust. The Court, on the ground that the substitute, as creditor under the trust, had a right to challenge every deed of the trustee in contravention of the trust, held that the objection to the misapplication of the trust funds was excluded by prescription, and assoilzied the defenders. The judgment was affirmed by the House of Lords, 10th March 1779. Paton's Appeal Cases, II, 495. Mar. 5, 1857. Barns v. Barns' Trustees.

The case of Rocheid v. Kinloch is a direct authority on the point. To understand the facts it is necessary to compare the different reports in Mor. Dict., Appendix to Prescription, Nos. 4 and 7, and in Patton's Appeal Cases, p. 35. It appears from such a comparison that Miss Rocheid, besides executing a strict entail of certain lands in favour of Alexander Kinloch and a series of heirs, conveyed also to him and the same series of heirs all her other estates and effects, on the condition that the same should be realised, and the proceeds be applied in purchasing other lands to be entailed on the same series of heirs, and on the same conditions as those set forth in her own deed of entail; that one of the conditions of the conveyance by Miss Rocheid was, that in case any of the disponees "shall before any purchase of land be made by them in manner before directed, happen to uplift any of the principal sums hereby disponed for that purpose, he shall be bound and obliged to lend and re-employ the same upon good and sufficient security, either real or personal, and the bonds and securities to be taken for the same shall always bear in express terms that the sum for which the same is granted was part of the money disponed by me to the person lending the same, and his or her heirs of tailzie, to be employed for the purchase of land when the same could be conveniently made, and the sum shall always be made payable to the heir of tailzie for the time who shall lend the same, and to his heirs tailzie herein named, according to the substitution and order of succession contained in this my right and disposition, to which particular reference shall always be made in such bonds and securities;" that Alexander Kinloch, the institute, accordingly did realise all the estate and effects (which amounted to about L.6000), excepting certain special debts and subjects mentioned in the reports; that he, however, contravened the directions in the settlement by not only delaying to purchase lands with the money realised by him, and entail them, but likewise by failing to obey the positive directions above quoted (as to which no discretion was allowed to him) of making such an interim investment of the funds as was directed in the settlement; and that, on the contrary, he,—often mixing up the trust funds so realised with his own proper funds, so as to render them undistinguishable,—left a settlement, destining everything which should belong to him at the time of his death to his son, and a series of heirs different from that in Miss Rocheid's settlement, and his son continued to enjoy all his estate and effects, including the funds realised by Alexander Kinloch from Miss Rocheid's estate. After the lapse of forty years from the date of Alexander Kinloch's intromisions with these funds, an action by the heirs of entail for an account thereof, and for investment of them in terms of Miss Rocheid's settlement, was found to be cut off by the negative prescription. The ground of this judgment (as appears from the report of date 1st March 1808, after the case returned from the House of Lords) was, "that the original right under the trust had been violated by the act of the defender's father to a certain extent, and that to this extent there had been an interest to pursue in the substitutes of entail, in consequence of which their right to the same extent was lost by prescription." In that case, as in the present, it was pleaded that the general obligation to account under the trust was extinguished by prescription; but that plea was repelled, and the negative pre-

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scription, while it excluded all claim for the portion of the funds as to which Alexander Kinloch had contravened the direction in the trust-deed, did not protect his successor from accounting for the special articles as to which there had been no such contraventions, but which had been uplifted only by the successor himself within the forty years before the action was instituted.

In the different reports of this case some obscurity is created by the expression "general accounting" being applied to the debts and subjects which Alexander Kinloch had realised, as above mentioned, in his lifetime, and of which the particulars are not mentioned, and do not appear to have been fully known when the action was instituted. In the House of Lords there appear to have been doubts whether that expression was not used in a wider sense; but the report of the opinions of the majority of the Court in pronouncing the ultimate judgment in this Court makes it quite clear that the expression was then used in the limited sense I have stated.

On the principle of these authorities, it is plain that, assuming the purchase of Hobsland to have been illegal and a contravention of the trust, as is alleged by the pursuer, the challenge of that transaction was competent from the time it was entered into, and that forty years thereafter having elapsed before the challenge of it which is contained in the present action had been instituted, this challenge is cut off by prescription.

Lord Deas.—Since this case came into the Inner House, a plea founded on the long negative prescription has been added to the record. In the course of the argument before me in the Outer House, prescription was certainly alluded to, but the grounds and bearing of the plea were not explained, nor was any proposal then made to add it to the record, so that I could not have proceeded upon it, even if it had been fully argued, which it was not. Its importance, however, if it had been duly stated, was obvious enough; and, accordingly, in the Note to my interlocutor, I observed that it might deserve attention if it should be necessary to go upon it. I further observed—"It appears to the Lord Ordinary that neither the claim for an accounting, nor the alleged liability for delay in reselling the surplus lands, can be held to be excluded by the negative prescription. It may be a nicer question whether the substantive objection to the act of purchasing Hobsland, in 1812, as altogether *ultra vires* of the trustees, can still form a ground of action, although more than forty years have elapsed since that purchase was made." All I have since heard has confirmed me in the opinion thus expressed as regards the general accounting and alleged liability for not reselling, and likewise in my impression that the applicability of the negative prescription, as barring the objection taken to the purchase of Hobsland, is a question of nicety and importance,—although it is a question upon which I have now formed a deliberate and clear opinion.

Your Lordship has pointed out the conclusion of the summons which directly strikes against the purchase of Hobsland, and seeks to have it found and declared that the whole transaction, relative to that purchase, was *ultra vires* of the trustees, and illegal and unwarranted, and cannot be binding upon or affect the trust-estate. Lord Curriehill has, in like manner, pointed out the passages in the record, extending from articles 11 to 19, both inclusive, which go to the same effect, and I need not repeat them here. Indeed the only prayer of the reclaiming note, in so far as it asks your Lordships to do anything different from what was done in the Outer House, is "to find that the pursuers are entitled to challenge or repudiate the purchase of the lands of Hobsland and others made in 1812 by the trustees of the late John Barns, as an act of administration or management by the said trustees under the trust-deed and settlement dated 4th June 1789," and "to decern in terms of the declaratory conclusions of the summons"—that is to say, the conclusion I have already alluded to, which your Lordship has read, and the conclusion to the effect that Mr Hill, as sole surviving trustee, is now bound to invest the residue of the trust-funds in the purchase of lands, and to entail the same in terms of the trust-deed—these being the only declaratory conclusions the summons contains. As to the prayer to find the pursuers entitled to an accounting, that is a part of the case not entered upon in the interlocutor under review, and upon which anything said in my Note is favourable to the pursuers, and with which, therefore, your Lordships could not be expected to deal till it has been dealt with by the

Lord Ordinary. The precise, and, substantially, the only question, which is thus brought before your Lordships by the pursuers, is, whether they are entitled (in the words of the prayer of their reclaiming note), "to challenge or repudiate the purchase of the lands of Hobsland and others, made in 1812"?

That challenge or repudiation may be barred either by prescription or by homologation, or both. I proceed now to inquire whether it is barred by prescription?

The pursuers seem, themselves, to assume the *terminus a quo* to be 1812. They say the purchase they seek to challenge was made in that year; and it is clear, from the documents before us, that it was so. The trustees made the purchase expressly in their character of trustees. They professed to bind, and did bind the trust-estate for the price, and they obtained right to the estate as trust-property. They entered into possession of it, as such, in 1812;—the crop of that year was reaped by the then existing beneficiary, Sir James Stevenson, and he purchased and placed the necessary stocking upon the lands; all, of course, by authority of the trustees. The granting and acceptance of the deeds and instruments which followed were merely the necessary consequences, which neither party could avoid, of the purchase made and acted on in 1812. If the purchase so made was, as the pursuers now say, *ultra vires*, illegal, and unwarranted, it appears to me too clear for argument that the beneficiaries interested in the disposal of the residuary estate might then have, at once, challenged the purchase and consequent misapplication of the trust-funds; and upon this point,—that is to say, as to 1812 being the *terminus a quo* from which prescription must run, if it runs at all, I have nothing to add to what has been stated by your Lordships. The purchase was publicly made and publicly acted upon—the parties interested were entitled and bound to inquire and to know (as in point of fact they did know) what the actings of the trustees were; and there is no room for pleading ignorance of the purchase and missives of sale any more than of the subsequent disposition.

Holding, then, the *terminus a quo* to be 1812, the question whether the negative prescription applies, seems to me to involve two points of inquiry—1st, Whether the statutes 1469, c. 28, and 1474, c. 54, would be applicable to the challenge of such an act as the purchase of Hobsland, supposing the investment of the residue had been the only purpose of the trust, and the act of purchase had brought the trust to an end? And if they would be so applicable, then, 2d, Whether, in respect that the trust still subsists, and that the trustees are still liable to account for their general intromissions, the negative prescription, which would otherwise have applied, becomes inapplicable?

The first enquiry turns upon the construction to be given to the statute 1469, c. 28, which is said to be limited to "obligations," and not to be applicable to a malfeasance, such as the illegal purchase here made, and relative misapplication of the trust-funds. The words of the Act are, "that the partie te quhome the obligation is maid, that hes interest therein, sall follow the said obligation within the space of fourtie zeires, and take document thereupon. And, gif he dois not, it sall be prescrived, and be of nane availe, the said fourtie zeires beand runnin, and unpersewed be the partie." Here the concluding words, as to the forty years being allowed to run without the obligation being pursued by the party, are not unimportant, as favouring the construction by which this Act has been held so extensively applicable as it has been to rights of action. Nor is it any great stretch of construction, even apart from authority, to apply the Act to a case in which trustees, being under an obligation to apply the trust-funds in one way, are said to have applied them in another way; and forty years have, nevertheless, been allowed to elapse without the party demanding implement of that obligation, and, as a necessary preliminary thereto, instituting a challenge of the act done in alleged contravention of it.

But we are not now to construe the Act for the first time. It has been construed by decisions and text writers for nearly four hundred years, and there are very few rights of action or rights of challenge (not involving questions of heritable rights), to which it has not been expressly held applicable. It was held to apply to a claim under a testament in Lindsay v. Balgony, 19th June 1627 (M., 10,718), "which" (the report bears) "was found, albeit these acts mention only prescription of obligations, and this title was a testament, whereto the pursuer alleged these acts could not extend." An obligation under a testament seems to me to be very analogous

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to an obligation under a trust-deed and settlement. In Lawers v. Dunbars, 26th July 1637 (M., 10,719), the Act was found to extend to a decreet *in foro*, although the case of a decreet is certainly less easily brought within the category of obligations than the case which occurs here. The report bears that the Lords "declared that they would observe this and the like decision, in all time coming, when the like question of prescription should be obtruded against decreets, albeit *in foro contentioso*, and found that the same comes under the Act of Parliament foresaid." In Murray v. Irvine, 18th March 1707, M., 10,721, the report bears—"The Lords found the action of reduction *ex capite lecti* prescribed *non utendo* within the space of forty years." This seems to me as strong an instance as can well be figured of a large and liberal construction of the Act, as applicable to rights of challenge and rights of action, or, as the concluding words of the Act expresses it, to pursuits by the party, although the pursuit be not, in the ordinary sense, either in respect of a violation or for implement of an obligation. The cases of Miller, 15th June 1757, M., 10,738, and the Magistrates of Linlithgow v. Mitchell, 21st June 1822, where a right to levy customs, or toll-duties, conferred, in the one case, by a grant from the Privy Council, and, in the other, by a Charter and Act of Parliament, was found to be cut off by the negative prescription, likewise afford instances of the same extended construction of the statute. The case of Porterfield, 6th December 1771 (M., 10,698), although it related to an obligation to execute an entail, seems to have been rested on the older statutes, and not on the statute 1617. Then the case of Pollock, 28th January 1778 (M., 10,702, Affd. on Appeal, Patton, ii. 495), seems to me to be conclusive upon the point that a right of action, founded upon misapplication of trust-funds, by applying them in one way and failing to apply them in another, may be cut off by the negative prescription, although the case, no doubt, does not touch the question, to be immediately considered, whether this will hold where the trust still subsists. The case of Dickson v. Brander, decided in the House of Lords, 2d March 1842 (Bell's App., i. 167), has also an important bearing on this branch of the argument as well as upon the next; for there, the right held to be cut off by prescription was a right to demand consignation, while the only obligation come under by the bond of caution was an obligation to pay. But it was held that, although the application was not, and could not be founded upon the bond, but upon a right which accrued to the parties in the process of ranking, the right was nevertheless cut off by the negative prescription. I infer from the observations made, in that case, by Lord Chancellor Cottenham, that the Courts in England have shown a similar disposition (taking example from the Legislature), equitably to apply the principle of a statute of limitations, as the Courts of Scotland have shewn so to apply these old statutes of prescription. Lord Bankton seems to think (ii. 12, 16), that these statutes were declaratory of the canon law and civil law, and he states (section 18)—"Actions of all kinds, or grounds of action, prescribe if they have not been commenced by executing a summons within forty years. Thus reductions on the head of deathbed, or other grounds (except that of falsehood), prescribe in the same manner. This prescription, therefore, excludes all claims whatever." Lord Stair (ii. 12, 11) says—"Our common rule of prescription is by the course of forty years, both in moveables and immoveables, obligations, actions, acts, decreets, and generally all rights, as well against those absent as present." He afterwards (section 12) cites several of the cases to which I have referred and have still to refer, by which the construction of the statutes in question has been extended,—obviously approving of these decisions, his general doctrine just quoted being founded on them. Mr Erskine, in the same spirit, observes (iii., 7, 9).—"The right of setting aside any deed, upon extrinsic objections which do not appear *ex facie* of the writing, but require a separate evidence, *ex gr.* the right of reduction *ex capite lecti*, is lost if not exercised within forty years." It may be worth while to observe, as indicating that there is no recent change in the views entertained on this branch of the law (although I quote no living author as authority), that Professor More, in his Notes upon Stair, says—"The effect of the long negative prescription is to extinguish and discharge all claims which have been allowed to lie over without being made or insisted in for forty years from the time they became exigible." "In the construction which has been given to these statutes," (and here he includes the statute 1617 along with the older statutes), "almost every right or ground of action or claim has been held to be cut off by prescription."

Looking to all these authorities, I cannot hold that there is anything in the character of the act here challenged, or in the right of action and challenge here asserted, to take this case out of the category of cases to which the long negative prescription is applicable, unless there be enough under the next head of inquiry to do so.

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2d, It remains, however, to inquire, whether the circumstance of there being here a subsisting trust, under which the trustees are still bound to account generally for their intromissions, be sufficient to prevent them from pleading the negative prescription against a challenge of the purchase of Hobsland, supposing such prescription would otherwise have been pleadable?

I am humbly of opinion that the subsistence of the trust, and the liability of the trustees to account generally for their intromissions, has no such effect.

Many trusts, either from accident or from their nature and objects, may last for more than forty years. And it would, I think, be very strange if, for no act whatever, done, it may be, at the very outset of the trust, openly, and in the knowledge of all the beneficiaries, could the trustees claim the protection of the negative prescription. If this were so, I do not see why the same principle should not apply although the trust were of a permanent nature, continued in the persons of heirs or of trustees *ex officiis*, and so leave acts done centuries ago as open to challenge as when they took place. I have no idea that any such principle applies either to temporary or permanent trusts. Nor am I prepared to say that prescription bars merely challenges of acts said to be *ultra vires* or amounting to breaches of trust, and does not equally bar a challenge of specific acts alleged to have been done from indiscretion, error in judgment, or mistake in point of law, such, for instance, as paying a legacy upon being advised by counsel that it had vested, when, according to a more correct view of the law, it had not vested, or the like;—although it may not be necessary to deal with such cases here, where the act sought to be challenged is alleged to have been *ultra vires*, unwarranted, and illegal.

The case of Kinloch v. Rocheid (M., App., Prescrip., Nos. 4 and 7) is, I think, when rightly understood, a direct and important authority to the effect that, in an action of accounting against trustees, they may effectually plead prescription against certain claims and objections, although not against others. I carefully studied that case at the time of the last hearing, and arrived precisely at the conclusion which your Lordship and Lord Curriehill have since arrived at, that the whole puzzle in regard to it is apparent and not real, and arises mainly from the use made in it of the terms "general accounting," as applicable to items with reference to which prescription was sustained, whereas these words are more correctly descriptive of the items with reference to which prescription was repelled. The true import of the decision, I think, is, that with regard to those portions of the funds which were said to have been misapplied more than forty years before the raising of the action, prescription was applicable; but that in regard to items which had continued to be rightly dealt with as proper trust-funds within the forty years, there was no such prescription. These last items formed, correctly speaking, the subject of the general accounting, and the others the exceptions, although in the original interlocutor the application of these terms is reversed. The grounds of judgment are clearly and accurately expressed in the concluding portion of the last report, to which I take leave specially to refer; and to the observations your Lordships have made in explanation of that report, I have only to add, that, in my manuscript notes of Professor Hume's lectures, I find the decision cited by that eminent lawyer as a sound decision upon the law of prescription.

Nor is the principle thus recognised either singular or startling. In the case of Lawder, 27th Nov. 1630, M., 10,635, an obligation in a registered contract of marriage, upon which marriage had followed, was found to be prescribed, in a suit at the instance of one of the parties, although that party had been compelled by the other, within the forty years, to fulfil a counter obligation in the contract, and it was pleaded that one part of the contract could not be prescribed and not the other. The case of Miller, and the case of the Magistrates of Linlithgow, both already referred to, also afford instances of the negative prescription being applicable to certain claims under subsisting deeds and grants, although not to others. In particular, in this last mentioned case, the right of the magistrates, under their

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charter and Act of Parliament, to levy dues at a particular ford on the river Avon, called Jinkabout, was held to be cut off by the negative prescription, although their right to levy dues above and below that ford, and for crossing the river generally, under the same charter and statute, was found not to be prescribed. So in the case, already mentioned, of Dickson v. Brander, the right to demand consignation in the action of ranking and sale (for, as already observed, the demand was not made under the bond) was held to be prescribed, although the action itself was not prescribed, and the *terminus a quo* was held to be the period when the right to demand consignation arose. All these cases seem to me to confirm the principle now under consideration, although none of them go so directly to the point as the case of Kinloch. The principle of the long prescription, as Mr Bell observes (Com. i. 3, 3, 5), "is not a presumption of payment, but a presumption of abandonment not to be overcome, but available to the debtor as equivalent to a discharge." Accordingly, it was found in the case of Napier, 7th December 1703 (M. 10,657), that, where the prescription has run, there can be no reference to the oath of party. This principle of abandonment is obviously just as applicable to the objections pleadable against a distinct act, like the purchase of Hobsland, by trustees under a going trust, as it is to the objections to any other act whatever.

Interruption of the currency of prescription there, plainly has been none here. On the contrary, the estate of Hobsland and its rents have, admittedly, been dealt with ever since the purchase as trust property.

Upon the whole I am clearly of opinion, with the majority of your Lordships, that, as regards the purchase in question, the plea of prescription falls to be sustained.

I must add, however, that I still think, on the grounds stated in the note to my interlocutor, that, supposing prescription not to be applicable, the challenge of the purchase of Hobsland would be barred by *mora*, acquiescence, and homologation. I do not say that it would be so barred if the purchase had been altogether *ultra vires*, unwarranted, and illegal, as the pursuers allege it to have been. And I agree with Lord Curriehill, that if we are right in sustaining the plea of prescription, the character of the act can never be inquired into. But if we were wrong in that view, and the question were therefore open, I should say that such was not the true character of the act, and it was not upon the assumption of its being so that the observations in my Note were made, but upon the footing indicated in the passage which bears, "As to the excess of price, it is said on behalf of the trustees that they could not find, and could not be expected to find, a suitable property at a price precisely equal to the fund in their hands, and that to have bought at a price less than the fund would have resulted in leaving a balance unemployed." Now it was not, in my opinion, *ultra vires* of the trustees to buy an estate at a price somewhat greater than the residuary trust-fund. On the contrary, it was implied, I think, in the power and duty conferred and imposed upon the trustees, that they might do so. The question, *to what extent* they might go in excess of the trust-funds, was a question in which they might err in point of discretion; but I cannot regard an error of that kind *bona fide* committed by trustees, acting to the best of their judgment for the interests of all concerned, as amounting to an act *ultra vires*, unwarranted, and illegal, in the sense in which these words are used by the pursuers, and consequently as incapable of being adopted, acquiesced in, and homologated by the beneficiaries for the time being, as binding on all concerned.

A question may remain behind as to the obligation to resell, which I do not at present enter upon, because I understand your Lordships to have confined yourselves solely to the question, whether all challenge of the purchase is barred,—and that, even with reference to that question, you wish to deal only with the plea of prescription, although I have thought it right to add, that if I were to look upon the act challenged in what I think its true light, I should say the challenge is barred also by *mora*, acquiescence, and homologation.

THE COURT pronounced the following interlocutor:—"Allow the proposed additional plea in law for the pursuers to be received, and hold the same to form part of the record; and having heard counsel for the parties on the reclaiming notes, and the additional pleas for the defenders, and the additional pleas for the pursuers—Sustain the plea

of prescription offered for the defenders, in regard to the challenge of the purchase of Hobsland, as being illegal and *ultra vires* of the trustees, or in breach of the trust: Repel the said plea of prescription, in so far as directed against the action, and demand for accounting generally: Find that the pursuers are not now entitled to challenge or repudiate the purchase of the lands of Hobsland and others, made in 1812, by the trustees of the late John Barns, for behoof of his trust-estate, and to that extent and effect adhere to the interlocutor of the Lord Ordinary submitted to review: Recall the second finding in the interlocutor of the Lord Ordinary *in hoc statu*, and remit to his Lordship to proceed further in the cause as shall be just; reserving all questions of expenses."

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PATRICK GRAHAME, W.S.—W. & G. COOK, W.S.—MORTON, WHITEHEAD, & GREIG, W.S.—WEBSTER & RENNY, W.S.—Agents.

GAVIN PAISLEY (Adam's Factor), Petitioner.—*A. B. Shand.* No. 138.

Curator Bonis—Sinking of the capital of a lunatic in purchasing an annuity in Scotland.—Authority granted to the curator of a lunatic, with the concurrence of his relations, to sink the capital of his estate in the purchase of an annuity, but with the proviso that the investment must be with an Insurance Company within Scotland. In this case the lunatic had two children, who were stated to be taken care of by their aunt.

Mar. 5, 1857. — 1st Division. Ld Mackenzie. L.

IN 1852 Mr Paisley, accountant in Glasgow, was appointed *curator bonis* to John Adam, a lunatic in Morningside Asylum. In a report to the Accountant of Court, Mr Paisley stated that the whole amount of funds belonging to the ward was under L.500, being the balance of a provision in his favour under his grandfather's settlement; and although the trust-estate was not yet wound up, that if any farther sum, which the curator did not anticipate, became payable, it would be very trifling.

The curator farther stated that the annual proceeds of the ward's means had hitherto been insufficient to defray his board and maintenance; and consequently his capital had been already considerably encroached upon, and in the course of a few years would be altogether absorbed. To avoid such a result he proposed to invest the funds, or, at all events, the greater portion of them, in the purchase of an annuity upon the life of the ward, from the Anchor Assurance Company, London, from whom he stated he could purchase at the rate of L.8, 12s. per cent, which, upon a reduced scale of board, would suffice for the maintenance and support of the ward.

The lunatic was a widower, fifty-one years of age, with two children. A medical certificate bore that his complete recovery was not probable.

The Accountant of Court reported that the children, "aged sixteen and fourteen respectively," have been from their infancy, and still are, in every way to be cared for by an aunt. Respecting the usual objection to sinking money on the precarious lives of lunatics, the factor explained that the lunatic's life in this instance was considered good as regards ordinary health; "and he was of opinion that powers ought to be granted to the curator to sink L.450, or a smaller sum, in a respectable Insurance Office."

The Lord Ordinary verbally reported the case, and expressed himself favourable to the proposal,[1] which was also concurred in by the relations of the lunatic.

LORD PRESIDENT.—It is proposed to invest with the Anchor Insurance Company of London. I object to the money being invested out of the country.

LORD MACKENZIE.—I would farther suggest that the Court ought not to commit itself in favour of any particular Office.

[1] M'Gilchrist, 13th June 1855, ante, vol. xvii. p. 917.

No. 138.

Mar. 6, 1857.
Robson v.
Denny.

The Court pronounced the following interlocutor:—"The Lords, on report of Lord Mackenzie, grant authority to the curator to invest a sum not exceeding L.450 of the means and estate of the said John Adam, junior, in the purchase of a respectable Insurance Company in Scotland of an annuity upon the life of the said John Adam, junior, at the sight of the Lord Ordinary, and decern; and remit to his Lordship to see this done, and to report."

John Ross, S.S.C.—Agent.

No. 139.

John Robson (Denny's Curator), Pursuer.—*Millar.*
William Denny and Others, Defenders and Claimants.—*Fraser—N. C. Campbell.*

Process—Statutes 58 *Geo. III. cap.* 121, *sect.* 9—1 *&* 2 *Vict. cap.* 118, *sects.* 3, 4—*A. S.* 24*th Dec.* 1838, *sect.* 2.—*Held* incompetent to remit a case from one Division to the other, even of consent, where contingency is not averred.

Mar. 6, 1857.
1st Division.
L.

In this case the following MS. note was addressed to the Lord President by all the parties to the cause:—"Mutual reclaiming notes for the above parties have this day been boxed to your Lordship in this case, which was originally attached to the First Division of the Court. As the case is one in which it is for the interest of the parties that a speedy decision should be obtained, and as they understand that the case would be taken up in its ordinary course in the Roll at an earlier period by the Second Division of the Court than by the First, they humbly crave your Lordship to move the Court to remit the case to the Second Division accordingly."

The note having been called in the single Bills,—

Fraser, in support of the competency of the course proposed in the note, referred to the 1 & 2 Vict. cap. 118, sects. 3 & 4; A. S. 24th Dec. 1838, sect. 2; 58 Geo. III. c. 121, sect. 9. He stated that he had not found any reported decision which he could refer to as a precedent; but he submitted that, inasmuch as the case was brought into the First Division by the choice of the pursuer, the pursuer and defender might of consent remove it into another Court of co-ordinate jurisdiction.

Lord President.—Consent of parties may remove after objections; but it is a very serious thing to say that the pursuer and defender may remove a case from one Division to another, if they choose. The question is, has the Court power to permit that?

Lord Deas.—If the principle be right, the intervention of the Court is not necessary. The theory, however, is, that an action from the Sheriff Court may of consent be brought at once to this Court.

Fraser.—We are willing to take any risk, and to waive all questions as to competency.

Lord Ivory.—This is not a matter in which the consent of parties can avail. They ask the Court to do a certain thing, but they do not say that the Court have power to do it, and if the Court have not power to do it, they are not in the least helped by the consent of parties. The statutes to which we are referred are authority, but not in favour of this proceeding. As to the 58 Geo. III., which is the source of jurisdiction as between the Divisions of the Court, no doubt there is conferred a general jurisdiction in all cases before they take their proper places in the Roll. Both Divisions have the same jurisdiction till then, but not otherwise; and I remember a case which took place under an old Act of Sederunt, which shews that consent of parties is not sufficient to remove the difficulty which may arise in a question of jurisdiction. The Act held, that on the death of a Lord Ordinary, where a case was not moved in for a period of six months, it was then necessary to have a special remit to another Lord Ordinary. In this case the Lord Ordinary had died, and there was no special remit; but the case was proceeded with for four

of prescription offered for the defenders, in regard to the challenge of the purchase of Hobsland, as being illegal and *ultra vires* of the trustees, or in breach of the trust: Repel the said plea of prescription, in so far as directed against the action, and demand for accounting generally: Find that the pursuers are not now entitled to challenge or repudiate the purchase of the lands of Hobsland and others, made in 1812, by the trustees of the late John Barns, for behoof of his trust-estate, and to that extent and effect adhere to the interlocutor of the Lord Ordinary submitted to review: Recall the second finding in the interlocutor of the Lord Ordinary *in hoc statu*, and remit to his Lordship to proceed further in the cause as shall be just; reserving all questions of expenses." No. 137. — Mar. 5, 1857. Paisley.

Patrick Grahame, W.S.—W. & G. Cook, W.S.—Morton, Whitehead, & Greig, W.S.—Webster & Renny, W.S.—Agents.

GAVIN PAISLEY (Adam's Factor), Petitioner.—*A. B. Shand.* No. 138.

Curator Bonis—Sinking of the capital of a lunatic in purchasing an annuity in Scotland.—Authority granted to the curator of a lunatic, with the concurrence of his relations, to sink the capital of his estate in the purchase of an annuity, but with the proviso that the investment must be with an Insurance Company within Scotland. In this case the lunatic had two children, who were stated to be taken care of by their aunt.

In 1852 Mr Paisley, accountant in Glasgow, was appointed *curator bonis* to John Adam, a lunatic in Morningside Asylum. In a report to the Accountant of Court, Mr Paisley stated that the whole amount of funds belonging to the ward was under L.500, being the balance of a provision in his favour under his grandfather's settlement; and although the trust-estate was not yet wound up, that if any farther sum, which the curator did not anticipate, became payable, it would be very trifling. Mar. 5, 1857. — 1st Division. Ld Mackenzie. L.

The curator farther stated that the annual proceeds of the ward's means had hitherto been insufficient to defray his board and maintenance; and consequently his capital had been already considerably encroached upon, and in the course of a few years would be altogether absorbed. To avoid such a result he proposed to invest the funds, or, at all events, the greater portion of them, in the purchase of an annuity upon the life of the ward, from the Anchor Assurance Company, London, from whom he stated he could purchase at the rate of L.8, 12s. per cent, which, upon a reduced scale of board, would suffice for the maintenance and support of the ward.

The lunatic was a widower, fifty-one years of age, with two children. A medical certificate bore that his complete recovery was not probable.

The Accountant of Court reported that the children, "aged sixteen and [illegible]teen respectively," have been from their infancy, and still are, in every [illegible] to be cared for by an aunt. Respecting the usual objection to sinking money on the precarious lives of lunatics, the factor explained that the lunatic's life in this instance was considered good as regards ordinary health; and he was of opinion that powers ought to be granted to the curator to sink L.450, or a smaller sum, in a respectable Insurance Office."

The Lord Ordinary verbally reported the case, and expressed himself favourable to the proposal,[1] which was also concurred in by the relations of the lunatic.

LORD PRESIDENT.—It is proposed to invest with the Anchor Insurance Company London. I object to the money being invested out of the country.

LORD MACKENZIE.—I would farther suggest that the Court ought not to com[illegible] itself in favour of any particular Office.

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[1] M'Gilchrist, 13th June 1855, ante, vol. xvii. p. 917.

No. 139. — Mar. 6, 1857. Macfarlane.

parties, Refuse the desire of the said note: Further, they appoint the cause to be put to the roll."

MURRAY & BEITH, W.S.—J. & J. MACANDREW, S.S.C.—Agents.

No. 140. ALEXANDER MACFARLANE AND OTHERS, Petitioners.—*D. F. Inglis*—*Fraser*.

Judicial Factor on the estate of an intestate under the New Bankrupt Act—*Stat.* 19 *&* 20 *Vict. cap.* 79, *sect.* 164.—The parties interested in an intestate estate, which consisted partly of heritage and partly of moveables, were children who were creditors to the extent of their provisions under a marriage-contract; and the executors of the widow, who were creditors for a sum advanced by her to clear off a debt with which part of the heritage had been burdened. No title had been made up to the heritage or moveables; but the parties interested in the succession had entered into an agreement, by which they regulated their respective interests. To meet their claims a sale was essential, but the heirs-at-law were minors. Application was therefore made by them for the appointment of a judicial factor, under sect. 164 of the 19th & 20th Vict. cap. 79;—*Held* (*dub.* Lord Deas), that the application not being for powers to carry out the agreement, but to distribute the estate, the appointment might competently be made.

Question, Whether the statute applies to all intestate estates, even if the heir-at-law or executor were willing to make up titles?

Mar. 6, 1857. — 1ST DIVISION. Ld. Mackenzie L.

THIS petition prayed for the appointment of a judicial factor, under the 164th section of the Bankrupt Statute, 19 & 20 Vict. cap. 79,* upon the estate of the late Alexander Macfarlane of Perth, who died on 14th February 1838.

By an antenuptial contract of marriage, Mrs Macfarlane conveyed to her husband her whole personal estate; while, on the other hand, Mr Macfarlane bound himself and his heirs to pay to his widow, after his death, an annuity of L.40 during her life. In security of the annuity he disponed a flat and shop in George Street, Perth. At his death, this property was burdened

* Section 164 is as follows:—"It shall be competent to one or more creditors of parties deceased, to the amount of L.100, or to persons having an interest in the succession of such parties, in the event of the deceased having left no settlement appointing trustees, or other parties having power to manage his estate, or part thereof, or in the event of such parties not accepting or acting, to apply by summary petition to either division of the Court for the appointment of a judicial factor; and after such intimation of the petition to the creditors of the deceased and other persons interested as may be considered necessary, and after hearing parties, the Court may appoint such factor, subject to such conditions as to caution and such other conditions as the Court may provide by act of sederunt; and such factor shall manage the estate, recover debts due to it, realise the moveable effects by public or private sale, as may be most expedient, dispose of the heritable estate by public sale or private bargain, according to such directions as the Court, on report of the accountant, may give, and shall apply the free proceeds, after defraying all expenses, in payment of the claims of creditors, according to their several rights and preferences, conformably to a state of funds and scheme of division to be prepared by him, and considered and approved of by the Court, on a report by the accountant; and thereafter the factor shall account for the residue, if any, after payment of debts and expenses, to the parties having a right to the deceased's succession; provided that the accountant shall annually examine and audit the proceedings, intromissions, and accounts of such factor, which shall be duly transmitted for that purpose, and report to the Court thereon from time to time, as he may deem expedient, and shall generally exercise the like powers, and discharge the same duties with regard to him as he is empowered and required to exercise and discharge with regard to a trustee under a sequestration, but subject always to the control of the Lord Ordinary or the Court."

with a debt of L.400. He also assigned to her, in case she should survive him, the household furniture belonging to him at his decease. No. 140.

With regard to the children to be procreated of the marriage, Mr Macfarlane bound himself and his heirs to make payment to them of the sum of L.560 amongst them, if more than one, at their respective majorities or marriages, with interest during the non-payment. These provisions to the widow and children were declared to be in full of terce, *jus relictæ*, and *legitim*. Mar. 6, 1857. Macfarlane.

There were nine sons born of the marriage, all of whom survived their father, and attained majority. Mr Macfarlane died intestate. He was survived by his widow, who died in September 1854. Alexander Macfarlane, her son, and William Duncan and John Gray, were her executors.

This petition was presented by Alexander Macfarlane for himself, and as attorney for four of his brothers who were abroad—by the widow of the deceased John Macfarlane, the eldest son of the marriage, and by Mrs Macfarlane senior's executors. It set forth the property belonging to the late Mr Macfarlane, and the facts above mentioned, and stated that the creditor in the bond over the subjects in George Street for L.400 having called up the money in 1850, Mrs Macfarlane senior, in order to prevent the subjects being sold, advanced the L.400, and took a discharge from the creditor. The discharge bore that the money was paid by John Macfarlane, iron-founder in Perth, the eldest son; but the money was actually advanced by his mother. That, in June 1854, a deed of agreement was entered into between Mrs Macfarlane senior, Mrs Isabella Macfarlane, as executrix of her deceased husband John Macfarlane, the eldest son, Alexander Macfarlane, William Stewart Macfarlane of Montreal, then in Perth, for himself, and as attorney, duly authorised, for his brothers James Macfarlane, Peter Macfarlane, Henry Hepburn Macfarlane, and David Jobson Macfarlane, all at that time abroad. This deed narrated the contract of marriage, and particularly the provisions in favour of the widow and children. It also narrated that Mrs Macfarlane, senior, was executrix of her deceased son Robert Macfarlane, town-clerk of Perth; that the claims on the moveable estate of Alexander Macfarlane, senior, nearly equalled the value thereof, and that the whole available estate left by him consisted of the heritable subjects therein specified; that nothing had been paid to the children on account of their provisions under the contract; that Mrs Macfarlane, senior, had advanced the sum of L.400 for clearing off the debt on the subjects in George Street, which sum formed a debt due to her from her husband's estate; that she acknowledged to have received, in the manner therein specified, payment of her annuity up to the date of the agreement, and agreed to take the rent of the George Street subjects as payment in future; and further, that she agreed to set off the interest on the L.400, on account of rent for the subjects in the High Street tenanted by her. The other subscribers agreed to hold said narrative as correct, and the arrangement binding upon them. It was further set forth, "that as the said sum payable to us (the children) at our majority was never paid, because there was no funds for the purpose, we shall, and do hereby respectively agree to hold ourselves on an equal footing in regard to our right and interest under said marriage-contract at the time when the death of our said mother shall happen, and that the estate then existing, consisting, as foresaid, of the said property in George Street, subject to the debt to our said mother of L.400, the said property in High Street and Horner's Hall, and the said bank shares, shall form the only fund for division amongst us, and shall then, less expenses, be equally divided amongst the said executrix of the said deceased John Macfarlane, and the others of us, said children of said marriage surviving, and which equal shares shall be held by us respectively in lieu and

No. 140. — Mar. 6, 1857. Macfarlane.

place, and in full of any claim which we might have under the said marriage-contract, and which we bind and oblige ourselves, and those for whom we act, to receive and accept accordingly, so as to prevent any questions or disagreements amongst us at a future time, when the contingency shall arise which shall render said distribution under said contract necessary."

The petition farther stated, that in consequence of the death of Mrs Macfarlane, this agreement had come into effect. The surviving children, and the representatives of those who had predeceased, were now desirous to obtain payment of their provisions under the marriage-contract, and the executors of Mrs Macfarlane, senior, desired payment of the L.400. But in consequence of the state of the title, and of the minority of the heirs-at-law, a difficulty had arisen which prevented payment being made of the debt and provisions. The heirs-at-law were the four daughters of the eldest son John Macfarlane, three of whom were in pupillarity, and only one had attained the age of puberty. Alexander Macfarlane, senior, having died intestate, the property could not be sold, and the proceeds divided among the children without the heirs-at-law making up a title and selling, and dividing the price. But in consequence of their minority a title could not be given to a purchaser through them, of such a character as to insure a fair price from a purchaser.

The moveable estate of the deceased, consisting solely of certain bank shares, the value of which was about L.150, was totally inadequate to meet these obligations, and it was absolutely necessary, therefore, that the heritable estate should be sold.

In these circumstances this petition was presented. It was stated that the whole of the debts of the deceased Alexander Macfarlane had been paid, with the exception of the debts due to the children or their representatives under the contract of marriage, and the L.400 advanced by the deceased's late widow, and now due to her executors; and the children or their representatives, and the executors, were the only creditors of the deceased.

The prayer of the petition was for intimation on the walls and in the minute-book, in common form, and thereafter, on resuming consideration thereof, with or without answers, to appoint Robert Martin to be judicial factor on the said estate, with the powers conferred by the statute; and specially, with power to make up titles in his person to the heritable estate which belonged to the said deceased Alexander Macfarlane—he always finding caution before extract; or to do otherwise, &c.

When the case appeared in the single bills,—

Lord President—We are desirous to consider whether the statute applies to such a case as this. The proper course, therefore, will be in the meanwhile to order intimation as craved, reserving consideration of the competency. The Court have not yet passed any act of sederunt to regulate such appointments; and if we should eventually grant the prayer of this petition, it must be subject to the conditions of any act of sederunt we may hereafter pass, and it is rather an omission not to ask for such other service as the Court may deem necessary. We think the prayer of this petition should be amended in another point. In applying this statute, I am not prepared to say that the Court will be disposed to accept the nomination of any party; otherwise, it would come to this, that any petitioner might choose his own trustee.

The petitioner then amended the prayer by adding the words, "or such other person as your Lordships may think proper." Of this date the case was advised.

Lord Curriehill.—I have not the slightest doubt as to the competency of this appointment. There is no application here for powers to carry out the agreement. If there were, I should refuse it. But there is a narrative of the agreement, not for the purpose of being carried out, but to show that the petitioners are creditors to

than forty years thereafter elapsed, the right to insist in such a challenge has now been cut off by the negative prescription. No. 137.

This view of the matter appears to me to be not only clear upon principle, but also to be established by authority. In Pollock v. Porterfield, 28th January 1778, Mor. p. 10,702, a party holding money under trust to employ it in the purchase of lands to be entailed on a series of persons to whom it was destined, misapplied it by paying it to the party who was to be the institute. After the lapse of forty years, an action was instituted by the substitute heir against the representatives of the trustee, and of the institute, who had received the money,—both of whom had died in the meanwhile,—concluding to have it found that the pursuer was entitled to the benefit of the trust, and to have the defenders ordained to pay over the capital to a person to be named by the Court to purchase and entail the lands in terms of the trust. The Court, on the ground that the substitute, as creditor under the trust, had a right to challenge every deed of the trustee in contravention of the trust, held that the objection to the misapplication of the trust funds was excluded by prescription, and assoilzied the defenders. The judgment was affirmed by the House of Lords, 10th March 1779. Paton's Appeal Cases, II, 495. Mar. 5, 1857. Barns v. Barns' Trustees.

The case of Rocheid v. Kinloch is a direct authority on the point. To understand the facts it is necessary to compare the different reports in Mor. Dict., Appendix to Prescription, Nos. 4 and 7, and in Patton's Appeal Cases, p. 35. It appears from such a comparison that Miss Rocheid, besides executing a strict entail of certain lands in favour of Alexander Kinloch and a series of heirs, conveyed also to him and the same series of heirs all her other estates and effects, on the condition that the same should be realised, and the proceeds be applied in purchasing other lands to be entailed on the same series of heirs, and on the same conditions as those set forth in her own deed of entail; that one of the conditions of the conveyance by Miss Rocheid was, that in case any of the disponees "shall before any purchase of land be made by them in manner before directed, happen to uplift any of the principal sums hereby disponed for that purpose, he shall be bound and obliged to lend and re-employ the same upon good and sufficient security, either real or personal, and the bonds and securities to be taken for the same shall always bear in express terms that the sum for which the same is granted was part of the money disponed by me to the person lending the same, and his or her heirs of tailzie, to be employed for the purchase of land when the same could be conveniently made, and the sum shall always be made payable to the heir of tailzie for the time who shall lend the same, and to his heirs tailzie herein named, according to the substitution and order of succession contained in this my right and disposition, to which particular reference shall always be made in such bonds and securities;" that Alexander Kinloch, the institute, accordingly did realise all the estate and effects (which amounted to about L.6000), excepting certain special debts and subjects mentioned in the reports; that he, however, contravened the directions in the settlement by not only delaying to purchase lands with the money realised by him, and entail them, but likewise by failing to obey the positive directions above quoted (as to which no discretion was allowed to him) of making such an interim investment of the funds as was directed in the settlement; and that, on the contrary, he,—often mixing up the trust funds so realised with his own proper funds, so as to render them undistinguishable,—left a settlement, destining everything which should belong to him at the time of his death to his son, and a series of heirs different from that in Miss Rocheid's settlement, and his son continued to enjoy all his estate and effects, including the funds realised by Alexander Kinloch from Miss Rocheid's estate. After the lapse of forty years from the date of Alexander Kinloch's intromissions with these funds, an action by the heirs of entail for an account thereof, and for investment of them in terms of Miss Rocheid's settlement, was found to be cut off by the negative prescription. The ground of this judgment (as appears from the report of date 1st March 1808, after the case returned from the House of Lords) was, "that the original right under the trust had been violated by the act of the defender's father to a certain extent, and that to this extent there had been an interest to pursue in the substitutes of entail, in consequence of which their right to the same extent was lost by prescription." In that case, as in the present, it was pleaded that the general obligation to account under the trust was extinguished by prescription; but that plea was repelled, and the negative pre-

No. 140. — Mar. 6, 1857. Sinclair.

ourselves make enquiry as to the matter, without any respect to the nominee of the petitioners.

THE COURT pronounced the following interlocutor:—"The Lords, having resumed consideration of the petition, Appoint Robert Martin, writer, Perth, to be judicial factor on the estate of the deceased Alexander Macfarlane designed in the petition, in terms of the 164th section of the recent Bankrupt Act, he finding in the meantime caution, in terms of the Pupils Protection Act, and decern *ad interim:* Direct the judicial factor, by notice in the Gazette, to call, at the distance of not less than fourteen days, a meeting of the creditors of the said Alexander Macfarlane, that he may receive their instructions respecting the realisation of the funds of the deceased: Declaring this appointment to be subject to such conditions as to caution and other conditions and regulations which may be contained in any Act of Sederunt which the Court may pass respecting appointments to be made under the foresaid section, and which Act of Sederunt shall from the date thereof apply to the appointment now made under the petition, and direct the factor immediately to intimate the petition and the terms of this appointment to the Accountant in bankruptcy.

JARDINE, STODDART, & FRASER, W.S.—Agents.

No. 141. MRS BARBARA M. G. THOMSON SINCLAIR, Petitioner.—*J. M. Duncan.*

Entail—10 *Geo. III. cap.* 51 (*Montgomery Act*—11 *&* 12 *Vict. cap.* 36, *sect.* 18. —An heir of entail obtained decree for three-fourths of his improvement expenditure under the Montgomery Act, but died without charging the estate in respect of the debt. Authority granted to the succeeding heir to execute a bond for two-thirds thereof in favour of a party who advanced that amount.

Mar. 6, 1857. — 1st Division. Ld Mackenzie. C.

THE petitioner, as heir of entail in possession of the estate of Freswick, presented this petition, with consent of her husband, for authority to grant a bond and disposition in security for two-thirds of three-fourths of sums expended on entail improvements, in terms of the 18th section of 11 & 12 Vict. cap. 36.

On 5th June 1849, William James Sinclair, then heir in possession, brother of the petitioner, and to whom the petitioner succeeded, obtained decree of declarator in terms of the 10 Geo. III. cap. 51, for L.3048, 2s. 7½d., being three-fourths of a sum of L.4064, 3s. 5¾d., expended by him in improvements previous to the 14th August 1848. He died on 20th February 1855, without having executed a bond of annualrent, or charged the entailed estate in respect of the improvement debt, as authorised by the Entail Amendment Act. The case was reported by Lord Mackenzie, who called the attention of the Court to the circumstances, 1st, that the present application was made at the instance, not of the heir who had executed the improvements and obtained decree under the Montgomery Act, but of his successor; and, 2d, that the said bond now sought was to be made payable not to executors in right of the debt due under said decree, but to a third party advancing the amount to be applied in discharging said debt. His Lordship reported in favour of the application.

THE COURT, without difficulty, authorised the bond to be granted.

ALEX. JOHN NAPIER, W.S.—Agent.

CHARLES CRICHTON, Pursuer.—*D. F. Inglis—Millar.* No. 142.
JOHN CAMPBELL, Defender.—*Penney—A. Mure.*

Mar. 6, 1857.
Crichton v. Campbell.

Proof—Oath on reference.—On a reference to oath, a defender deponed that he had paid to a relative with whom he had other pecuniary dealings money to discharge the claim sued for, but had never seen a discharge, nor had he been told that the debt was paid. His relative had left the country, and died without any settlement of their accounts taking place;—*Held* (*aff.* the judgment of the Lord Ordinary) that the resting owing was proved.

2D DIVISION. Ld. Benholme. R.

THIS was an action raised in 1855 before the Sheriff of Argyleshire by a surgeon, for payment of an account amounting to L.67, for medical attendance and medicines furnished between August 1836 and July 1837. The sum charged was, to the amount of L.49, for attendance and medicines for the defender's wife at the defender's house at Arihoulan, the balance being for attendance and medicines for the defender during an illness with which he was seized while on a visit to Mr Smith, his brother-in-law, at Glenevis. The defender pleaded prescription;—he alleged, moreover, that the account was overcharged,—an account for the same attendance, &c., previously rendered, having only amounted to L.41. In 1838 the defender had executed a trust for behoof of his creditors, who had discharged their claims on payment of a composition. The pursuer had not at that time made any claim. He was allowed a proof by the oath of the defender.

The oath was to the following effect:—The pursuer was not the defender's ordinary medical attendant. He was called to visit the defender's wife at Arihoulan, and made some calls afterwards. The defender only recollected of four or five visits. The pursuer was called upon to visit the defender by Smith, when on a visit to Smith, then residing at Glenevis. "I paid Mr 'Smith for Dr Crichton's professional attendance on me at Glenevis. I 'forget the sum I paid Mr Smith. Whatever Dr Crichton was to charge 'for attendance on me, Mr Smith was to pay for, as Mr Smith had sent for 'Dr Crichton. Dr Crichton and Mr Smith had running accounts. Smith 'had funds of mine in his hands, and he said he would settle Dr Crichton's 'account; and Smith charged me with the doctor's account. I don't recol-'lect the amount that Smith charged me with as paid by him to Dr Crichton 'on my account. Smith and I had no final settlement of accounts; and he 'left the country indebted to me. Smith never exhibited to me an account 'of Dr Crichton's charges for attendance on me. On one occasion I wanted 'money from Smith, and he said that he had running accounts with Dr 'Crichton, and that the doctor's charges would stand as cash paid by Smith 'on my account. Smith's excuse for not giving me money at the time was, 'that he had accounts with Dr Crichton, which he had paid, or would pay, 'on my account, as he had employed him. I also left funds in Smith's 'hands to pay Dr Crichton for his attendances on Mrs Campbell, but I am 'not sure whether Smith paid the doctor." "Smith never said that he had 'actually paid Dr Crichton's account; but I considered that he had settled 'it, as Dr Crichton had not rendered an account to me for fifteen years of 'his professional charges." The defender farther deponed—The pursuer made purchases at a sale the defender had at Arihoulan, in 1838, to the amount of L.4 or L.5. This sum was never accounted for to the defender, but a bill for the money might have been granted and been discounted. The person who took charge of the sale stated that the proceeds of some bills which had been granted had been applied in payment of debts due by the defender and Smith.

The Sheriff-substitute found, with reference to the constitution of the debt, that the oath established the claim to the extent of four or five professional visits to Mrs Campbell at Arihoulan, with corresponding furnishings of medi-

No. 142.

Mar. 6, 1857.
Crichton v.
Campbell.

cine, and the whole visits to the pursuer at Glenevis, but not the furnishings of medicine there. With respect to the resting owing of the debt, found the oath negative of the reference, and assoilzied the defender.

The Sheriff, on 24th July 1855, altered this judgment, and found the oath established the resting owing so far as the Sheriff-substitute had found the constitution of the debt established, and *quoad ultra* adhered; and remitted to the Sheriff-substitute to proceed with the cause. *

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* "NOTE.—The Sheriff agrees with the Sheriff-substitute regarding the extent to which the defender's deposition establishes the constitution of the debt. The idea that Smith was exclusively liable is founded on the pretence that he sent for the defender without necessity, which is contradicted by the defender's admission that he accepted the pursuer's attendance for a long course of visits; and is inconsistent with the anxious endeavour, throughout the deposition, to make out that the pursuer was paid out of the defender's own funds.

"The Sheriff has carefully considered the question of resting owing, but has been unable to arrive at the same conclusion with the Sheriff-substitute.

"It is not enough for a defender, who admits that he has not himself paid the debt, to depone in vague terms that he believes it to be paid;—he must state the grounds of his belief, that they may be judged of by the Court. In the present case the statement of the defender amounts to no more than this, that he had money in the hands of his brother-in-law Smith, with whom he had various transactions; that Smith was to pay Dr Crichton's account, as well as sundry others; that Smith never shewed the defender any account rendered by Dr Crichton, or voucher of his having paid such; that the defender never settled accounts with Smith, who left the country in his debt; but that Smith, on one occasion, assigned as a reason for withholding money from the defender, that he had accounts with Dr Crichton which he had paid, or would pay, on the defender's account. The defender adds, that he left funds in Smith's hands to pay the attendance on Mrs Campbell; 'but I am not sure whether Smith paid the doctor.'

"The Sheriff holds this statement to establish resting owing on the authority of several decided cases, where the circumstances were very similar. In Cooper v. Hamilton, House of Lords, 14th March 1826, 2 W. and Sh., p. 59, the defender deponed that he believed the account had been paid by his factor, and he was certain it had been paid, from his having settled accounts with him. The accounts were recovered, and they did not shew payment of the debt. The Court of Appeal, affirming the decision of the Court of Session, held resting owing to be established. In Mette v. Dalziel, 8 Shaw, p. 387, and the case of Goodall v. Newton, there reported in a note, it was held not to be enough for a defender to depone that he had given money to another to pay the debt, and that other told him he had paid it, without shewing him some receipt or evidence of having done so. The same principle ruled the decisions in the more recent cases of Paul v. Allison, 10th March 1841, where resting owing was held to be made out, and where Lord Jeffrey's note lays down the principles very clearly; and Mackay v. Ure, 7th March 1849, where the defence was sustained on a deposition contrasted with the present.

"Here the defender does not even go so far as to say positively that Smith told him he had paid the pursuer; and Smith did not stand to him in the relation of clerk or servant, or the usual disburser of his cash—a circumstance which has been held of weight in the cases above referred to.

"It is clear that the statements regarding purchases by the pursuer at the sale of the defender's effects must be disregarded, as compensation is, without doubt, an extrinsic quality. So the Sheriff-substitute seems also to have viewed it.

"The case has been remitted, that the rate of charge per visit, and the amount to be allowed for medicines, may be fixed; points which, it is conceived, will be very easy of adjustment. The Sheriff cannot but reprobate the random way in which the pursuer has stated his charges in the two accounts in process, which do not agree even in the number of visits or furnishings of medicines. It would seem to follow that he cannot be allowed more than the lower charges made; and if the Sheriff had been in a position to pronounce a decerniture disposing of the whole case, he would have found expenses due to the pursuer, only under modification."

The Sheriff-substitute then found the pursuer entitled to the sum of L.19, being for five visits to Mrs Campbell at Arihoulan, and for the visits to the defender at Glenevis, with interest on that sum from the date at which a claim for payment was first made, to which the Sheriff adhered. No. 142. — Mar. 6, 1857. Crichton v. Campbell.

The defender advocated. The Lord Ordinary pronounced this interlocutor:—"Repels the reasons of advocation: Remits the case *simpliciter* to the Sheriff, and decerns: Finds the respondent entitled to expenses," &c.*

The defender reclaimed, and pleaded:—The question to be decided was, whether non-payment was proved? The inference, from the long time that had been allowed to elapse, and the pursuer having made no claim when the defender obtained a settlement on a composition with his other creditors, was that the pursuer had been paid; he was bound, in order to prevail, to shew that the oath was conclusive of the fact of resting owing, which it was not.[1]

The pursuer pleaded;—The two things to be proved were the constitution of the debt and the resting owing; the evidence of each of these must be extracted from the oath, and must be different in character; the proof of the first must be affirmative, of the latter negative. The constitution of the debt was clearly proved by the oath, and there being nothing in it that could be held to prove payment, the pursuer must be held to have proved his case; for although it might be maintained that the defender had paid the money to his brother-in-law, that was no proof of payment to the pursuer.

Lord Justice-Clerk.—I am very unwilling to give effect to the oath in this case.

We must lay aside all consideration of the distance of time since the date of the attendances charged for by the pursuer.

If the oath of the defender had been to the effect that he did not know, at such distance of time, how the debt had been paid, but he was certain it had been paid, that oath would have been negative of the reference. But this person condescends upon his reasons for thinking that the debt has been paid. He says that Smith, who had funds of his in his hands, promised to pay the pursuer, but he does not say that Smith ever shewed him an account discharged by the pursuer, or that there was ever any settlement of accounts between himself and Smith, and he admits that he did not himself pay this debt. We cannot tell, from the terms of this oath, how the debt was paid. It would be introducing a very loose practice in regard to the effect of an oath, if such a statement, as is made by the defender here, of having paid a sum of money to another party to pay the debt, or allowed him to take credit for it, should be held to be proof of payment to the creditor. Where a party can prove a settlement by an arrangement to which there are fair grounds for holding that the creditor was a party, as in the case of Law v. Johnston, the case is very different. The pursuer never was a party to this alleged arrangement with Smith. Here there is just the defender's statement that Smith had funds of the defender's in his hands, but there is no statement that Smith ever shewed the defender a state of accounts shewing payment of the pursuer's claim, or any receipt from the pursuer. Considering the long time during which this claim has been allowed to stand over, and the high rates charged (but which have been considerably cut down by the Sheriff), I must, with reluctance, adhere to the judgment finding that resting owing has been proved.

Lord Murray.—The oath is distinct enough in the first portion of it, but vague when the defender was interrogated more closely. There is no statement that there was any voucher produced by Smith for the money paid to the pursuer; there

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* "Note.—The Lord Ordinary agrees with the judgment and views of the Sheriff, as developed in his interlocutor of 24th July 1855, and note attached to it."

[1] Paul v. Alison, 10th March 1841, ante, vol. iii. p. 874; Heddle v. Baikie, 17th June 1847, ante, vol. ix. p. 1254; Law v. Johnston, 9th Dec. 1843, ante, vol. vi. p. 301; Mackay v. Ure, 7th March 1849, ante, vol. xi. p. 982.

No. 142.
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Mar. 7, 1857.
Messer v. Simson's Trustees.

was not even a final settlement of accounts between the defender and Smith; all that is stated is, that Smith, when asked by the defender for money, said he would pay Dr Crichton; but there is a great difference between "would pay" and "had paid." I agree with your Lordship.

LORD COWAN.—I am of the same opinion. As regards the constitution of this debt, that is clearly established to the amount determined by the Sheriff. The defender exoners himself from the resting owing by his arrangement with Smith; but to that arrangement the creditor was not a party, as in the case of Law v. Johnston. To my mind it is perfectly conclusive that this case is distinct from that of Cooper v. Hamilton, 20th Feb. 1824, which was taken to the House of Lords, and decided there of date 14th March 1826. The words of the oath in that case were very clear, making reference to receipts in process; but it was found, on looking at these receipts, that their terms did not support the oath.

THE COURT pronounced this interlocutor:—"Recall *hoc statu* the remit to the Sheriff: *Quoad ultra* refuse the prayer of the reclaiming note, and adhere to the interlocutor reclaimed against: Find the reclaimer liable in the expenses incurred since the date of the reclaiming note: Allow an account," &c.

SANG & ADAM, S.S.C.—JOHN PATTEN, W.S.—Agents.

ADAM MESSER, Pursuer.—*Logan.*

No. 143. JOHN SIMSON AND OTHERS (Simson's Trustees), Defenders.—*Thomson.*

Process—Issue—Amendment of libel.—A summons of declarator of right to a moss contained a wrong description of it. The record having been closed, the pursuer proposed an issue, "Whether the piece of moss ground, described in the schedule hereunto appended," &c., and the schedule described the bounds of the moss correctly. The case having been reported on the adjustment of issues, the proposed issue was refused; and it was *held* incompetent to amend the libel so as to render the description in the summons conform to that in the schedule.

Mar. 7, 1857.
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1ST DIVISION.
Ld. Mackenzie
L.

A RECORD having been made up and closed in conjoined actions of declarator of right to a piece of moss or muir ground, the Lord Ordinary reported the case on the adjustment of issues.*

The issue proposed by Messer was as follows:—"Whether the piece of moss ground, described in the schedule hereto appended, is the property of the said Adam Messer? and whether, for forty years and upwards prior to 27th May 1856, the said Adam Messer, his predecessors and authors, have possessed the same free from any servitude of pasturage, or other servitude, on the part of the said trustees, their predecessors and authors?

"SCHEDULE.

"All and whole a piece of moss or muir ground, consisting of thirteen acres, one rood, or thereby, imperial measure; bounded the said piece of moss or muir ground on one side by the lands of Threepwood, on another

* "NOTE.—Dr Messer has committed a blunder in his summons regarding the description of the moss in dispute, and this seems a bar to his obtaining the issue proposed by him, with the view of trying the question, whether the moss is his property, till the error is corrected by an amendment of the libel, if this be still competent.

"It is understood that Simson's trustees do not claim the property of the moss in dispute as a part and pertinent of their lands. On the contrary, it was explained that they limited their claim to a right of servitude of pasturing cattle and cutting grass on the moss. The issue proposed by them in this view should be made more precise.

"If Simson's trustees admit that the *solum* of the moss is the property of Dr Messer, it is thought the whole question in dispute might be tried under the issue whether they have possessed the servitude claimed by them of pasturing cattle and cutting grass on the moss."

by the lands of James Robertson, on the third by those of Andrew Robertson and the heirs of Francis Halliday, and on the remaining side by ground belonging to Simson's trustees." No. 143. Mar. 7, 1857. Gale v. Bennett.

In his summons he described the moss as "a piece of moss or muir ground, consisting of thirteen acres, one rood, or thereby, being a part and portion of, and comprehended within the bounds and marches of the lands and estate of Nether Blainslie, the property of the pursuer;" whereas it was not so comprehended, but the error was avoided in the issue. In his condescendence, Messer averred that the moss, as stated in the summons, was comprehended in his lands, and the defenders denied that it was so comprehended. He now moved for leave to delete "and comprehended within the bounds and marches of," from the summons.

The defenders were not called on.

LORD PRESIDENT.—The description of this property in the schedule appended to the pursuer's issue is not in accordance with the conclusions of the summons, but quite the opposite. Where a party in this way changes the description of property he claims right to, one or other of two things must happen: Either the summons is irregular, because the averments do not support its conclusions, or it is a summons which concludes to have a piece of property declared to belong to a party, which, he says, is situated in one place, but which he afterwards wants to have it declared is situated in another place. I cannot conceive anything more *inter essentialia* than this, and I am quite averse to allow an issue where the conclusions of the summons are so opposed to the proposed terms of it.

LORD IVORY.—I have arrived at the same conclusion. The strict locality is of the substance of the case. The declaratory conclusions are at variance with the previous recital.

LORD CURRIEHILL.—I am of the same opinion; and I do not think we have the power to grant this issue. The pursuer would not be in safety to go to trial with it as the record stands. But the practical question is, whether we shall allow an amendment of the libel at this stage of the case, and whether, without contravening the Judicature Act, we can do so? The hardship, after all, resolves into a matter of expenses, for this party can avail himself of the statutory privilege of abandoning this action, and bringing another in which he may be careful to avoid the objection which has proved fatal to this one.

LORD DEAS concurred.

THE COURT pronounced the following interlocutor:—"Having heard counsel for the parties,—Find that under the summons as laid, and the record, the pursuer Dr Messer is not entitled to an issue of the property of the piece of ground as described in the schedule to his proposed issues; and *quoad ultra*, Remit to the Lord Ordinary to proceed farther in the cause as shall be just, reserving all questions of expenses, and granting power to the Lord Ordinary to dispose thereof."

HENRY MOFFAT, S.S.C.—JOHN COSENS, W.S.—Agents.

MRS JANE CAMPBELL OR GALE, AND JONATHAN W. GALE, Pursuers.—*Logan.* No. 144.
SAMUEL BENNETT, Defender.—*A. B. Shand.*

Process—Mandatory—Husband and Wife—Reparation—Slander.—An action was raised by a married woman, and her husband as her administrator in law and for his interest, concluding for damages for the publication in a newspaper of slanderous statements regarding the wife. The husband was a sailor employed in a cruising vessel belonging to a port in South Australia.—*Held* (affirming the judgment of the Lord Ordinary) that the defender was not entitled to insist that *ante omnia* a mandatory for the husband should be sisted. Mar. 7, 1857. 2D DIVISION. Ld. Ardmillan. R.

THIS was an action concluding for reparation and *solatium* for the loss, damage, and injury inflicted on Mrs Gale by the publication of an article

No. 144. — Mar. 7, 1857. Gale v. Bennett.

containing false and calumnious statements of and concerning her in the Dumbarton Herald newspaper, of which the defender is printer and publisher. The action was raised in the name of Mrs Gale, and Jonathan W. Gale, as his wife's administrator in law, and for his interest as her husband. It was stated that Mrs Gale was married in 1852. That in September 1854, her husband sailed in the capacity of steward on board the ship "Prince of the Seas" of Glasgow, on a voyage to Melbourne in the colony of Victoria. The vessel was wrecked on the Heads of Port Philip, and he being obliged to shift for himself, engaged as steward on board the cruising pilot cutter "Queenscliffe" of Melbourne, and had since continued to be employed on board that vessel. In these circumstances the defender pleaded,—That *ante omnia* the pursuers, at least the male pursuer, was bound to sist a mandatory.

Having heard counsel on this plea, the Lord Ordinary pronounced this interlocutor:—"Repels the said plea *in hoc statu*, and allows the preparation of the cause to proceed, in respect that the female pursuer resides in Greenock; that the action is for damages on account of slander personal to her, and that the male pursuer sues only as her administrator, and for his interest as her husband: Appoints Mr Donald Beith, S.S.C., Curator *ad litem* to the female pursuer." *

The defender reclaimed, and pleaded;—The action was really at the instance of the female pursuer. A married woman had never been allowed to sue for damages and *solatium* without her husband or a mandatory for him, unless where he refused to join her in the vindication of her character,[1] or where she had been carrying on a business which was injured,[2] or, as in one case, where the pursuer was a widow and sued as her husband's executrix.[3] The judgment reclaimed against seemed to have gone on the principle that the defender was not entitled to any security for the expenses of the litigation if he was assoilzied.

Lord Justice Clerk.—I don't think that we can stop proceedings in this case until a mandatory be sisted, the defender not alleging that the male pursuer refused to concur in the action.

Lord Cowan.—I cannot hold that a married woman is not entitled to right herself when her character is attacked, even without her husband's concurrence. I do not think the defender's demand ought to be complied with by the Court.

Lord Murray concurred.

Lord Wood absent.

The Court adhered, reserving the question of expenses.

W. Mason, S.S.C.—Hill & Robertson, W.S.—Agents.

* "Note.—The pursuer residing in Greenock, while her husband is at sea, brings this action for vindication of her character, and for such reparation as law can award for personal slander. It was stated by her counsel, that her husband is expected to be soon in this country. It is settled by the decisions in Mackenzie or Cullen v. Ewing, 19th November 1830, and Smith v. Stoddart, 5th July 1850, that a wife can sue such an action independent of her husband. A curator *ad litem* is appointed; and the Lord Ordinary does not think that a mandatory can be required at present."

[1] Finlay v. Hamilton, February 15, 1748, M. 6051; Mackenzie v. Ewing, Nov. 19, 1830, ix. S.D., p. 31, affirmed, July 24, 1833, i. Sh. Sup. 101.

[2] Milne v. Gauld's Trustees, January 14, 1841, ante, vol. iii., p. 345.

[3] Smith v. Stoddart, July 5, 1850, ante, vol. xii., p. 1185.

Peter Robertson, Pursuer.—*Patton—A. B. Shand.* No. 145.
Alexander Menzies, Defender.—*Penney—Scott.* Robertson v. Menzies.

Lease—Joint tenancy—Assignation—Acquiescence and homologation.—A farm was let to two tenants, and the survivor of them, and the heirs of such survivor. The tenants (for their own convenience) divided the farm, and each paid the rents and burdens effeiring to his half. One of them assigned his right under the lease to a nephew, and soon after died; the assignee continued in possession for more than a year, and paid his share of the rent. His name also was entered in the landlord's rental book as joint tenant;—*Held* (affirming judgment of Lord Mackenzie) that the assignation could not overturn the rights of the other tenant under the lease, he having been no party to it, and that the acts libelled did not amount to acquiescence in, and homologation of the assignation, and were not such as to prevent him from vindicating his right as sole tenant of the farm under the lease.

Mar. 10, 1857.
1st Division.
Lords Deas & Mackenzie.
L.

The nature of the deeds which gave rise to the question in this case, and the pleas of parties, are fully embodied in the note appended by the Lord Ordinary to the following interlocutor, pronounced by him on 22d May 1855:—"Finds, that by a lease, dated 27th April and 1st May 1843, the *curator bonis* of John Duke of Atholl let the farm of Westerton to the late John Malcolm and the pursuer, and the survivor of them, and the heirs of such survivor, but secluding assignees and subtenants, and that for nineteen years from Whitsunday 1843 as to the houses and grass, and the separation of that year's crop from the ground as to the arable lands; but subject to this condition, that the lease should come to an end at the first term after the Duke's death, unless the heir of entail entitled to succeed to the estate should agree to allow it to run to its natural termination: Finds that the pursuer and the late John Malcolm entered into possession of the farm of Westerton under this lease: Finds that after the death of the late John Duke of Atholl, in September 1846, the pursuer and the late John Malcolm were accepted as joint tenants under the lease by the present Duke: Finds that the late John Malcolm, on 21st April 1851, executed an assignation on the back of the lease, whereby he assigned to the defender his whole right and interest in the said lease: Finds that the said John Malcolm died in August 1851: Finds that the defender entered into possession of that part of the farm of Westerton previously occupied by Malcolm, and reaped the half of the crops in 1851, 1852, and 1853, and that he paid to the landlord the half of the rents for these years: Finds that on the 6th July 1853 the pursuer's agents wrote to the defender, intimating that he had no right or title to interfere with the lease, and requesting him to remove from that part of the farm possessed by him: Finds that, in consequence of the defender's refusal to comply with that request, the present action of declarator and removing was raised against him: Finds that, according to the special terms of the lease which was granted to the late John Malcolm and the pursuer, and the survivor of them, it was *ultra vires* of the said John Malcolm as one of the joint tenants, without the pursuer's consent, to assign his half share or interest in the lease to the defender, so as to deprive the pursuer of his right to succeed to the whole lease as the last survivor after Malcolm's death: Finds that the pursuer, as the last survivor, has now the sole right as tenant to the lease of the farm of Westerton, and is entitled to the exclusive possession thereof till the expiry of the said lease: Finds that the defender has no legal title to the said lease as tenant or joint tenant in whole or in part, and is bound forthwith to remove from the said farm: Therefore, repels the defences, and to the above extent, finds, decerns, and declares in terms of the libel, and decerns and ordains the defender to flit and remove himself, his family, servants, goods, and gear, from the said farm of Westerton, and leave the same void and redd, to the end that the pursuer

No. 145. may, as sole tenant thereof, occupy and possess the same during the whole remaining years of the said tack yet to run; reserving to both parties all other claims in the premises, and all objections thereto, as accords: Finds the defender liable to the pursuer in expenses." *

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* "NOTE.—The object of this action, which was raised in March 1854, is to have it found and declared that the pursuer has now the sole right as tenant to the lease of the farm of Westerton, granted by the *curator bonis* of the Duke of Atholl in 1843 in favour of the pursuer and the late John Malcolm, and the survivor of them, and that the defender, as assignee of Malcolm, has no right to interfere with the lease, and is bound to remove from the farm. By a lease, dated 27th April and 1st May 1843, the *curator bonis* of John Duke of Atholl let the farm of Westerton 'to the said John Malcolm and Peter Robertson, and the survivor of them, and the heirs of such survivor, the eldest heir-female always succeeding without division, but secluding assignees of every description, and subtenants, and possessors for behoof of creditors,' and that for nineteen years from Whitsunday 1843 as to the houses and grass, and the separation of that year's crop from the ground as to the arable lands. It was declared, however, that the lease should come to an end at the first term after the Duke's death, unless the heir of entail entitled to succeed to the estate should agree to allow it to run to its natural termination. The pursuer and John Malcolm entered into possession of the farm of Westerton as joint tenants under this lease. For their own convenience they agreed to divide it into two separate portions, Malcolm having occupied the eastern and the pursuer the western division, while a small park was possessed in common. Each of the tenants paid half of the rent to the landlord.

"After the death of the late John Duke of Atholl, in September 1846, the pursuer and Malcolm were accepted as tenants by the present Duke. A minute was written on the back of the lease, bearing that the Duke renounced the power to put an end to the lease, and accepted the pursuer and Malcolm as tenants for the period still to run; 'but always under the conditions, provisions, and restrictions mentioned in the said lease, and also under the provisions after written.' This minute was duly subscribed before witnesses by the pursuer and Malcolm, on 12th February 1849; and, though it is not signed by the Duke, it was homologated and acted upon by him.

"The defender, Alexander Menzies, is the nephew, but not the heir-at law, of the late John Malcolm. On the 21st April 1851, Malcolm executed an assignation on the back of the lease of Westerton, whereby he assigned and made over to the defender 'my whole right and interest in the within written lease or tack, surrogating and substituting him, the said Alexander Menzies, in my full right and place of the premises.' This assignation was duly intimated to the landlord on 22d April 1851.

"In August 1851 John Malcolm died, leaving a trust-disposition and settlement, whereby he directed his trustees to make over to the defender the whole crop, stocking, and effects on the farm belonging to him at the time of his death.

"In April 1851, the defender entered into possession of that part of the farm of Westerton, including the dwelling-house and range of offices previously occupied by Malcolm; the defender continued in possession after Malcolm's death; he was allowed to reap the half of the crops, and to pay the half of the rents and other public and parochial burdens; his name was entered in the rental-book of the landlord as joint tenant along with the pursuer; and, although the pursuer alleges generally that he objected to the defender's possession, it does not appear that any serious attempt was made to disturb it till on or about the 6th July 1853, being upwards of two years after the date of the assignation, and nearly two years after Malcolm's death. On that date the pursuer's agents wrote to the defender, requesting him to remove from that part of the farm possessed by him; although it is explained on the record that this requisition was only intended to apply to the defender's removal at Martinmas 1853. The defender having declined to remove, the pursuer adopted proceedings against him in the sheriff court; and these, having been unsuccessful, were followed by the present action of declarator and removing.

"1. In this state of the facts the first question which arises is, Whether it was in

The record had been closed on 20th July 1854, and diligence granted against havers on 23d December 1854, and on 3d February 1855 a minute

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the power of Malcolm, as one of the joint tenants, to assign his half-share or interest in the lease to the defender without the pursuer's consent, so as to deprive the pursuer, as the last survivor, of his right to succeed to the whole lease on Malcolm's death? It was argued by the defender that the clause in the lease founded on by the pursuer was a mere gratuitous destination, which Malcolm was entitled to alter at pleasure; that this was effectually done by the assignation in favour of the defender; and that, if the landlord did not object, no other party could do so. To this it was answered by the pursuer that, looking to the special provisions of this lease and the strong *delectus personæ* necessarily implied in joint tenancy and the mutual relations arising therefrom, it was very questionable whether Malcolm could validly assign his interest in the lease, even during his own lifetime, without the pursuer's consent; but that, even supposing Malcolm could do so, he had no power to defeat the rights of the pursuer as last survivor under the lease; that this was not a proper case of gratuitous destination, the rights of the joint tenants being regulated by a mutual onerous contract, whereby the life of one party was set against the other, and it was stipulated that, on the death of either, the whole right to the lease should accrue to the survivor and his heirs, and that this express condition of the contract could not competently be altered or set aside by one of the joint tenants without the written consent of the other. Though the Lord Ordinary is not aware of any case precisely similar to the present, he is humbly of opinion that Malcolm had no power, without the pursuer's consent, to grant any assignation to the defender which could have the effect of defeating the pursuer's right to succeed to the whole lease as the last survivor.

"2. Another point maintained by the pursuer was, that the assignation granted in favour of the defender by Malcolm was a mere conveyance of his 'whole right and interest in the within written lease;' that this could only carry Malcolm's half-share or interest in the lease during his life, but nothing after his death; and that Malcolm did not alter or attempt to alter the clause of substitution in the original lease in favour of the last survivor of the joint tenants, even supposing he had power to do so. Though there is some plausibility in this view, the Lord Ordinary would not be inclined to adopt it if he was prepared to hold that Malcolm had full power to dispose of his half-share of the lease, not only during his life but after his death, without the pursuer's consent; because, upon that hypotheses, he thinks the assignation would be sufficient to support the defender's claims.

"3. But the chief difficulty which the Lord Ordinary has felt in disposing of this case has arisen from the conduct of the pursuer in permitting the defender after Malcolm's death to continue in possession of the half of the farm, to reap the half of the crops, to pay the half of the rents and public burdens, and to exercise all the powers and rights of a joint tenant under the lease; and all this apparently without challenge or interruption, till about the 6th July 1853, when his agents formally required the defender to remove from the farm. Assuming the defender's title under the assignation to be defective, the question remains, What effect is to be given to the proceedings which took place during this long period, in the course of which it is said, various improvements were executed by the defender, not only upon that part of the lands separately occupied by him, but upon the field possessed in common? It is not improbable that the pursuer was ignorant of the true nature of his rights under the lease till he consulted his law-agents in July 1853, when, for the first time, written notice was given to the defender to remove from the farm at Martinmas following. Be this as it may, if the Lord Ordinary be correct in holding that, on the death of Malcolm, the pursuer acquired the sole right to the lease, it follows that the defender could not insist on retaining possession of any part of the farm during the remaining years of the tack without a written title from him. The circumstance that the defender was allowed by the pursuer to remain in possession of the half of the farm for about two years after Malcolm's death may preclude the pursuer from calling him to account for his possession during that period, and may give rise to other questions, if money was *bona fide* expended by the defender in meliorations or improvements; but it is thought this cannot supply

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was tendered by the defender, averring that at the first term after Malcolm's death the pursuer and defender both attended at the collection of rent, when Malcolm's name was deleted from and the defender's entered in the rental-ledger. The pursuer was, upon the above occasion, aware of the deletion and entry, and that the defender was substituted for Malcolm as the joint tenant of the farm during the endurance of the lease. He approved of the insertion of the defender's name as such joint tenant along with him for the remainder of the lease; the subsequent payments of rent were made "on the faith of the foresaid entries, and of this adoption and reception as joint tenant for the full period of the lease." The Lord Ordinary "in respect it appeared to him, as intimated in the course of the debate, that the general averments made by the defender ought to be made more precise and specific, had allowed the minute to be received with that view, and to form part of the process, and appointed the pursuer to answer it."

The pursuer, who denied all knowledge of the assignation by Malcolm, denied this new allegation, except as to the fact of the entry in the rental, and the fact of the payment of rent, and then protested against the minute being held part of the record, on the ground that it was not merely an explanation of any statements in the record, but contained totally new matter, involving a new ground of defence which had occurred to the defender since the examination of havers.

The defender reclaimed, praying the Court to to assoilzie him, with expenses; or otherwise to allow the statements in the minute given in under interlocutor of 3d February to be added to the record, and, if necessary, to open up the record to that effect, and to allow a proof.

At advising,—

Lord President.—I say nothing as to the value of the averments in this minute, nor whether they would make the record very materially different from what it is, but I see no reason for allowing the minute to be added. The parties had ample opportunity of making up their record, and they did make such averments as they thought the facts would warrant. I see no good reason, therefore, for allowing the record to be meddled with by importing this minute into it.

That being so, the defender prays to be allowed to prove the facts averred by him in the record—and which are indicated in this document—in order to establish the fact of his being now in full right of Malcolm's share of this lease, and that he cannot be excluded from it. The view which presents itself to me, in the first place, in regard to the lease itself, is that it was a lease in favour of John Malcolm and Peter Robertson, and the survivor of them, and the heirs of such survivor. That is a question which does not admit of construction, and, therefore, I hold that if John Malcolm had died without having made any assignation of his interest, Robertson, being the survivor, would undoubtedly have been tenant in full possession. The arrangement between the parties, whereby, during the currency of their possession, they separated the lands to be occupied by them, did not affect this question of survivorship. But Malcolm, during his life, having assigned his right to the defender Menzies, the question comes to be, whether or not under that assignation, or under that assignation coupled with the facts averred, the right of possession under this lease until the termination of it, if he is not the survivor, belongs to

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the want of a proper written title from the pursuer, so as to enable the defender to maintain his possession after his right to do so is objected to during the remaining years of the lease. On the whole, therefore, though the question is not free from difficulty, the Lord Ordinary has come to be of opinion that, in the absence of a consent in writing by the pursuer, the alleged acts of acquiescence founded on by the defender are not sufficient in law to entitle him to insist in continuing in possession of the farm as joint tenant during the remainder of the lease.

"Of course all claims of accounting by the pursuer, and all claims for meliorations by the defender, as well as all objections against the same, are reserved, as they cannot competently be disposed of in the present action."

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Robertson v. Menzies.

Menzies as assignee of Malcolm? and a farther question might arise as to what would be his interest in the event of the death of Robertson? But the first question is, how far did he acquire right to continue in possession in these lands? The assignation transferred to Menzies Malcolm's right and interest, and apparently under that assignation Menzies was admitted into possession, and did possess for some time during the life of Malcolm. The averment that is made here is intended not to support merely the recognition of Menzies as assignee of Malcolm in any sense whatever, but to support his pretension as assignee to the full extent now set forth. Robertson may have consented or agreed to or acquiesced in the reception of Menzies as tenant with him during the life of Malcolm, without consenting to receive him as joint-tenant in the event of Malcolm's death. This would not exclude him from the right of survivorship under the lease which might emerge on the death of Malcolm, but what is contended here is, that he did so exclude himself from that right, either by allowing Menzies to get into possession under the assignation, or by those other actings which are said to have taken place with the landlord himself.

It is not a sound interpretation of the actings of a party to adopt, that when the effect of the actings may be to deprive that party of the rights that he possesses under writing, you are necessarily to construe these acts in the largest sense so as to deprive him of these rights. I am far from saying that Robertson might not have raised a question as to the admissibility of Menzies at all into this joint-tenancy. But there is nothing stated which fixes Robertson in the position of having recognised Menzies as coming in place of Malcolm's personal possession—that is, during Malcolm's life. The joint payment of a year's rent after Malcolm's death is another matter. That comes to be of importance on considering whether he surrendered his right to exclude Menzies from becoming tenant with all the rights which Malcolm would have had had he survived. But, of itself, it does not amount to a surrender of that right. These averments are not sufficient to overturn the right which Robertson had under the original lease, or to import that he ever surrendered these rights; and therefore I am, on the whole, of opinion that the Lord Ordinary has arrived at a right result.

Lord Ivory.—There was a portion of this case which I had not the advantage of hearing, viz., the argument for the pursuer in whose favour I am to decide, but, as I have heard all that is to be said for the defender, I have no hesitation in saying that I entirely concur. As to the construction of the lease, there is no room for question. It is clearly a lease with survivorship; and as to the rest of the case, I see no reason to differ from the conclusion of the Lord Ordinary.

Lord Curriehill.—I also concur. The construction of the original lease is clear. Robertson contracted for half of the rights under this lease; but in the event of his being the survivor, it was provided that he and his heirs should have right to the whole, and of course Malcolm contracted on the same footing. The rights of parties and their heirs were ultimately to depend on the survivorship. But one thing is plain, that after the death of either of them there was to be only one tenant, and that tenant was to be the survivor, and his heirs. What Malcolm conveyed to Menzies was only the right, such as it was, which he himself had under his lease. But according to the construction contended for, he conveyed the right to one-half of the lease after his own death—when his own right was to cease, and when therefore neither he nor his heirs had any right to it; so that if the assignee should survive Robertson, then although Robertson was the survivor of the two parties to whom the lease was originally granted, and although his heirs, by the terms of the lease, would then have right to the whole of it, yet Robertson's heirs would then be excluded altogether, and thus, according to the construction now contended for, that conveyance by Malcolm of what he, by taxative words, limited to his own right, would be held to be a conveyance of rights which did not belong to him but to Robertson, because he was conveying a right to that half which would have belonged to Robertson in the event of his being the survivor. Now that is rather a violent construction to put on this conveyance, more especially as Robertson himself was no party to it. I cannot hold that that was the meaning of Malcolm, but only that he conveyed such right, present and contingent, as he himself then had. Then, the question is, Did Menzies, after he entered into possession, acquire any other right after the possession commenced; and, in particular, did he thereby

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acquire from Robertson the right which Robertson had under the lease? for that is what it comes to. Now, when you bring the question to that issue, it is very clear that all these proceedings can have no such effect.

Lord Deas.—I agree with your Lordships, both as to not allowing the minute to be added to the record, and on the merits. Parties must attend to their records in framing them, or take the consequences. As regards the terms of the lease, I think the sole right of the survivor is just as much part of the contract as his joint right during the lifetime of both. It is true the words applicable to the heirs of the survivor are just as express as the words applicable to the survivor himself. But the difference lies in this: the heirs of the survivor were no parties to the contract, and any right conferred on them was a mere right of succession, which the survivor, if the landlord did not object, might defeat. It is on this principle that a lease to a person and his heirs, secluding assignees and sub-tenants, may be assigned by the tenant if the landlord does not object,—a principle which does not at all apply to the right of survivorship contracted for by two joint tenants.

As to the other point: the defender must either rest on homologation of the assignation, or on homologation of the entry in the landlord's rental book. But, unfortunately, homologation is here required for two purposes: *first*, to put a certain construction on the assignation and entry in the rental book, which they do not *ex facie* bear; and *second*, to homologate, or rather to adopt, the assignation or the entry (which are not the writ of the pursuer) as being his writ. I do not think we have here averments relevant to infer homologation to either of these effects, and still less to both.

The Court pronounced the following interlocutor:—"Having heard counsel in this cause for the parties, and advised the reclaiming note No. 68 of process, refuse to allow the statement in the minute No. 66 of process, given in under the interlocutor of 3d February 1855, to be added to or to form part of the record: Adhere to the interlocutor of the Lord Ordinary submitted to review, and refuse the reclaiming note; and allow decree to go out *ad interim*: Find additional expenses due, and remit," &c.

John Marshall, S.S.C.—Hill & Robertson, W.S.—Agents.

No. 146. Henry Smith and Mrs Seney Willey and Mandatory, Pursuers.—*Patton—Gordon.*

The Caledonian Railway Company, Defenders.—*D. F. Inglis—Monro.*

Process—Issues—Patent.—Form of issues adjusted to try a question of alleged contravention of patent for "an improved wheel for carriages of different descriptions."

Mar. 10, 1857. — 1st Division. Ld. Mackenzie. L.

This case was reported on the adjustment of issues. The action concluded for L.3000 of damages against the Caledonian Railway Company for an infringement of letters patent for "an improved wheel for carriages of different descriptions," and of which the pursuers were assignees. The following were the issues proposed by the pursuers, and the counter issues proposed by the defenders:—

"It being admitted that John Day, of York Terrace, Peckham, in the county of Surrey, on 25th November 1835, obtained letters patent under the Seal used in Scotland in place of the Great Seal of Scotland, on 20th January 1836, to subsist for fourteen years from and after said 25th November 1835, being No. 14 of process, and that, *in terms of the proviso contained in the said letters patent*, he *duly* enrolled a specification, being No. 15 of process:—[The words in italics objected to by defenders.]

"It being also admitted that the said John Day, by an indenture, dated 15th August 1845, sold and assigned unto the pursuer Henry Smith, and to Thomas Willey of Liverpool, engine-manufacturer, now deceased, their executors, administrators, and assigns, the said letters patent, and all right

competent to him, the said John Day, under the same, for the residue of the term of fourteen years granted by the said letters patent:

"It being also admitted that the pursuer Mrs Seney Willey is in right of the said deceased Thomas Willey's interest under said patent, as executrix under his last will and settlements:

"Whether, between the said 15th day of August 1845 and 25th November 1849, or during any part of said period, the defenders did, by themselves or others, wrongfully, and in contravention of the privileges conferred by the said letters patent, manufacture or use wheels for engines, tenders, and other carriages, substantially the same, *and manufactured by the same process*, with the wheels described in said specification, and to the extent set forth in the said letters patent and specification, to the loss, injury, and damage of the pursuers?—[The words in italics proposed to be added by the defenders.]—Or,

"1. Whether the invention, as described in the said letters patent and specification, *or any material part thereof*, is not the original invention of the said John Day?—[The words in italics objected to by the pursuers.]

"2. Whether the description contained in the said specification is not such as to enable workmen of ordinary skill to make the wheels therein mentioned, according to the process of manufacture therein mentioned?

"3. Whether the process of manufacture described in the said specification, *or any material part thereof*, is not practically useful for the purposes set forth in the said letters patent?"—[The words in italics objected to by the pursuers.]

The case was called on 3d March, when the defenders objected to the form of the pursuers' issue, in respect it did not specify what the infringement was, nor which of the two things complained of had been done—whether the defenders had manufactured wheels according to the pursuers' patent, or whether they had merely used the product of such manufacture? The pursuers proposed to separate these two things, and amended issues were lodged as follows:—

"1. Whether, between the said 15th day of August 1845 and 25th November 1849, or during any part of said period, the defenders did, by themselves or others, wrongfully, and in contravention of the privileges conferred by the said letters patent, use the invention, described in the said letters patent and specification, in manufacturing wheels for engines, tenders, or other carriages, to the loss, injury, and damage of the pursuers?

"2. Whether, between the said 15th day of August 1845 and 25th November 1849, or during any part of said period, the defenders did, by themselves or others, wrongfully, and in contravention of the privileges conferred by the said letters patent, use wheels for engines, tenders, or other carriages, in the manufacture of which the invention described in the said letters patent and specification was used, to the loss, injury, and damage of the pursuers?"

J. F. Inglis, for the defenders;—In regard to the first issue it is extremely doubtful how far the manufacture of wheels is an infringement of the patent, unless these are used or sold, therefore the words "for use," or some such words, ought to be added; and in regard to the second issue, in order to give it relevancy to this question, it is necessary not merely that the use of the manufactured wheel shall be said to be in contravention of the patent, but that it shall be shewn that the manufacture of these wheels by means of the patent is of itself an infringement of the patent, for otherwise the use of the wheels would not be unlawful. Farther, there is no date given, and unless it be such as entitles the pursuers to complain, the use of the wheels is not unlawful.

LORD PRESIDENT.—The words "in contravention of the letters patent" imply

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that the use was subsequent to that date. I am not for holding that it is incompetent for the pursuers to shew the date of the manufacture to have been subsequent to their assignation, the date of which they have given.

The following issues were approved of:—

It being admitted, &c. (as before, the words in italics being omitted.)

"1. Whether, between the said 15th day of August 1845 and 25th November 1849, or during any part of said period, the defenders did, by themselves or others, wrongfully, and in contravention of the said letters patent, use the invention, described in the said letters patent and specification, in manufacturing for use, wheels for engines, tenders, or other carriages to the loss, injury, and damage of the pursuers?

"2. Whether, between the said 15th day of August 1845 and 25th November 1849, or during any part of said period, the defenders did, by themselves or others, wrongfully, and in contravention of the said letters patent, use wheels for engines, tenders, or other carriages, in the manufacture of which the invention described in the said letters patent and specification had been used in contravention of the said letters patent, to the loss, injury, and damage of the pursuers? Or,

"1. Whether the invention, as described in the said letters patent and specification, is not the original invention of the said John Day?

"2. Whether the description contained in the said specification is not such as to enable workmen of ordinary skill to make the wheels therein mentioned according to the process of manufacture therein mentioned?

"3. Whether the process of manufacture described in the said specification is not practically useful for the purposes set forth in the said letters patent?

"Damages L.3000."

Robert Rutherfurd, W.S.—Hope & Mackay, W.S.—Agents.

No. 147. John F. Anstruther (Macfarlane's Executor), Pursuer.—*Cook—Mill*
John Carment (Tutor *ad litem* to Miss A. S. Macfarlane), Pursuer.—*M*
Margaret Macfarlane or Mitchell, and Jonh Cullen, Defenders.—
D. F. Inglis—Penney—Young.

Process—Declarator—Reduction—Competency.—Pending an action agai brother and sister, to have it found that funds deposited in bank in name of sister really belonged to the brother, against whom the pursuer held a decree, brother died; the sister's agent paid the pursuer's claim, and took an assign of the decree in his own favour. In an action at the instance of the broth executor against the sister and her agent, concluding for declarator that the mo paid, in consideration of which the assignation was granted, was a part of brother's estate; that the sums assigned belonged to the pursuer, and that assignee should be decerned to "deliver" the decree to him;—*Held* (affir judgment of the Lord Ordinary, *diss.* Lord Justice-Clerk, *abs.* Lord Wood), that action was competent, and *objection* that reduction of the assignation in favo the agent was essential, *repelled.*

Jury Trial—Issues.—Form of issues adjusted to try the questions raised in action.

Process—Reduction—Trust—Absolute disposition.—An action of reduction of assignation, which bore to be in consideration of a fair price, on the allegation it was gratuitous, and in trust only;—*Held* (altering the judgment of the L Ordinary) incompetent, there being no conclusions declaratory of trust.

Process—Reclaiming days.—A reclaiming note against an interlocutor rep an objection to the competency of an action does not require to be presented wi ten days.

See ante, vol. xvii. pp. 97, 98, 228, 302, 657, 750; vol. xviii. pp. 592, 1043.

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2D DIVISION.
Ld. Mackenzie I.

The late John Macfarlane, and his brother-in-law John Fulton Anstruther as joint owners of the ship "Reginald Heber," were sued by Dobie and Company and their mandatory for L.439, the amount of an account for repairs on the ship, supplied by them at the Cape of Good Hope, where she put in to repair damages in the course of a voyage from Calcutta. Dobie and Company obtained decree in absence. Anstruther stated to Dobie's agent that he had no means to pay his share of this sum, and offered L.55, as having been supplied by his friends, for a discharge of the claim. This was not accepted. When the decree was about to be enforced against Macfarlane, he left Greenock, having previously granted an assignation of his household furniture to his sister, Mrs Mitchell, which bore to be in consideration of the payment by her of L.72, and also granted in her favour a bond and disposition in security over some property belonging to him in the Bay of Newark, near Port-Glasgow. He also uplifted his funds from the bank, and redeposited various sums on receipts in name of his sisters; and, in particular, a sum of L.500 was so deposited in the Royal Bank of Scotland at Glasgow. The sole partner of the firm of Dobie and Company died, his son and executor, Richard Paxton Dobie, used arrestment in the hands of the bank against Macfarlane, and raised an action of reduction, declarator, and furthcoming against him and Mrs Mitchell, concluding for reduction of the deposit-receipt for the sum of L.500, so far as it bore to be her property; for declarator, that the money was Macfarlane's property, and liable for his debts, and that the Royal Bank and their cashier should be decerned to pay the same to Dobie, or at least so much as should be necessary to satisfy his claim against Macfarlane. Mrs Mitchell defended the action; in 1853, while it was in dependence, Macfarlane died. After his death issues were adjusted for trial by jury. Before the date of the trial, Mr Cullen, Mrs Mitchell's agent, acting on the advice of counsel, paid the debt due to Dobie and Company, and took an assignation from Dobie in his own favour to the decree.

Macfarlane left a settlement, whereby his whole property was disponed to his only child Annabella Sinclair Macfarlane; of those appointed his executors and tutors and curators to his daughter, Anstruther alone accepted. Cullen charged Anstruther for payment of the sum in the decree assigned to him; but, in a suspension of the charge, he insisted in it only to the extent of the proportion effeiring to Anstruther's share in the "Reginald Heber," which Anstruther consigned. The case was suspended to allow an action to be brought to try the validity of the assignation; but warrant was granted to Cullen to uplift the consigned money, on finding caution to repeat, in the event of the assignation in his favour being reduced or found to be in trust for Mrs Mitchell, who, Anstruther said, had advanced the money with which Dobie and Company had been paid out of funds belonging to her brother. As his executor, he now raised an action of count and reckoning against Mrs Mitchell and her sister. He also raised the two actions now disposed of in his own name, as Macfarlane's executor, and in the name of Miss Macfarlane; to whom in both a curator *ad litem* was appointed. These actions were—1st, an action against Mr Cullen and Mrs Mitchell, concluding for declarator that the money with which Cullen paid the debt due to Dobie and Company was really a part of Macfarlane's funds advanced through him for that purpose by Mrs Mitchell. That neither Mrs Mitchell nor Cullen was entitled to uplift from the pursuer as an individual, or the representative of Macfarlane, the sums contained in the assignation, and that they should be decerned to transfer the same to the pursuer, as Macfarlane's executor, and deliver up to him the decree at Dobie and Company's instance;

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and 2d, an action against Mrs Mitchell, concluding for reduction of the assignation of his furniture granted by John Macfarlane, and for redelivery thereof, or payment of its value.

I. In the action of declarator it was alleged that John Macfarlane and his sisters had, with the view of defeating Dobie and Company's diligence, or of throwing the whole of the debt due to Dobie and Company by him and the pursuer as joint owners of the "Reginald Heber" upon the pursuer alone, uplifted a sum of L.1200, lying in the Greenock Bank at his credit, and paid it into the Royal Bank at Glasgow, on a deposit-receipt in name of the defender, Mrs Mitchell, and her sister; by subsequent drafts and payments the sum deposited in the bank varied; he reduced it to L.1040, and afterwards paid in various other sums. After his departure from Scotland, the defender, Mrs Mitchell, and her sister, shifted the money from one bank to another, sometimes taking receipts in name of both, and sometimes only in Mrs Mitchell's name. That the money paid in satisfaction of the debt to Dobie and Company was truly part of this money belonging to Macfarlane, and the assignation in favour of Cullen was taken in his name for the fraudulent purpose of enabling Mrs Mitchell again to possess herself of the money she had so advanced.

Cullen pleaded;—This action was incompetent, as an attempt summarily to deprive him of what was effectually vested in him by a valid and formal assignation constituting him the assignee of the proper creditor, which could not be set aside, except by a reduction or declarator of trust. It was implied by the judgment of the Court in the process of suspension, at Anstruther's instance, of the charge given on the assignation, that it could not be impugned or set aside unless actually reduced, or found to be in trust for Mrs Mitchell, the alleged debtor to Macfarlane's estate. The averments of the pursuers were not relevant to support the conclusions of the summons against Cullen, whose position was that of an onerous and *bona fide* assignee, of which the assignation, while unreduced, was *probatio probata*. Even in a declarator of trust, the terms of the assignation and the consideration therefor could only be redargued by the writ or oath of the assignee. And in respect the funds, in consideration of which the assignation was granted, having been truly advanced by Cullen, the action was groundless.

The same grounds of defence were stated for Mrs Mitchell. It was pleaded for her besides;—The allegations were not relevant, because, even supposing she had, as custodier of her brother's funds, applied part of them in paying her brother's debt, the consequence would be the extinction of that debt. She might be liable to account in a proper action, but to that end this action was wholly inapplicable.

The Lord Ordinary pronounced this interlocutor:—(After repelling a plea stated by the defenders, but not insisted in, that the pursuer being neither decerned nor confirmed as Macfarlane's executor, had no title to sue; but reserving the defenders' right to insist on confirmation before extract)—"Finds that there is no incompetency in the conclusions of the summons: Finds that the averments of the pursuers are relevant to support these conclusions: Repels the defence so far as inconsistent with these findings, and decerns: Appoints the cause to be put to the roll, in order that parties may be heard as to further procedure, and, in the meantime, reserves all questions of expenses." *

* "NOTE.—There seems no doubt of the title of the pursuers to insist in this action, and the objection on this point was not pressed in the discussion before the Lord Ordinary.

"What the defenders maintained was, 1st, That as the summons contains no

The defenders reclaimed. In addition to the argument urged before the Lord Ordinary, they pleaded;—That as there had been already brought into Court an action of count and reckoning at Anstruther's instance against Mrs Mitchell, the present action was unnecessary for any purpose he could have in view.

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The pursuer answered;—This was a process for declarator that the pursuer, as Macfarlane's representative, had right to what was conveyed by the assignation to Cullen. The action was brought in that form, because the money in respect of which the assignation was granted was part of Macfarlane's funds. It depended on the circumstances of each case, whether it was necessary, in order to displace a party who stood on a probative deed, to have recourse to a reduction or declarator of trust.[1] If the pursuer set forth circumstances in which he was entitled to a right, that right might be competently sued for by a declarator.[2] In this case a declarator was the most proper form of action. The pursuer had no interest to reduce the assignation, it being a good conveyance from Dobie and Company. His interest was to have the nature of Cullen's right under the deed declared, and him (Cullen) decerned to transfer it to the pursuer.[3]

Lord Justice-Clerk.—While the details of the facts which the pursuer proposes to prove are singular and complicated, the competency of the action depends, in my opinion, on one simple fact—that Cullen holds an absolute and unqualified assignation, *ex facie* regular and complete, vesting him in the right to the debt owing to, and decree obtained therefor by, Dobie and Company.

The pursuer Anstruther was a joint debtor under that decree. Cullen having, as the assignation at least bears, paid the debt, charged Anstruther on that decree. The procedure which followed is set forth by the pursuer. By our interlocutor of

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reduction of the assignation, and no declarator of trust, the conclusions to have it found that the pursuer Anstruther, as executor of Macfarlane, has a right to the debt, and that the defenders are bound to make it over to him, are incompetent; and 2d, That, at all events, the averments of the pursuers are not relevant to support the conclusions of the action.

"As to the first point, the pursuers state that a reduction of the assignation would not accomplish their object; that this would have the effect of leaving the debt with Dobie; and that they are entitled to have it made over to them for the benefit of Macfarlane's estate. They further contend that there was properly no relation of trust between the defender Cullen and Macfarlane, and that a declarator of trust would be inapplicable and out of place. In support of their views as to the competency of the conclusions, the pursuers refer to the judgment of the Court in the case of Gillies, 11th February 1846, where law-agents, who had acquired property with the funds of their constituent, were held to have done so for his benefit, and were ordained to convey it over to his representatives, without any reduction of the title.

"As at present advised, the Lord Ordinary does not see any objection to the competency of the conclusions, if the facts averred by the pursuers are relevant to support them.—(His Lordship here narrated the facts of the case).

"According to the view which the Lord Ordinary takes of the pursuers' case, it seems to be rested mainly on two grounds: 1st, That Dobie's debt was paid, not from any money belonging to the defenders, or either of them, but with funds forming part of the estate of the late John Macfarlane; and 2d, That the assignation was taken by the defenders in the name of Cullen, fraudulently, for the purpose of defeating the legal rights of the pursuers as Macfarlane's representatives. The case appears to be a very special one; and although the Lord Ordinary has felt it to be attended with difficulty, he has come to the conclusion that the defences stated to the competency and relevancy of the action are not well founded, and ought to be repelled."

[1] Leckie v. Leckie, 21st Nov. 1854, ante, vol. xvii. p. 77.
[2] Stair's Inst. iv. 4, 1.
[3] Gillies v. M'Lauchlan's Representatives, 11th Feb. 1846, ante, vol. viii. p. 487.

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13th February 1856 (ante, vol. xviii. p. 593), we superseded consideration of the suspension to let an action be brought "to try the validity or onerosity of the deed of assignation," and we allowed consigned money to be uplifted on caution to repeat, "in the event of the said assignation being reduced, or found and declared to be in trust for Mrs Mitchell.

We certainly went far enough in Anstruther's favour in taking that course. I will not say that no other forms of action than those referred to in this interlocutor could have been raised, if under such other form of action the results contemplated by the Court could be obtained. But the object which the Court held to be necessary is very clearly stated, and if the pursuer has, in order to avoid, as he thought, difficulties in following the plain course, or from some predilection for the sort of action he has chosen to institute, thought fit to devise a different course from that pointed out by the interlocutor, which shall be found to be wholly insufficient, he has himself to blame. The object which the Court held to be necessary was to set aside the title.

The assignation is before the Court. It is distinct, regular, and complete. It is, therefore, a legal title in the person of Cullen to the debt, and to the decree. Now let us see what is the conclusion of the summons:—"And further, it ought and should be found and declared, by decree foresaid, that the foresaid sums of money belong to the pursuer, the said John Fulton Anstruther, as executor foresaid, and that he is the only party entitled to uplift and receive the same: And the said defenders ought and should be decerned and ordained to assign and transfer the said sums to the pursuer, as executor foresaid, and to deliver to him the said extract-decree at Dobie and Company's instance, to be used by him as executor foresaid, as his own proper writ and evident in all time coming."

It is not set forth, that as the money was Macfarlane's, therefore the assignation should be set aside and reduced; but that there is no title in Mrs Mitchell to uplift and to sue for and discharge the same, nor in Cullen. In Mrs Mitchell certainly not. But in Cullen there is a title, and the novelty is, asking us to find that a man has no title when the title is clear and indisputable, and is not challenged in the action.

Again, it is concluded that it should be found that the sums belong to the pursuer as Macfarlane's executor, and that he is the only person entitled to uplift them. Now, as to one-half of the sums, being Macfarlane's proportion of them, there can be no doubt, if paid out of his funds, that the conclusion should have been a totally different one on the pursuer's own notion of the case. Dobie being paid, granted a discharge, and therefore the debt due by Macfarlane, if paid out of his funds, was at an end, and no sum could be drawn out of Macfarlane's funds by the pursuer on pretence of that debt. The conclusion as to this half should have been, that having in truth been paid out of Macfarlane's funds, the debt was extinguished against him by such payment, and could not be in Cullen or any one else,—not that the right to uplift that half was in the pursuer. Indeed, this conclusion seems to proceed on the notion that Cullen had actually drawn and recovered that half. From the pursuer himself, no doubt, as an individual, there was to be drawn one-half of the debt wholly paid, as he says, out of Macfarlane's funds, by himself, as Macfarlane's executor—a very singular fact in the case.

But, according to the pursuer's statement, out of Macfarlane's estate nothing could be drawn. Hence the greater reason to reduce the title Cullen had improperly (as said) got to that half of the debt; but it was whimsical to conclude that the pursuer, as Macfarlane's executor, was to have the right to recover from Macfarlane's estate what was paid out of Macfarlane's funds, and, therefore, could not at all subsist as a debt. This is very strange. But the remainder of this part of the summons is still more curious.

It demands that it should be found that the defenders should assign and transfer the sums of money so alleged to have been paid to the pursuer, without reference to the actual application of them—of, as he says, Macfarlane's funds to pay Macfarlane's debt. This implies that Cullen has got the sums. How the pursuer is to get the sums not yet recovered I do not understand. His proper conclusion, even in this form of action, should have been, that they were truly applied to pay Macfarlane's debt,—not that they are to be recovered and uplifted—I own I do not comprehend from whom — except one-half from himself. But, at all events, to Dobie's right to recover the same there is a regular assignation,—standing directly

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opposed to any such notion of the pursuer's right. Further, there is no conclusion that Cullen should assign his right under the assignation to the pursuer,—that would have brought out the fatal objection to this form of action too prominently,—but only to the sums; and then "to deliver to the pursuer the extract-decree at Dobie's instance, to be used by him as executor foresaid, as his own proper writ and evident." This is the most curious conclusion I ever saw. The decree is assigned to Cullen. There is no demand that Cullen should assign it to the pursuer, but only to deliver it to the pursuer. What good could that do without an assignation? The pursuer is one of the defenders under that decree. Mere manual possession of a decree will not enable a defender to use it against another defender. But his own statement is, that the whole debt, for one-half of which he was himself liable, was already paid truly out of the other debtor's funds. Then how is he to use this decree? He cannot pay the debt himself. It is paid. He cannot get an assignation to it from Dobie's mandatory (supposing him still to be such), for he has assigned it, and proof of the reduction of that assignation the pursuer could not produce, and the creditor who was paid and assigned durst and would not assign again. Then what is the meaning of this mere delivery of the decree? It would not enable him formally, as Macfarlane's executor, to sue himself as debtor in one-half the debt. And if he succeeds in a proper action to establish that the debt was paid out of Macfarlane's funds, he may repay his half very easily without any other title. It is a very significant fact to prove that the pursuer wished to avoid some difficulty, that he did not even conclude that Cullen should assign the decree to him. In the way of any such demand, no doubt, stood the assignation to Cullen. That he did not choose to reduce; and yet, while that assignation stands, he calls on Cullen to deliver up a decree, to be used by himself, the only title to use which would still remain assigned to Cullen.

Even on the notion on which this action proceeds, the conclusions are quite inapplicable to the facts averred, and cannot be relevantly deduced from these facts. However, the main and radical objection to the action is the incompetency of trying to alter and take away rights vested by a regular deed, without any reduction of that deed, or a declarator of trust.

The incompetency of the action is made the more manifest by the issue which the pursuer proposes to take.

That issue, clearly, is one which could only be given in a reduction.

The argument stated in the outset of the discussion, viz., that a reduction would not have answered the pursuer's object, as he did not wish to set aside the payment to Dobie, and so revive the debt, was plainly founded on a misconception; for it would not have been at all necessary to carry the reduction that length. On the contrary, founding on the fact that payment was made, as averred, out of the funds of Macfarlane, the only thing to reduce was the assignation taken by Cullen in his own favour.

I am not at all disposed to countenance the second proposition so anxiously contended for by the pursuer, that by simply stating the matters of fact to be proved in any ordinary action, you were entitled to obtain a declarator of right without any reduction of the deeds vesting rights in another party, and so take away in that loose manner the rights under such deed. While it was very confidently said that this was common in practice, no case whatever could be produced sanctioning such a course. And the two cases referred to were conspicuously against the pursuer's proposition. I could find no example of such a style of summons in the Juridical Styles.

The pursuer seems to have taken up an erroneous idea of the action referred to in Lord Stair, iv. 4, 1, as to the trial of questions of right in regard to heritable property. It often happens in a competition of titles, that there is no necessity for any reduction at all, and that the case involves no question as to any fraud or illegality in the titles of the defender. The whole case may depend on priority of right—sufficiency of prescriptive possession on one title, against a prior title, or of possession as part and pertinent,—or on consolidation, and innumerable other similar questions.

But this is an action based on fraud—fraud, in the concoction and preparation of the deed, which is itself quite regular and complete. That deed vests absolutely a complete right to the debt in question in the person of the assignee. To take

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away the right so created, reduction is necessary, or a declarator of trust, which I think could be quite relevantly libelled in the facts of the case. But on allegations of fraud the pursuer might have a wider course of proof in a reduction than in the other form of action.

The present action is in my opinion quite incompetent. There is no distinction in not only the practice, but in the principles of the law of Scotland, more firmly established than the difference between an ordinary action and reduction. It would be very dangerous to allow new forms to rush in upon that distinction, which is founded on the broad ground, that deeds in themselves regular and complete must receive effect until reduced, and the right thereby validly constituted cut down and taken away in that established form of procedure. Such a case as that of the pursuer might as competently be stated *ope exceptionis* as in this ordinary action, and all our rules, most valuable, as well as established from the earliest period, would be at once overturned, and the forms of procedure thrown into utter confusion. I am not disposed to give the pursuer the benefit of such innovations.

But, further, the pursuer has no special case to state, in order to make out the necessity of departure, in this instance, from the fixed principles applicable to deeds giving one party a complete title, but which the other wishes to set aside, so as to take away the right so disponed. He has chosen, without cause, to run his head against a pretty stiff and well built wall.

I suppose that the pursuer has a reason for adopting this course, in order to avoid some difficulty he foresees in his proof, or to give him a greater command over the decree, in which he is a joint debtor along with Macfarlane. But, in any view, the Court ought not to assist.

The case of Gillies, 11th February 1846, is misapprehended by the Lord Ordinary; but it is so complicated that one is not surprised that there should be mistake about it. As it has had obviously much influence on the Lord Ordinary's mind, it is important to explain the case, which underwent much discussion in this Division. Gillies, who had been a private soldier, connected originally with Glasgow, had employed M'Lauchlan and M'Pherson to attend to some claims he had, and to recover and make good his right to some heritable property. They had intromissions with some funds, as he said, belonging to him, while he was in the Peninsula and afterwards, and the accounts had not been adjusted. He raised an action of count and reckoning against their representatives, which had no reference to any heritable property at all. This action was raised on the 10th April. Whether he got further information I do not know; but on the 30th of April he raised a reduction and declarator of trust as to some heritable property, the title to which was in the heirs of M'Lauchlan. He averred that the firm having made good his right to some heritable property, pretended to sell it to a person of the name of Rodger at a small price, which they credited him with, but then took the title in their own favour, being of much greater value at the time, and of increased value at the time of this discovery. He then raised a reduction and declarator of trust. The facts might have been stated in a way very similar to the pursuer's allegations here. The action there was not, in the least, of the character supposed by the Lord Ordinary. But the origin of the mistake is easily explained. The defenders in the reduction gave in a minute in the Outer-House, for the purpose of trying to stop the reduction, by paying a sum of money as the price of the house.—(Reads.) The Lord Ordinary found the pursuer entitled to go on. Then they reclaimed, and gave in another minute in the Inner-House, which rendered decree of reduction unnecessary in the opinion of the Court. Very full opinions were delivered, and the interlocutor was as follows*—(reads.)

What became of the case I do not know; but as the defenders were to convey under the declaration of trust to the pursuer, probably any decree of reduction was not necessary.

I wish to add, that while the averment of fraud very often enlarges the scope of proof competent to a party in making out the fraud, I am not aware that the allegation of fraud liberates a party from the necessity of adopting the form of action proper for setting aside the deed said to be concocted in fraud. Indeed, if the deed is said to have its origin in fraud or collusion, it seems to be only the

* See ante, vol. viii. p. 507.

more necessary to adopt the form of reduction, in order to get, in the real foundation of the case, grounds for sweeping away the regular deed.

Lord Murray.—We have been told by both parties that this is a case turning on the form of process, but we have been little assisted in considering it by any decisions or recent authorities which have been referred to. It has thrown me back on my earlier studies, and the practice of the Court from my first acquaintance with it, more than half a century ago.

The Lord Ordinary's interlocutor of the 13th of January, after repelling the objections to the title of the pursuer, has two important findings:—(1.) That there is no incompetency in the conclusions of the summons; (2.) That the averments of the pursuers are relevant to support these conclusions. I shall arrange the observations which I have to submit to the Court under these two heads. Under the (first), I shall consider the summons, and the condescendence, which forms a part of the summons.

(First,) Whether this action is competent in form?

(Second,) Whether it is relevant to authorise the conclusions deduced from what is set forth in the summons, and condescendence, which forms a part of it?

The summons brought at the instance of John Fulton Anstruther, executor under a deed of settlement by the deceased John Macfarlane and his wife and the only surviving child—and as disponee—and as accepting curator to Miss Macfarlane. The facts are set forth in the condescendence, which, according to the recent Act of Parliament, forms part of the summons.

The first point is, whether there is any incompetency in the conclusions of the summons; and I have not, in considering this case, been able to find out that there is, and therefore I agree with the Lord Ordinary. According to what is set forth in the summons, the pursuer does not maintain that the defender Mr Cullen is a trustee for him or for Macfarlane's family. If he is a trustee at all, according to these allegations, he is a trustee against them, and he is engaged, as Mrs Mitchell's agent, in a design to take from Macfarlane's family what truly belongs to them, and preserve it for Mrs Mitchell, for whom he is acting. I do not pretend to say how such a case would be tried in England—whether it would be tried as a conspiracy, or by an action of trover, or on the case, or whether it would be thought more appropriate for proceedings in Chancery.

In the discussions which take place in the Court of Appeal we have not always the full benefit which might arise in the full consideration of our forms. There is one most orthodox class of English lawyers, who adopt to its full extent that everything in the law of England is perfect. These are usually those whose practice is confined to the Courts of Common Law, and who talk almost as contemptuously of the proceedings in Chancery as they do of Scotch Courts. That seems to have been the tone adopted by Sir Fletcher Norton, a great English common lawyer. Yet others maintained that there is more property disposed of in Chancery in a week than in all the Courts of Common Law in a year. Our Scotch law forms are something intermediate between the precise forms of the Common Law Courts in England and the proceedings in Chancery, which are of a more indefinite nature, though I do not pretend to be able to describe them.

It was the great object of the bill introduced by Lord Rutherfurd to preserve all that is good in our forms, and exclude what was indefinite, and also to supersede, to a great degree, discussions which frequently took place in our Courts with regard to the *media concludendi*, less necessary. With the view of promoting that bill I published a letter to Lord Rutherfurd in the year 1850; and I believe it is generally acknowledged Lord Rutherfurd rendered a great service to the country by the statute he introduced.

In a question of form and competency I have always found Lord Stair the best and most satisfactory, for the comprehensive views he had; and in order to go fully through this case, it would be necessary not only to consider many parts of his excellent work in the 4th tit. of the 4th book, but also various parts of the 6th tit., Declarators of Trust, and the 16th tit., Declarators to insist with certifications and actions *cognitionis causa*, which, as Lord Stair observes, are declaratory, because they do not conclude for payment, and the effect of the decree is only to declare what debt was due by the defunct.

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It is also necessary to consider the different passages of Lord Stair's writings in which he refers to the effect of fraud.

In the 9th tit. of the first book, sec. 10, Lord Stair specially refers to the edict *de dolo malo*, which he quotes in these terms:—"*Quæ dolo malo facta esse dicentur, si de his rebus alia actio non erit, et justa causa esse videbitur, judicium dabo.*" Lord Stair observes, "that the action was personal, and so reached no further than the person committing the fraud, and not *in rem* reaching the thing, if lawfully it came to any other not partaking of the fraud."

Lord Stair, therefore, clearly held, that if the party was cognizant of the transaction, he was liable to the extent of the subject, whatever it was.

Lord Stair concludes his disquisition of this subject by observing—"We have in this also resumed the sentence of the civil law, because it is most equitable and expedient, and therefore is generally followed by our custom."

Lord Stair then enters at some length into the proof of fraud, and it appears to have been in his time somewhat arbitrary. He says, "it will be hardly presumed in a person of entire fame and honest life; but more easily in those who have been found to defraud, or are so reputed."

After referring to various cases his Lordship observes—"A discharge was found null (as to an assigny) of a bond granted by one brother to another, the discharge being of the same date with the bond, which could have no construction, but that the brother, by assigning the bond, might deceive, unless there were instructed a just cause of that date."

The case of a party and agent would not have been considered by Lord Stair as entitled to peculiar favour.

Lord Stair commences the 12th section by stating, that under fraud simulation and collusion are comprehended. Simulation, he observes, occurs mainly in two cases:—in gifts of escheat and liferent, and in dispositions *retentæ possessione*; and that collusion occurs chiefly where the debtor or common author opposes some creditors and concurs with others, and favours one or other class.

He sums up the subject in the 14th section, where he says—"Fraud gives remedy by reparation to all that are damnified thereby, against the actor of the fraud, either by annulling of the contract or other deed elicited or induced by fraud, at the option of the injured." Actor, here, must equally be extended to actors where more than one are said to be parties engaged in accomplishing the fraud.

The fraud of an author has been found competent against a singular successor in personal rights or in incomplete real rights of land, even although that author had an infeftment, since that infeftment was null, as flowing from a person not infeft. This was so held in the case of Burden v. Whitefoord of Dunduff, 4th June 1742; and a similar judgment seems to have been pronounced in the case of Dunlop v. Cruikshank, also reported by Lord Elchies.

I have come to the conclusion, therefore, from consideration of all the cases which seem to me to have a bearing on this case, that the Lord Ordinary is right. I hold that any fraud may be reached by a declarator setting forth the acts of fraud.

I find the second question—whether the conclusions of this action are relevant—attended with greater difficulty. I have no doubt, in any case where acts of fraud are set forth, the action may be maintained, and such acts may be proved by the law of Scotland; but it is a very difficult question often to say whether the acts of fraud, if proved, will authorise the conclusions of the summons; and it is attended with peculiar difficulty until the proof takes place. This question was often in former times the subject of discussion before the Court. Defenders often maintained that the *media concludendi* in the summons were insufficient to authorise the conclusion; and here I must import the whole statement in the 20th article. (His Lordship here read the statement which was in the 20th article, to the effect that, although the assignation was taken in Cullen's name, the money was not paid by him, but was truly paid by Mrs Mitchell from funds belonging to her brother, and that the assignation was taken in Cullen's name for the purpose of enabling Mrs Mitchell, by raising diligence on the decree and assignation against Anstruther, to repossess herself, to the prejudice of Macfarlane's representatives, of what she had paid to Dobie and Company).

It appears to me, that if these facts were fully proved, as set forth in the record, they would fully authorise a conclusion that the money did not belong to Mr Cullen;

but I have some doubt whether they sufficiently authorise a conclusion that it belongs to the pursuer. I rather think they do, and so agree with the Lord Ordinary on that second point, for there seems sufficient *media* for finding that the money belonged to some person or another, and if not to Mr Cullen or Mrs Mischell, the legal conclusion seems to be that they belong to Anstruther, his executor, or to Macfarlane's daughter, and heir, for whom a *tutor ad litem* has very properly been appointed.

While I have stated the views I entertain with regard to this action, I fully acknowledge that the practice for many years has tended very much to such actions having conclusions of reduction or of trust.

A conclusion of reduction adds great power and scope to a summons, and declarator of trust affords very great assistance to the Court.

I do not understand why the summons did not contain conclusions of a reductive nature and also of declarator of trust, as alternative. Neither do I see any objection in a case so very peculiar as this (and where Mrs Mitchell's conduct seems to have been very extraordinary, if not tortuous), to allowing an action of reduction with conclusions declaratory of trust, to be repeated. It must be satisfactory to both parties to have the case placed on a footing in which all the points would be properly probed and fairly decided.

Lord Wood absent.

Lord Cowan.—This is not a case where a probative written title is attempted to be put aside as of no effect by way of exception. The very object of this action is to have the deed of assignation founded on judicially held unavailing to the defenders, as fraudulently concocted, and obtained in prejudice of the pursuer's rights; and the only question regards the competency of the form in which its legal efficacy is challenged.

Besides the statements in the 20th article of the condescendence, in which the ground of action is set forth, the facts alleged in the prior articles are important. The scheme devised between Macfarlane and his sister Mrs Mitchell to avoid payment of Dobie & Co.'s debt, and by which she obtained possession of his funds,—the proceedings taken by Dobie and Co., by whom this assignation was granted, against Mrs Mitchell, as holder of those funds,—and the settlement of the case on the eve of trial by payment of Dobie & Co.'s debt on condition of its being assigned, more especially the letter of the defender Cullen, acting as agent of Mrs Mitchell,—these are all very material to be kept in view as introductory to the 20th article.

Such being the device fraudulently got up as alleged, and in which the two defenders were participant, what we have to consider is, not whether the most apt and expedient form of action has been adopted, but whether the form actually adopted, be incompetent.

1. It is contended that there should have been reductive conclusions, fitted to set aside the *ex facie* valid title by assignation in Cullen. But, (1.) this is not a challenge by the granter of a deed, because of its having been obtained from him by fraud, and being, therefore, reducible, in which case, unless the deed be *ex facie* null, reduction might be requisite.

Neither (2.) is it a challenge of a deed fraudulently concocted between the granter and grantee, to the prejudice of third parties, and wholly voidable on that ground.

Further, (3.) it is not a deed against which the alleged fraud of the grantee is urged to the effect of having it wholly set aside; for, as an assignation, the deed is proposed to be preserved and made use of in order to give effect, not to the fraudulent views of the defenders, but to the just rights of the pursuers as those may be found judicially.

And, lastly, the deed is not in reference to heritage or real property, or one of a series of connected titles, but has regard to a moveable subject, fraudulently, as alleged, put into the person of the defender, when the right under it truly belonged to the pursuers.

Looking to the peculiarities of the case, therefore, the relative position of the pursuers and defenders, the nature of the fraud averred as the ground of action, and the limited purpose and object in the view of the pursuers—I do not think, if the summons be otherwise well laid, that the absence of reductive conclusions can be held to render the action incompetent.

The necessity of reductive proceedings more frequently occurs for consideration,

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when it is doubtful whether the defence can be properly stated *ope exceptionis*; and whether, to get the better of the ground of action, it is not necessary for the defender to insist in a recissory action; and not, as here, whether the pursuer must institute such proceedings to obviate the effect of a deed founded on by the defender to exclude the action. The principle applicable to such a case is well stated by Lord Gillies in his opinion in Gibb and M'Donald v. Sir Paul Baghott, 1st June 1827. Applying that principle to this case, I do not think that the pursuer's action is incompetent from the want of reductive conclusions. And this view appears to me supported by the passage in Mr Bell's Commentaries, ii. 194, where he treats of the form of action proper to be adopted in challenging preferable securities in bankruptcy.

2. *Esto* that reduction is not necessary, it is objected that the declaratory conclusions of the summons are inept and insufficient, inasmuch as they are not declaratory of trust, which alternatively is contended to have been indispensable.

This objection proceeds upon a mistaken view as to the relative position of the parties. The relation of truster and trustee was never constituted, and does not subsist between the pursuers and either of the defenders. There may be such relation between the two defenders, but it is that which subsists between two parties acting together to commit the fraud which it is the object of the pursuers to have found of no effect as against them. And as to any allegation of a trust having been constituted by the deceased John Macfarlane in the person of his sister Mrs Mitchell, there is no proper case of that sort in the facts stated in the record. On the contrary, the averment is that the funds in Mrs Mitchell's hands were well employed by her in payment of the debt of Dobie and Co., and the plea is that the funds belonging to Macfarlane's estate having been so employed, that estate alone is interested in the assignation of the debt. Had the action been directed solely against the defender Mrs Mitchell, the declaratory conclusions, when taken along with the petitory, are so expressed as to bring out the true point in the case, and properly state the pursuer's demand. The defender is told, in so many words:— "You have got part of my (pursuer's) estate, which you have fraudulently appropriated to yourself, and you must assign it over to me, the true owner." The case of Gillies, referred to by the Lord Ordinary, supports this view. In like manner, where a tutor or trustee has fraudulently taken rights in his own name belonging to his constituent, action will lie against him to account and to transfer those rights to the true owner.—*Vide* case of Wilsons, 1789, D. 16,376. And this being so, the use of the defender Cullen's name in the transaction cannot affect the question as to the form of the action. He is the mere hand or instrument, according to the allegation, employed by his client to accomplish her fraudulent purpose. The conclusions are such as to put in issue the fraud alleged to have been practised. If no fraud be proved there is an end of the case. It seems to me that no just or equitable right or interest in either of the defenders can be affected by our sustaining the action as laid.

On the whole, therefore, I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The Court adhered.

It having been agreed that the cause should be disposed of without a remit to the Lord Ordinary, parties were allowed to lodge issues, for trial by jury. The following issues were adjusted:—

"It being admitted that, upon the 23d day of May 1855, Wallace Walker, merchant in Liverpool, mandatory and attorney of Richard Paxton Dobie, merchant, Cape Town, Cape of Good Hope, executed in favour of the defender Cullen the assignation No. of process:

"1st, Whether the several sums of money therein specified, bearing to have been paid by the defender Cullen to the said Wallace Walker, were not paid by the said defender from his own proper funds, but were paid by the defender Mitchell, or by the defender Cullen, on her account, with funds furnished by her, forming part of the estate of the late John Macfarlane, sometime shipmaster in Port-Glasgow?

"2d, Whether the said assignation was taken by the defender Mitchell in

the name of the defender Cullen, fraudulently, and for the purpose of defeating the legal rights of the pursuers as the representatives of the said John Macfarlane?"

II. In the action of reduction, it was alleged by the pursuer, in his condescendence (stat. 4), that Macfarlane was, in the course of the year 1852, threatened with diligence at the instance of Dobie and Company; and with the view of protecting his estate from their diligence, he conveyed his whole estate to the defender Mrs Mitchell, and to another sister, ostensibly for their own behoof, but really in trust for himself; in particular, he granted the assignation of his furniture, under reduction, ostensibly in consideration of L.72 paid to him by the defender.—(Stat. 5) the transaction narrated in the deed was fictitious, no sale of the furniture having been made, and no price paid therefor; the assignation was granted under the apprehension that the furniture might be attached under Dobie and Company's diligence, and to protect it therefrom. It was accordingly understood and agreed, between Macfarlane and the defender, that she was to hold the furniture in trust for him, and for his behoof, and to reconvey the same when required, but she now fraudulently pretended that she had purchased the furniture from Macfarlane, and paid him the price thereof, and that the assignation was valid.

The assignation bore to be granted in consideration of L.72, 3s. 10d., paid by Mrs Mitchell. It conveyed to her, her heirs, executors, and assignees, all the granter's household furniture, and made reference to an inventory and valuation thereof by a licensed appraiser, wherein the furniture was valued at L.72, 3s. 10d.

The defender pleaded;—I. The pursuer had no title to sue, being neither decerned nor confirmed executor to the late John Macfarlane, and there being no evidence that the other parties named as executors had declined to accept. II. The reasons of reduction were not relevant, in respect—1st, it was not alleged that John Macfarlane was insolvent, or in any way restrained in the disposal of his property; 2d, there was no averment of fraud by the defender or by Macfarlane; and 3d, the statements which resolved into a declarator of trust were irrelevant, as they did not amount to a ground of reduction, while there was no conclusion for declarator of trust. III. The object imputed to Macfarlane in executing the deed was *jus tertii* to the pursuers, and one in which they had no interest. IV. The transaction was a *bona fide* sale for a full and adequate price, paid at the time *simul ac semel* with the delivery of the furniture, and the assignation was confirmed by Macfarlane having allowed the transaction to rest upon it undisturbed till his death.

The Lord Ordinary pronounced this interlocutor:—"Finds that the objection to the pursuers' title is not now insisted in by the defender, and repels the same, the pursuers being bound to produce a confirmation before extract: Farther, repels the second and third pleas in law for the defender, and decerns: Appoints the case to be put to the roll, in order that parties may be heard as to further procedure." *

* "NOTE.—This action has been brought by the pursuers as representing the late John Macfarlane, to reduce an assignation of household furniture, granted by him to the defender, Mrs Mitchell, his sister, on the 24th September 1852, and to obtain from the defender restitution of the furniture, or payment of its value.

"The pursuers' allegations are denied by the defender, and her defence on the merits is, 'that the transaction as to the furniture was a *bona fide* sale by John Macfarlane to the defender, for a full and adequate price, paid at the time *simul et semel* with the delivery of the furniture.'

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In the single bills an objection to the reclaiming note, as not having been presented within ten days of the interlocutor being pronounced, was repelled. The defender reclaimed. When the case was advised,—

Lord Justice-Clerk.—The question raised by this reclaiming note is of the greatest importance in point of practice, but still more of principle. The interlocutor of the Lord Ordinary appears to me to proceed on an erroneous view of the object and effect of the Statute 1696, respecting the proof of trusts. Latterly, the counsel for the pursuer seemed to wish to make out that the assignation which he challenged was not a trust, according to his view, in the person of Mrs Mitchell. The attempt was vain. No other view can be taken of his case than that pointedly and unqualifiedly averred on record as his ground of action; and the facts stated show that the case is an averment of trust, even if *that* had not been *averred* to be the character of the alleged transaction. In articles 4 and 5 he distinctly sets forth that various dispositions and transactions were carried through by the deceased John Macfarlane (in whose right the pursuer, as executor, is), to vest in his sister, the defender, parts of his funds and effects, in order to exclude the diligence of a particular creditor, but still, seemingly, to be held for his behoof. The general plan by which the pursuer and another sister were to hold his property in trust for him is narrated; and article 5 states that the assignation was fictitious to defeat diligence, and that the furniture was only to be held in trust, and reconveyed when demanded. This is the ground of action. This is the allegation which the pursuer undertakes to prove. Then, beyond all dispute, this is a plain averment of a trust, and nothing else or less. In the close of the section he says the defender fraudulently pretends that the assignation was onerous. Now this the more proves that the issue he raises is trust or onerosity in the original transaction. In every case of alleged trust, of course, there is fraud in the party obtaining the deed in trust (if that shall be proved) attempting to take advantage of the *ex facie* character of the deed, and to maintain an unqualified right of property under it. But that allegation of an improper use of the deed (according to the pursuers' averments) in no degree alters the character of the case, which is an averment of a trust against an absolute deed of conveyance. Neither can it, in my opinion, affect the character of the case, or render any other action than a declarator of trust, or an equivalent declarator, competent to establish such a case, that the pursuer avers that the object of the alleged trust on the part of the granter was to deprive creditors of the means of getting at his property. It may have been very wrong in him to resort to such a device, and wrong in a sister or friend to aid him so far as to agree to hold his property in trust for such a purpose. But still a trust it was on such an averment, and a trust must be established in order to take away the absolute right created by the deed. It might perhaps be thought that the only effect of such a statement of the intended fraud against creditors should be to bar the party or his representative from recovering property which he had passed from himself, with such a fraudulent purpose. But, then, if he is right in averring that the property was really taken in trust, to exclude him, on a personal exception, from proving the trust, would enable the defender, against the truth of the case, to retain as her own, property which belongs to another. Accordingly no such exception was pleaded by the defender. In truth, the object of the alleged trust does not in any manner alter the character of the case to be proved, viz., the establishment of a trust.

" Apart from this defence on the merits, it is objected by the defenders that the statements of the pursuer are not relevant to support the conclusions of the action, chiefly because it is brought in the form of a reduction, and not of a declarator of trust. Now, if it had been necessary to keep up the assignation as a link in the title, a declarator of trust might perhaps have been the appropriate remedy. But as this was not requisite or advisable, and the assignation purported to be a deed of sale by Macfarlane to the defender for a full and adequate price, it is thought the proper course was to challenge the transaction by a reduction, and to follow this up with petitory conclusions for restitution of the furniture, or payment of its value. Looking at the grounds of action as set forth in the condescendence, the Lord Ordinary has no doubt that they are relevant to support the conclusions of the summons; he has therefore repelled the 2d and 3d pleas in law for the defender."

The argument of the pursuer latterly took a turn which, I own, I did not understand. It was said—this assignation purports to be a sale for a price. No price was paid—it was not a sale. It gave no title, it was said, against the granter—it was null and void from the first; and the granter might have reclaimed the property next day. To be sure; but how? This question was jumped over in the argument, and never answered when put to the pursuer. This process shows that it could only be done by action, and then the point is—what is it that, after all, the party has to prove who says the transaction was not such as the deed declares, but that the defender holds for him—that is, in trust; and how is that to be established but in a declarator of trust? The truth is, the plea that the deed was no title of property against the granter, proceeded on a strange jumble of things. To maintain that a regular absolute assignation is not a title against the granter, is a contradiction in terms. It must be set aside somehow, and so the pursuer has felt. But *title* was confounded with *real and true right*, and when the right to the property is proved, in the proper action, then the title will fall. But the proposition that an *ex facie* absolute assignation, bearing to be for onerous causes, is no title against the granter, is certainly the most singular novelty which could well appear, for it happens that the deed actually divests the granter till he establishes that the true right remains still in him, and that the deed was only a trust.

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The pursuer has proposed to accomplish this result by a reduction, but his ground of action is distinctly and in terms the averment of trust, and that is the case he puts on record.

The pursuer's next step is to maintain, that as this is a reduction, he does not fall within the prescription as to the mode of proof in the statute, and hence, as Mr [illegible] distinctly avowed, his object is to have an issue to be tried by a jury. Really this proposal, put alongside of article 5, brings out most conspicuously the fallacy of the whole argument of the pursuer.

It is a sacred principle of the law of Scotland (Lord Gillies said in Scott v. Miller), "that a trust cannot be proved by parole, either under a declarator of trust or otherwise."

This simple action of reduction appears to me to be quite incompetent. I do not say that an action, although not called a declarator of trust, may not be libelled in such a form as to embrace a conclusion to establish a trust, and then the case is in shape, and the Court can declare the right *ex facie* absolute to be only a trust. But in one form or other, and in a distinct and pointed form, there must be a conclusion under which the Court can declare a trust.

I do not proceed on the narrow and somewhat artificial ground that the reduction is incompetent because it seeks to set aside the deed, in common words of style, to have been from the beginning null and void, whereas, on the pursuers' showing it was intended to be a conveyance, but in trust, and was therefore at first valid. It does not follow that, if we entertained the action, it would be necessary to pronounce decree in the very words of the summons, if the pursuer should be successful. But further, these are words of style, for the purpose of obtaining the pursuer entirely reponed against the deed. And further, the expressions would not be inappropriate on the pursuer's showing, for his object is to make out that the assignation never did establish an onerous valid right of property, as the defender contends. My objection is founded on this broad ground, that the ground of action is the averment of trust, and that a trust is the case disclosed; and that being the case, there must be an action which will enable the Court to declare the trust. Reduction is not the conclusion to deduce, and hence the form of action is not the proper process best adapted in order to withdraw the case of trust set forth on record from the operation of the Act 1696.

Lord Murray concurred.

Lord Cowan.—The pursuers have not disputed that the assignation, as the constitution of a latent trust, would fall under the provisions of the statute 1696, had there not been the peculiarities on which they rely to justify the form of challenging the deed, to which they have resorted. This could not have been successfully disputed. Although the subjects assigned are the *ipsa corpora* of moveables, the right to them has been vested in the defender by a formal deed; and it has not been alleged that the effect of that written title can be got quit of upon allegations of trust, because of its having relation to moveables, in any other mode than it must

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have been had it related to an heritable subject. It is this which gives its importance to the question raised in the discussion.

Holding, then, this deed not excluded from the operation of the statute 1696—and the question was so dealt with in the argument—what is the case attempted to be made by the pursuers?

The conclusion of the summons is for reduction of the assignation in usual style, as from the beginning, now, and in all time coming, null and void; and decree of reduction to that effect being pronounced, there is a petitory conclusion for delivery of the effects, or payment of their value; but there are no conclusions which, either expressly or by implication, raise a question of trust. The only point, then, is—whether the statements in fact are relevant to support this reductive conclusion? I am clearly of opinion that they are not. The statements in the record have been referred to. They are in substance that John Macfarlane, who is represented by the pursuers, devised a scheme, with the view of protecting his effects from the diligence of his creditors, and in furtherance thereof conveyed them to his sister, the defender, and another sister, "ostensibly for their own behoof, but really in trust for him;" and in particular, executed in favour of the defender the assignation under reduction. Then it is alleged that the transaction was fictitious; that no price was paid by the defender for the conveyance; that Macfarlane's sole purpose in granting it was to protect the furniture from the diligence of his creditors, and that the understanding and agreement between him and the defender was, "that the defender was to hold the said furniture in trust for him, and for his behoof, and to reconvey the same when required."

This is the nature of the transaction as regards its origin, according to the pursuers' own statement. The object avowedly was to constitute an *ex facie* absolute title, but truly a latent trust in the person of the defender. And the purpose contemplated, as averred, was to carry through, it may be, what the law cannot but designate an unlawful purpose, but still a purpose designed by the granter himself. While the transaction, therefore, may be designated by the pursuers "fictitious," and originating *ex turpi causa*, it was the act of the granter, in whose room the pursuers stand, as certainly as it was that of the defender. The relation between the granter and the grantee of the deed, as set forth in the record, was nothing else than that of truster and trustee. It is impossible to take any other view of their legal relation.

No doubt it is further averred that the defender now fraudulently pretends that the transaction was a real one; that the assignation is a good deed; and that the effects conveyed by it belong to her in absolute property. This is the precise statement always made when a latent trustee dishonestly attempts to support the absolute title, and to found upon it as evidence of a real transaction. It is the very fraud which had become so common at the time as to call for the interposition of the Legislature in 1696. The act proceeds on the preamble "that the entrusting of persons without any declaration or back bond of trust in writing from the person entrusted, are occasions of fraud, as also of many pleas and contentions." Hence the enactment that no action of declarator of trust should be sustained against the trustee or his heirs or assignees, "except upon a declaration or back bond of trust lawfully subscribed," "or unless the same be referred to the oath of party *simpliciter*." Any one entrusting another with property under an absolute deed, but truly in trust, without taking a declaration or back bond or other writing, necessarily exposes himself precisely to that dishonesty and fraudulent acting here alleged against the defender. Such an allegation cannot be held relevant to reduce the deed on the ground of fraud to be established by parole proof under an issue, without a virtual abrogation of the statute.

The proposal is to have the deed reduced as *ab initio* null and void; but irrespective of the allegations of trust, there are no averments in the record whatever to support this conclusion. There is no fraud alleged *dans causam contractui* excepting the truster's own fraud, in which the trustee was, no doubt, participant. The deed gave true expression and effect to the intended object, to serve which it was granted and received; and this is the very class of deeds to which the statute relates. Wherever written title is necessary, or has been resorted to for the transference of the property, whether heritable or moveable, the rule of the statute applies. Here there is a written title, and that is enough, in the state of the argu-

ment, for the application of the statutory rule. The deed sets forth the truth of the case as between the parties to it, and it took effect, as the truster intended. It never was, and cannot be held to have been *ab initio* null and void. As an assignation to the furniture it was a perfectly good deed; and, on the accomplishment of the alleged object for which it was got up, a totally different kind of action was indispensable. Some conclusions in the summons involving declaration of the trust, were requisite as a basis for the alternative petitory conclusions for delivery or payment.

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Were the question with a third party it would be quite otherwise. The creditors of the truster, for example, might reduce the deed as fraudulently got up, and granted to their prejudice. Or any other third party having an interest to challenge the right might set it aside on that ground. No better statement of the distinction exists than will be found in the opinions of the Court in Lord Elibank v. Hamilton, 16th November 1827.

Here the pursuers cannot occupy any better position than their author John Macfarlane, whom they represent. The defender is entitled to have this case disposed of on the same footing as if Macfarlane himself had instituted proceedings. The question is thus entirely one between truster and trustee in a latent trust. But, supposing this to be the case, it was argued that the fraud upon his creditors, to accomplish which the deed was concocted, takes the case out of the ordinary rules applicable to latent trusts, and entitles the pursuers to the extraordinary remedy of reduction to which they have resorted. The turpitude of the truster in granting the deed is founded on as having the effect of placing him and his representatives in a better position than if the trust had been for legitimate purposes. This is certainly a novel plea. The usual rule is that in *turpi causa melior est conditio possidentis*. But it would not have served the pursuer's purpose to plead that maxim; and it has not, fortunately for him, been pleaded on the other side. Its effect might have been to exclude the pursuer from legal remedy of any kind. In the most favourable light, the pursuers cannot ask to be regarded as in any better legal position than if the trust had been granted for an unexceptionable purpose.

The Court pronounced the following interlocutor:—" Alter the interlocutor of the Lord Ordinary: Sustain the objection that an ordinary reduction, without any declaratory conclusions, is not the proper action in which to insist for establishing the trust averred and set forth on record; and therefore dismiss the same, and decern: Find the pursuer liable in expenses, and remit," &c.

John Ross, S.S.C.—John Cullen, W.S.—Patrick, Macewan, & Carment, W.S.—Agents.

The National Exchange Company, Pursuers.—*Penney—Young.* No. 148.
Peter Drew and Matthew Dick, Defenders.—*F. F. Inglis—Fraser.*

Process—Proof—Examination of Havers.—Held (1) that a specification for recovery of "all ledgers, journals, cash-books, bill-books, and other books, documents, and papers," included letters, and copies of letters; (2) that access to books for the purpose of getting excerpts did not entitle a party to make notes and carry them away as his own private property.

In this case the Court, on 16th July 1856, granted diligence against havers, in terms of an amended specification, the first article of which was as follows:—" All ledgers, journals, cash-books, bill-books, and other books, documents, and papers, kept by the National Exchange Company, Glasgow, that excerpts may be taken therefrom, shewing the state of their affairs at the date of the reports to the annual meetings in September 1846 and September 1847, and at the date of the purchase and transfer of the shares in question: Also all books and other documents kept by them in connection with their business as sharebrokers, shewing the state of the Company's affairs at the date of the sale and transfer of the shares in question."

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The case now came before the Court on appeal against deliverances of

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the commissioner. A haver having deponed that he had in his possession all the books and papers of the National Exchange Company, and having produced certain books under the specification, the report bore:—"The defenders' agent here proposed that the books should be lent to him by the commissioner, for the purpose of being examined by the accountant, that excerpts may be taken therefrom of all the entries therein relative to the matters in dispute, and to the specification sustained by the Court,—or otherwise, that access should be given to the books and others in the office of the haver in Glasgow for that purpose. The agent for the pursuers objected to this course. He was perfectly willing that the books should remain in the hands of the commissioner, or that they should be exhibited, as proposed, in Glasgow, and that the defenders should get excerpts of all the entries falling within their call; but the books contained entries of other matters, which it was neither expedient nor right the defenders should see. It was accordingly arranged that the books now exhibited should be removed by the haver to Glasgow, and that access should be given to them, as well as to the other books and documents of the pursuers, which the haver states he has not brought with him to this diet, for the purposes of the specification, in the office and at the sight of the haver or his clerks,—reserving to the parties to bring under the notice of the commissioner any question that may arise in the course of the examination of the books and others. "It was further arranged, with reference to the remaining articles of the specification, and the various documents falling within the same, that the haver should in like manner allow access thereto, in order that the various productions and excerpts to be made by him may be adjusted by the parties."

In consequence of this arrangement, Mr M'Phun, on behalf of the defenders, obtained access to the books; and at a subsequent diet the haver deponed as follows:—"The only documents of the Company other than their books which Mr M'Phun requested to see were the letters belonging to the Company. I refused all access to the letters of the Company, because I conceived, and was advised, that the same were not covered by the terms of the specification, No. 60 of process. And being again called on to exhibit the letters of the Company, as forming part of the documents and papers of the Company, for the purpose mentioned in the first article in the specification—To this call the pursuers' agent objected, as not being within the terms of the specification. The commissioner having considered this objection, repels the same, and appoints the letters in question to be exhibited; against which deliverance the pursuers' agent appealed to the Court."

The report also contained the following appeal:—"The defenders' agent here stated to the commissioner that Mr M'Phun, on their behalf, had, in terms of the arrangement made at the former diet, taken various excerpts from the books exhibited by the haver, but that he had not been permitted to remove them from the haver's office, in which the books of the Company are deposited, and he moved the commissioner to appoint these excerpts to be delivered to Mr M'Phun, in order that they may be laid before counsel, and also that he may advise thereanent with another accountant on behalf of the defenders, in the view of preparing for the trial of the case.

"The pursuers' agent stated that Mr M'Phun had made no excerpts, in the proper sense of the word, but had made a compilation of notes or jottings, which might be quite intelligible to himself, but totally unintelligible to other parties. That these notes refer to matters not contained in the specification, and went beyond the dates to which the defenders were limited. That the pursuers are quite willing, through the haver Mr Craig, to furnish full and complete excerpts of every entry in the books to which the defenders are entitled, and these excerpts could be made use of at the trial; but

the notes which Mr M'Phun had taken were not of that nature, and therefore the defenders were not entitled to get possession of them as contended for. No. 148. — Mar. 11, 1857. Smith v. Davidson and Wilson.

"The commissioner, in respect that the notes or excerpts in question have been taken by Mr M'Phun under the arrangement minuted at the diet of 22d August, whereby it was agreed that full access should be given to the books of the pursuers' Company with a view to the preparation of excerpts in common form, and in respect that the defenders' agent does not insist on the said notes or excerpts being produced in process, finds it unnecessary *hoc statu* to dispose of the objection stated by the pursuers' agent, and appoints the notes or excerpts in question to be delivered to Mr M'Phun, the same appearing to the commissioner to be his private and exclusive property, and acquired in a legal and competent mode."

Against which deliverance the pursuers' agent appealed. It was now contended that the letters did not fall under the specification, and also that the notes taken by Mr M'Phun were not his private property.

THE COURT pronounced the following interlocutor:—"The Lords having considered the appeals in the commission granted to Mr Boyle, and heard counsel thereon, Find, on the first objection and appeal regarding the production of letter-books and letters, that letter-books and letters do fall within the first article of the specification, and that therefore the defenders are entitled to production or excerpts of all letters, or copies of letters, kept by the Company, shewing the state of their affairs at the several dates mentioned in the first article of specification * * * On the third appeal, Find that Mr M'Phun is not entitled to carry away the notes referred to as his private and exclusive property, but that the parties may hold their consultations at the office or other apartment of the haver, where the documents are kept.

JAMES F. WILKIE, S.S.C.—WOTHERSPOON & MACK, S.S.C.—Agents.

WILLIAM SMITH, Pursuer.—*Cook—Gifford.* No. 149.
[JO]HN DAVIDSON AND ROBERT WILSON, Defenders.—*D. F. Inglis—Fraser.*

[E]xclusive privilege—Provisional specification—Date of patent—Cotemporaneous [inv]ention—Prior use—Statute 15 & 16 *Vict. cap.* 83, *sects.* 8, 23, 24.—An inventor [hav]ing filed a "provisional specification," obtained, within six months, letters patent, [whi]ch were dated as at the date of the provisional specification. Another party [had] made a similar invention prior, but did not use it for his trade till after the [dat]e of the specification being filed, though the machine invented by him was [cap]able of being so used earlier. The patentee brought an action of damages for [infr]ingement of his patent,—*Held* (1), that in such questions the date of the patent [is th]at of filing the provisional specification; (2), that there was not such prior [use] as to invalidate the patentee's right; (3), that it being not the discovery in [whi]ch the public are interested but the disclosure, the patentee was entitled to be [prot]ected; therefore, that the patentee was entitled to put down the use of the [cote]mporaneous invention;—*Opinion*, that the use of his own invention during the [peri]od between the filing of the specification and the granting of the patent did [not] subject a party as an infringer.

[T]HIS case went to trial on 23d July 1856 before the Lord President and [a Ju]ry on the following issues:— Mar. 11, 1857. — 1st DIVISION. Jury Cause. Ld. President, Presiding Judge.

1. Whether, on or about the 1st day of February 1854, the pursuer [obta]ined letters patent under the Great Seal of the United Kingdom, bear[ing] date the 14th day of November 1853, for an invention therein described ['Im]provements in Ruling Ornamental Figures,' and did thereafter duly

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file a specification, describing the nature of the said invention, and the manner in which the same was to be performed?

"2. Whether, during the years 1854 and 1855, or part thereof, and during the currency of the said letters patent, the defenders did, by themselves or others, wrongfully, and in contravention of the said letters patent, use improvements in ruling ornamental figures, substantially the same with the improvements described in the said specification, to the loss, injury, and damage of the pursuer?

"Or,

"1. Whether the improvements mentioned in the said letters patent and specification are not the original invention of the pursuer?

"2. Whether improvements, substantially the same as those mentioned in the said letters patent and specification, were known and used within the United Kingdom prior to the date of the said letters patent?"

The jury returned the following verdict:—

"On the first issue for the pursuer, find for the pursuer; and on the first alternative issue for the defenders, they find also for the pursuer. And in regard to the two remaining issues, being the second issue for the pursuer, and the second alternative issue, they find (1), that the defenders did, in the years 1854 and 1855, use improvements in ruling ornamental figures, substantially the same as the improvements described in the specification filed by the pursuers. (2), That the improvements used by the defenders were invented by the defender Davidson before 14th November 1853, being the date of the provisional protection. That Mr Davidson did not use his invention for the purposes of his trade before 14th November 1853; but that the machine invented by him was capable of being so used before that date. That Mr Davidson used his invention for the purposes of his trade between the 14th November 1853 and the 1st of February 1854. But whether the use by the defenders of the improvement was wrongful, and in contravention of the letters patent, the jury leave the Court, as matter of law, to determine, upon a consideration of these findings, and of the notes of evidence, and to enter up a verdict upon these issues for the pursuer, or for the defenders, according as they shall decide the matter of law. And in the event of a verdict being entered up for the pursuer, they, of consent of parties, assess the damages at one shilling."

An exception taken to the charge of the presiding judge was now abandoned

The pursuer now pleaded;—That it being established that there was no use of improvements the same as those patented prior to the date of the letters patent, he was entitled to a verdict.[1] A patentee had the right of stopping the secret use of his patent. A party having got a patent for an invention, was the only party that the legislature recognised as the inventor. It might be that another party had also invented the same thing, but the law conferred the privileges of a patentee upon that party alone who accepted the conditions which the public offered for the benefit of that invention, and took out a patent. His right was then good against all the world.

No person can use the invention to the prejudice of the patentee. There might be a practically harmless use of an invention for mere amusement which the patentee had no interest to challenge. But where the patent is used for sale or profit, or secretly to save the expense of buying it, the patentee had an interest to challenge that use of it, and would be entitled to suppress it. It was optional for an inventor to keep his invention secret, or take a patent for it. He might keep it secret in the belief that he would make more profit by doing so than by disclosing it on the conditions offered by the public.

[1] Cornish v. Keene, 1836, Webster's Patent Cases, p. 513; Carpenter v. Smith, ibid. p. 537.

But he kept it secret at the risk of other persons by the exercise of the same ingenuity as he himself had displayed finding it out, and taking a patent for it. If any such person, having made the discovery, offered to disclose it as a new invention, he was entitled to the usual privileges offered to all inventors. Although it had been already invented, it had never been disclosed. The public had never got the benefit of it, and there was no reason, therefore, why the monopoly given to the person so disclosing it should not be equally good against the person who had been making a profit by it in private, as against every one else. He had been playing a selfish game, and there ought therefore to be no particular tenderness on the part of the public towards him, who had refused to give them the benefit of his invention on the terms which they offer to all inventors.[1] But here the jury had found not that Davidson was using the machine, but that it was only ready for use. It was only capable of being used. This action was brought with reference to the 15 & 16 Vict., sections 8, 23, 25, under which a party may use a patent for six months without it being held to be a publication of the patent. Here the provisional specification was dated 14th November 1853; and although the patent was not issued till several months afterwards, yet the effect of it drew back to November, and by sect. 8 the patentee was entitled to debar the use of his invention after that date.

Pleaded for the defenders;—This is unquestionably a new point in patent law.[2] If the principle contended for by the pursuer be well founded, the taking out of a patent for a process which may have been in operation for half a century, but secretly carried on, will entitle the patentee to put down that manufacture. But the right of a patentee rests on an exception to a great general rule. The statute of James I. is the foundation of the patent law of this country. The policy of that statute was the extinction of monopoly; and the right of a patentee is grounded entirely on an exception to that rule. The question first to be considered arises under the issue of infringement. The jury have found that the defender was using a machine not the same, but substantially the same, as that covered by the pursuer's specification; and, second, that that machine was an original invention. The right claimed by the pursuer to prevent the defender using that machine receives no countenance or authority from statute or decision. There never has been a case in which the parties to the suit have been, as here, two rival inventors. The true doctrine of law was, that a patentee is secured in nothing but the exclusive use of his own invention. He is entitled to put down the use of that invention by everybody else; and it was no answer for the person using it to say, that somebody else had already thought of it, although confessedly the person so challenged for using it derived his whole knowledge of it from the patentee. That was the ordinary case that occurred; and here unquestionably the patentee was entitled to protect himself in the exclusive use of his invention. But if his right be confined to the exclusive use of his own invention, was he therefore entitled to put down the use of a similar invention not borrowed from his at all?—not a colourable imitation of his invention, nor an attempt to evade his right, but an independent and complete invention, the result of separate and independent thought and experiment, and coming into perfect and complete existence before any patent right had been created. The Crown grant conferred upon him no right to interfere with similar inventions, although they might be prejudicial to him. The only thing secured to him was the use of his own invention; and the defenders' answer to the pursuer's charge of infringement was, that they

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[1] Forsyth v. Riviere, Webster's Patent Cases, p. 97.

[2] Hill v. Thompson, Com. Pl. Trin. T., 1818, Webster, p. 239; Caldwell v. Vanvlissengen, 9 Hare's Reports, 428; Note by Webster at p. 543.

No. 149. were not using his invention.[1] The great merit of some inventions was, th they should be kept secret. Suppose that I invent a mode of producing a ch mical substance well known in the market—not better than what is already the market—but by a mode which enables me to undersell every one else that the public has been using this product of mine for many years, but th another person then discovers my mode of manufacturing it, and takes out patent for it: Is he entitled to put down my manufactory?—and yet th would be the result of the pursuer's argument, although the public h been getting the benefit of my invention, inasmuch as they had been getti an article at a cheaper rate. There certainly was no authority for th Farther, where there was no identity between the inventions, yet where th were so much alike, that if the one had followed on the other which h been patented, it would have been a colourable imitation: In such a ca suppose a mode invented to attain some result in chemistry, would a la inventor who had attained the same result by a mode very nearly the sa yet not identical, be entitled to go back on the prior invention, and say also is my invention? Clearly not. Suppose a party perfects a mach and another party seeing his way to the same result, but not having atta the same perfection, puts in a provisional specification, he prevents the of the perfect machine; yet his own invention is not complete, and specification is put in not for publication but to postpone it, inasmuch as is merely groping his way in the direction of the end which the other p has already achieved. A person in the position of Davidson, theref cannot by using his own invention commit a piracy of a thing which ano person invented. But it does not follow, and is not contended, that bec a person who has invented a machine is entitled to use it, that ther every other person is also to be entitled to use it.

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Again, in reference to the question of public use, the question is, whe the date of the patent is the date it is made falsely to bear, or the dat which the letters are truly issued? The lodging of a specification is protection in this sense, that if any man use the same invention, or stantially the same, with that which is afterwards patented, or as the re of an independent invention, there is anything to protect the patent ag that. The use which will void the patent is not the use of that whi disclosed, but the public use of a separate and independent invention, ha no reference to the discoveries of the patentee at all. The object of 16th and 17th Vict. is very plain. The party is left at liberty, after he so far disclosed the nature of his invention, by lodging a specification on to mature it, without any restraint as to publication. But the prior use is a totally different thing, and stands on a different footing gether from that upon which the validity of the grant depends. The tion of granting letters patent by the statute of James is, that no using this particular invention; but here there was a prior use arising an invention independent of the patentee.

Lord President.—The exception to the direction at the trial having bee drawn, we are now to dispose of the case as if none had been taken. Th have, on certain issues, returned a verdict in favour of the pursuer; and, in to certain others of the issues, they have pronounced special findings of fact with the concurrence of the parties, have devolved on us the duty of enteri verdict for the pursuer or defenders, according as we shall decide the matter upon these findings.

The action is brought on the ground of alleged infringement of patent. cludes as usual for damages; but, as the object of the pursuer was not so recover damages as to try the question of right, it was arranged at the tri

[1] Dolland v. Hall, H. Blackstone's Rep. xi. p. 470–478; Gibson v. Bra and Grain. iv. p. 205; Lord Lyndhurst in Househill Coal Co. v. Nielson, 1843, Bell's Ap. Cases, 2 p. 1; Lewis v. Macleay, Webster's Patent Cases,

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in the event of a verdict being entered up for the pursuer, it should only be entered up for the nominal damages of one shilling.

The defences to the action were of a twofold character. Some of them resolved into a challenge of the validity of the patent, and others into a denial of the alleged infringement. The issues sent to trial were framed so as to comprehend both branches of the defences. Then, again, while the defenders denied having used the pursuer's invention, although Davidson admitted having used one substantially the same, he took a counter-issue impeaching the validity of the patent. These issues impeached the validity of the patent on two grounds, which appear from the issues themselves. The first issue calls in question the originality of the invention as the invention of the pursuer; and, under that issue, if it had been found that the invention had not been truly the invention of the pursuer, but of somebody else, which the pursuer had passed off as his own, the patent would not have been valid. Under the second issue, the question is raised as to the prior use of the invention;—by anybody, no matter by whom. If so used before the issuing of the letters patent, it does not signify who was the inventor. If the pursuer was the inventor, and allowed his invention to be used, then his patent was invalid; and, if any one else was the inventor, and allowed the invention to be used, the patent was equally invalid. Prior use destroys the right to obtain a patent, and the validity of a patent if obtained.

These issues having gone to trial, the jury, by a verdict, found in favour of the pursuer upon his first issue. By that finding it was established that he had obtained letters patent as there pointed at. Then, on the first alternative issue, the jury, by their finding, determined the pursuer's originality of invention. Therefore, upon that ground, the patent was sustained. But there was another ground of challenge, in reference to which the jury pronounced certain special findings. They found that the improvements used by the defenders were invented by the defender Davidson before 14th November 1853, the date of the provisional protection. That Mr Davidson did not use his invention for the purposes of his trade before 14th November 1853; but that the machine invented by him was capable of being so used before that date. That Mr Davidson used his invention for the purposes of his trade between the 14th November 1853, and the 1st of February 1854.

The first question to be considered arises upon the second alternative issue, which goes to invalidate the patent by reason of previous use; and such might have been the result although the pursuer was the original inventor, for he might have allowed it to get into public use. After giving his invention to the public without conditions, he could not reclaim it and secure the privileges of a patentee. The jury have found that the improvements used by the defenders were substantially the same with those invented by the pursuer, and that they had been invented by the defender Davidson, and brought to perfection before 14th November 1853, and were used by him for the purposes of his trade between the 14th November 1853 and the 1st February 1854. It is that use which raises the question of the validity of the patent, for there was no attempt made to shew that the invention had been used by any other person than the defenders. The jury have disposed of this issue by finding special facts applicable to it, and have left it to us to say whether the use was such as to entitle the defenders to a verdict on it. If they be, it will be unnecessary to enter farther into this case; because, in that event, the patent would not be valid, and there could be no infringement of it so as to subject the defenders in damages, or entitle the pursuer to a verdict on the separate issue of contravention.

In order to invalidate letters patent on the ground of previous use, it is necessary not only that the use shall have been prior to the date of the letters patent, but that it should be a public and not a secret use. Accordingly, in this case, the issue puts the question, "Whether improvements substantially the same as those mentioned in the letters patent and specification were known and used within the United Kingdom prior to the date of the said letters patent"? Now, "known and used" means known to the public, and openly used. The jury have by their verdict fixed the nature and extent of the use. They find that, prior to 14th November 1853, the machine invented by Davidson was capable of being used for the purposes of his trade, but was not so used till after that date, and they have not found that it was used for any other purpose before that date, nor does it appear that it had been published or made known before that time. Indeed it

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appears from the evidence that Davidson at that time contemplated applying for a patent, and, consistently with that, he could not do otherwise than avoid publication of his invention. His experiments were over, and the invention was complete and ready for publication and to be put in use, but it was not so published or used. In these circumstances, it cannot be held that, prior to the 14th November, the improvements patented by the pursuer were "known and used" in the sense of the issue, or in any sense which could be held as invalidating the letters patent.

But the jury have found that, between 14th November 1853 and 1st February 1854, being the date at which the letters were issued, the defender, Davidson, did use the invention for the purpose of his trade—that the invention was his own invention, although substantially the same with that of the pursuer, and it is not found that the use which he so made of it was anything else than that open and public use of it which the ordinary exercise of a trade imports or implies. Indeed the evidence shews that the use—during that period at least—was not secret, but open and public. The question arises, therefore, whether that use was such as to entitle the defenders to a verdict on the second alternative issue, and so invalidate the pursuer's patent on the ground of prior public use.

I am of opinion that it cannot have that effect: In the first place, because the issue does not embrace that period of time, and, in the second place, because the law would not give such effect to the use during that period. The letters patent bear date 14th November 1853, and the duration of them is for fourteen years from that date. The 14th November 1853 is the date they actually bear, and that date was given to them in strict accordance with the provisions of the statute 15 & 16 Vict. c. 83. The question put in issue is distinctly limited to use before the date of the "said letters patent," which cannot mean anything else than the date which the letters lawfully bear, and actually do bear; that is the 14th November 1853; and it could scarcely have been intended to embrace use subsequent to that date, for the defenders have no plea on record founding on such use, and the way adopted was the true way of putting the issue in this case. Even if the terms of the issue could be extended so as to cover that period, I do not think that the use by Davidson of the invention during that period would invalidate the patent, because the provisional protection, which the pursuers had obtained on 14th November, protected his patent against such consequences. In this question of previous use, it is of no importance who was the inventor of the thing used; for I think that letters patent protect the party against the consequences of use during that intervening period between the date of the provisional specification and the actual issuing of the letters patent. The provisions of the statute on that subject are the 8th, 23d, and 24th sections. Section 8 introduces what was not in the patent law before—the power of lodging a provisional specification; and, if the provisional specification is allowed, then the invention "may, during the term of six months from the date of the application for letters patent for the said invention, be used and published without prejudice to any letters patent to be granted for the same, and such protection from the consequences of use and publication is hereinafter referred to as provisional specification."

I read that section as protecting the party against any objection to the validity of the patent, founded on the intermediate use of it.

Then section 23 provides, that "it shall be lawful to cause any letters patent to be issued in pursuance of this Act, to be sealed and bear date as of the day of the application for the same; and in case of such letters patent for any invention provisionally registered under the 'Protection of Inventions Act 1851," as of the day of such provisional registration, or when the law officer to whom the application was referred, or the Lord Chancellor, thinks fit and directs, any such letters patent as aforesaid may be sealed and bear date as of the day of the sealing of such letters patent, or of any other day between the day of such application or provisional registration and the day of such sealing." And section 24 provides that "any letters patent issued under this Act, sealed and bearing date as of any day prior to the day of the actual sealing thereof, shall be of the same force and validity as if they had been sealed on the day as of which the same are expressed to be sealed and bear date: Provided always, that save where such letters patent are granted for any invention in respect whereof a complete specification has been deposited upon the application for the same under this Act, no proceeding at law or in equity shall be

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had upon such letters patent in respect of any infringement committed before the same were actually granted."

Therefore, although a party may use the invention in the meantime, that use is not to subject him to an action for infringement; and, on the other hand, while not exposing him to such an action, such use does not invalidate the patent. There is an exception, where, instead of a provisional specification, a party lodges a full specification. In such a case, the use of the invention after that date and before the date of issuing the letters patent, renders the party so using it liable to an action for infringement. But if the patentee lodges only a provisional specification, that saves his patent, but does not entitle him to raise an action for infringement.

It therefore appears to me that if the defender Davidson used the invention during that intermediate period for the purposes of trade, it had not the effect of invalidating the patent, and that, consequently, the verdict here ought to be entered up for the pursuer on that second alternative issue, in so far as such use can be founded on as invalidates the patent. That disposes of both grounds on which the validity of the patent has been questioned. The jury have negatived the objection founded on the want of originality of the invention, and, on the facts found by them, it necessarily follows that we must enter up a verdict for the pursuer on that second alternative, negativing the objection founded on previous use. The patent must then be held to be a valid patent, for it is not challenged on any other ground.

But that does not exhaust the case. It only settles the validity of the patent. There remains the question of infringement, and that is perhaps the part of the case attended with most difficulty. This is a case not very common,—one of contemporaneous invention. The jury have found in effect that the pursuer and defenders were each of them original inventors of improvements in their department of trade,—that their inventions were substantially the same,—and that they were contemporaneous inventors. The pursuer obtained a provisional specification on 14th November 1853, before which time the defender Davidson, acting independently, had perfected his invention. He used his own invention from and after that day. The provisional protection did not, during its currency, disable him or disentitle him from using his own invention, and the question is, whether the giving out of letters patent disentitles him to continue the use of it under pain of being liable as an infringer of the patent. No case has been cited to us ruling this precise point. We have been referred to some dicta in which the point has been suggested, but there is no indication of opinion on the subject given in any case, nor do the suggestions appear to have been made in any case in which the opinions upon that point would have been of any value, or from which we can infer that the Judges had given the question full consideration. The utmost that can be said of them is, that they are suggestions, and as to some of them, I am not sure that we are to consider them as suggestions on this particular matter. It is contended that the defender is still entitled to use his own invention without being liable as an infringer, because the patent could not prevent him doing what he was doing before it was granted, and because at most it could only prevent him using the pursuer's invention, but not his own. These are the grounds on which the argument is maintained, and the case presented to us for decision.

The first of these grounds admits of two answers—First, if the 14th November 1853 be taken to be the true and legal date of the letters patent, as I think it must, there was nothing done by Davidson before that date which amounted to use of his invention, and therefore it cannot be a hardship to prevent him doing what he was not doing before that date. Therefore, if he is now to be limited to the condition he was in before the date of the letters patent, that is a condition in which he was *not* using the invention for the purpose of trade. Second, although the use of the invention during the subsistence of the provisional protection does not expose the user to prosecution as an infringer, there is nothing in the statute from which we can infer that it entitles him to continue such use after the letters patent are given out. The case of the defenders, therefore, must rest on the other ground, that Davidson was using, not the pursuer's invention, but truly his own invention; and that view is supported by the fact which is found by the jury, that he was an original inventor, that this machine was made by him, and that he was using that machine till the 1st February 1854. He also founds on an inference to be

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deduced from the terms of the letters patent, which limit the monopoly of the pursuer to the use of his own invention.

That raises a question of novelty and importance. Cases were put to us of extreme hardship as tests of the principle. An invention, it was said, which had been used by the inventor for a length of time, might be put a stop to by a party taking out letters patent, and therefore, such a result was not to be implied in a grant of monopoly of this kind. In this particular case we are not compelled to deal with a question of that kind, because the use of the machine had not commenced at the date of the letters patent; but still the principle is involved. After all the consideration I have been able to give to this case, I am of opinion that the argument so maintained on the part of Davidson is not sound in law. When a patent is validly granted—is held in law to be a valid patent—then I think that the party who obtains the patent is held to be the owner of that invention described in the letters patent. It is held in law to be his invention. A monopoly of it is given to him as being his invention, because he is the party who has given to the public that invention. He has given it to the public under the condition that he shall obtain a monopoly, and so it comes to be his invention in that sense. The discovery is not the thing the public have an interest in; what they have interest in is that they shall have the benefit of that invention. A party may live and die, taking the knowledge of his invention with him, but the disclosure of the invention and the means by which it shall be put in use, are the conditions on which he obtains a monopoly of it from the public, and the party who comes forward and complies with that condition, being himself the true inventor, gets the right to the monopoly of that invention. It becomes his invention in law. The consequence is that his monopoly must be protected, and although there may be others who have made the discovery, but who have not brought it to the same perfection, and have not made their bargain with the public in regard to it, they cannot disturb the integrity of the monopoly of the party who first makes his bargain with the public. In all cases the statute provides for sufficient notice being given to every one, that if there be any good objection to giving the monopoly to the party who has applied for it, such objection may be stated; and although I do not rest my judgment on the circumstance that it is now too late to object, yet delay is a circumstance to be considered, as also that it is only after full publication that a monopoly of the invention is given to the party as being truly his invention, and in the exercise of that monopoly he must be protected. The invention is then his. It is used by no other party. A separate inventor who comes after him does not borrow the invention if he is truly original in his invention. But that will not entitle him to use such invention against the interests of the patentee; and if this defender, who was an inventor before the date of the patent, but had not then brought his invention to perfection or made it public, is now entitled to use it merely because he can say he did not take it from the patent, what consequences will follow? May not any person take the invention from the defender, using his invention, and not the invention of the patentee, and so the patent may be altogether destroyed by a growth of users springing from this other source of invention? To allow this, therefore, would be to destroy the validity of the monopoly. I see no ground for the defenders' doctrine, from the policy of the statute, from the history of this monopoly, or from the terms of the letters patent. On the contrary, I think that the true reading of all is, that by giving the public the benefit of the invention, that invention, and everything that is substantially the same with it, and which was not public before the date of the patent, is the invention of the patentee, and that no person has right to destroy his monopoly by using machinery or improvements substantially the same with his. I therefore think that the verdict ought to be entered up for the pursuer on the second issue.

I may add, that at the trial both parties were examined, and that their examination was perfectly creditable to them. They were evidently running a race of invention. Both of them spoke with perfect candour, but it so happens that the pursuer was lucky in the race.

Lord Ivory.—I concur in the result at which your Lordship has arrived, and substantially in the reasoning. I am of opinion that the verdict must be for the pursuer.

Lord Curriehill.—I also concur.

LORD DEAS.—We have had the advantage of a full consultation in this case, and I concur in the result of your Lordship's opinion, and also in every one of the observations by which that result is arrived at. No. 149.

Mar. 11, 1857. Ross. Lamb.

THE COURT pronounced the following interlocutors:—

"*Edinburgh*, 11*th March* 1857.—The Lords, having resumed consideration of this cause, and heard counsel for the parties, of consent of the defenders, Disallow the exceptions taken by the defenders to the charge of the judge at the trial, and reserve all questions as to expenses."

"*Edinburgh*, 11*th March* 1857.—The Lords, having resumed consideration of this cause, and heard counsel for the parties on the special verdict of the jury and whole cause, Direct a verdict upon the second issue for the pursuer, and upon the second alternative issue for the defenders to be entered up for the pursuer, and apply the verdict of the jury, and the verdict now entered up for the pursuer. —*Quoad ultra* appoints the cause to be put to the roll."

GEORGE COTTON, S.S.C.—PATRICK PAUL, W.S.—Agents.

No. 150.

...NE ROSS OR MELBOURN AND HUSBAND AND MANDATORY, Petitioners.—*J. B. Nicolson.*

...*dicial Factor.*—An appointment of factor *loco tutoris* made to a pupil resident ...ngland, for the management of heritable property belonging to him in Scotland.

...UME POLLOCK, residing at Newton Stewart, died possessed of certain ...e property there. By deed of settlement he disponed his whole estate, ...able and moveable, to his wife in liferent, and to her son and daughter ... former marriage, James Ross and Elizabeth Ross or Lindsay, share ...share alike, in fee, and to their respective heirs and assignees. Mar. 11, 1857. 1ST DIVISION. C.

...rs Pollock, the widow, died in 1853. Her son, James Ross, was also ... He left an only son, a pupil, residing at Sharrington in Norfolk, ...succeeded to his father's interest in Hume Pollock's estate.

...is petition was presented by the widow of James Ross, now wife of ...iam Melbourn, residing in Norfolk, with consent of her husband, stating ...at Hume Pollock having appointed his wife and son to be his executors, ...ere was at present no person legally authorised to uplift the rents of the ...ritable property belonging to the pupil, and therefore praying for the ...pointment of a factor *loco tutoris* to the pupil, "in order that the estate ...ght be preserved without injury for behoof of the pupil, and of all persons ...ving right therein." The pupil had no tutors. An interim appointment ...a judicial factor was made during the Christmas Recess. When the peti...n was moved, the Court expressed an opinion that a factor *loco tutoris* ...s the proper appointment to be made in the circumstances. The original ...plication was accordingly withdrawn; and on this amended application ...ng presented,

THE COURT pronounced the following interlocutor:—"Having resumed consideration of this petition,—Nominate and appoint James Black Dill, banker, Newton Stewart, to be factor *loco tutoris* to James Ross, the pupil mentioned in the petition, with the usual powers,—the said James Black Dill always finding caution before extract, and decern *ad interim*."

JAMES ARNOTT, W.S.—Agent.

MRS CHARLOTTE ANNE GREIG OR LAMB, Petitioner.—*Cowan.* No. 151.

Judicial Factor—Foreign.—A judicial factor appointed for the management of ...itage in Scotland, belonging to a pupil resident in England, and to whom guar-

No. 151. — Mar. 11, 1857. Anderson v. Anderson. — 1st Division. C.

dians were appointed under a will executed in the English form, and appointment of a factor *loco tutoris*, refused.

The late Mr Lamb, a domiciled Englishman, died on 29th November 1856, leaving a will executed in the English form, by which he appointed the Earl of Eglinton, Sir Frederick Leopold Arthur, Bart., and Henry Danby Seymour, Esq., to be his executors; and appointed the petitioner Mrs Lamb, and, after her decease, the gentlemen nominated executors, to be guardian and guardians of the persons and estate of his children during their respective minorities.

Mr Lamb left one son, Archibald Lamb, a pupil, and two daughters. At the time of his death he held a heritable security for L.22,500 over the estate of Glassfoord in Lanarkshire. In his will this was dealt with as personal property—such mortgage being personal by the law of England. Mrs Lamb now presented this petition, stating that these circumstances had given rise to a variety of questions of international law, that she was advised that the English will was defective in the technical terms and solemnities requisite to carry the heritable security as Scotch heritage, and that the nomination of guardians contained in the English will was not sufficient to entitle the parties named to act in relation to heritable estates in Scotland belonging to their ward; "and it becomes therefore necessary that the guardianship of the said Archibald Lamb *quoad hoc* should be committed by your Lordships to a proper party as his factor *loco tutoris*, with the usual powers."

The Court expressed an opinion that such an appointment would be incompetent, in respect the pupil was resident in London, and furth of their jurisdiction; and recommended that an application for the appointment of a judicial factor should be substituted. This was done, and special intimation having been made to the executors,

> THE COURT pronounced the following interlocutor:—"The Lords having resumed consideration of this petition, appoint Roger Montgomerie to be judicial factor on the said heritable estate in Scotland, with the usual powers, he finding caution before extract, and decern *ad interim*."

HUNTER, BLAIR, & COWAN, W.S.—Agents.

No. 152.

GEORGE ANDERSON, Pursuer.—*Scott.*
ROBERT ANDERSON, Defender.—

Process—Division and Sale.—An action of division and sale is an Outer-House action. Form of procedure in an action of division and sale at the instance of a *pro indiviso* proprietor of certain subjects not divisible, the other *pro indiviso* proprietor refusing to concur in the proceedings.

Mar. 11, 1857. — 1st Division. Ld. Ardmillan. C.

ON 17th February 1857, the Lord Ordinary pronounced the following interlocutor and note:—"The Lord Ordinary reports the cause to the First Division of the Court, and grants warrant for enrolment thereof in the Inner-House Rolls."*

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* "NOTE.—This action was brought for division of small subjects in Dunkeld, with a conclusion for sale, if the subjects should be found not divisible.

"After inspection and report by a competent person, the subjects were found not to be divisible, and were ordered to be sold. Articles of roup were prepared, but the defender, the brother of the pursuer, refused to sign them.

"A proof of value has since been taken, and L.182 has been ascertained to be the value. A scheme of sale and allotment has been lodged by the pursuer; and the whole proceedings are now reported to the Court, in order that their Lordships,

On 19th February the Court appointed the cause to be put to the summar Roll. On 24th February, the case being called,— No. 152. Mar. 11, 1857. Anderson v. Anderson.

Lord Ivory.—I doubt whether this case comes before us in regular form. In the case of Craig[1] great avizandum was made to the Court. I am afraid that as we are dealing with an absent party, the pursuer may be getting into difficulties in point of form, which may be troublesome hereafter.[2]

Lord Curriehill.—The case of Brock v. Hamilton,* decided by Lord Rutherfurd, affords the greatest light on the nature of this process of any reported authority.

The case was continued; and on the 10th March, being again called,—

Scott, for the pursuer, stated that he doubted the competency of the Lord Ordinary pronouncing an interlocutor ordering a sale, and appointing the clerk to sign the articles of roup.[3]

Lord Curriehill.—This is not an Inner-House action. It is an action brought

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if they shall think fit, may approve of the scheme of sale and allotment, and remit to proceed with the sale, and at the same time may appoint, or empower the Lord Ordinary to appoint, the clerk to the process to sign the articles of roup."

[1] Craig v. Dickson, 4th Feb. 1837, 15 S. 486.

[2] Milligan, 2d Feb. 1782, Dict. 2486; Hailes, 897; Shand, p. 611.

[3] Milligan, *ut supra;* Marshall, 26th Jan. 1815, and 23d Feb. 1816; Brock v. Hamilton, 27th Jan. 1852.

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* Brock v. Hamilton. Jan. 27, 1852. Brock v. Hamilton. Ld Rutherfurd

Pro indiviso *proprietors—Division and sale.*—Where two parties were *pro indiviso* proprietors of certain subjects not divisible, either separately or by apportionment;—*Held* that declarator of division and sale at the instance of one of the parties was competent. *Observed,* that the principle of the Roman law, *de communi dividundo,* is recognised by the Court of Session, and applies to such a case.

This was an action of declarator and division and sale of certain subjects in Glasgow, held by two *pro indiviso* proprietors, one of whom was bankrupt, Brock (the pursuer) being his trustee.

The following interlocutors were pronounced by Lord Rutherfurd, Ordinary, and were acquiesced in :—

"12*th July* 1851.—The Lord Ordinary holds the record closed upon the revised condescendence and defences, and relative notes of pleas in law, No. 20 and 21 of process, and appoints counsel for the parties to be ready to debate; reserving to both parties to produce such writings as they may consider necessary within eight days."

"11*th November* 1851.—The Lord Ordinary having heard counsel for the parties, makes avizandum to himself with the process."

"*Edinburgh, 25th November* 1851.—The Lord Ordinary having heard parties' procurators, and made avizandum, and thereafter considered the closed record, writs produced, and whole process—Finds that the pursuer's author and the defender are proprietors *pro indiviso* of the subjects libelled, partly by succession and partly by purchase: Finds it admitted by both parties, and especially founded upon by the defenders, that the subjects are not divisible, either separately or by apportionment, between the parties: Finds, therefore, that the conclusions for sale and division of the price are competent, and sustains the action to that effect accordingly: Finds that no relevant defence otherwise has been stated against these conclusions: *Quoad ultra* appoints the cause to be enrolled in the motion roll, with a view to determine the steps which it may be necessary to adopt for carrying through the sale."

Note.—The present action is of the nature of an action *de communi dividundo,* and concludes for division of the common subjects, or in the event of its being found that they are indivisible, for sale under authority of the Court, and division of the price. The pursuer, while he inserts the conclusions of division, following the style book in the matter, avers that the subjects are indivisible, meaning, as was distinctly explained, that they could not be divided into two equal lots, either separately, or

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at common law; and being so, I do not know any principle upon which it is necessary to make it an Inner-House action, and I would not like to do anything to

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by any apportionment of the three. The defender admits this statement to be correct, and, indeed, founds upon the fact that the properties are indivisible in either of those senses, as the ground of the plea on which he has mainly insisted, namely, that the action, though it might be competent in its conclusions for division, if division were possible, is altogether incompetent, in so far as it concludes for sale and division of the price. This view of the matter raises a question of importance. The elements of the decision exist in the case, on the admission of the parties, and without farther inquiry.

The competency at common law of an action for division between co-proprietors of a common subject, and at the suit of one, does not seem to be denied by the defender. It cannot, indeed, be disputed, in the face of clear authorities, that we have borrowed from the Roman law, and introduced into our common law actions of the same nature and import with those of the Roman law *familiæ erciscundæ* and *de communi dividundo*. The defender referred to Erskine, 3, 3, 56, *et seq.*, as shewing that the action of division was, by the law of Scotland, limited to moveable subjects, and that an action for division of heritable subjects, except under a brief of division, as between heir and tercer, and between co-heirs, had no place in the law of Scotland, but required the aid of statute, as in the case of commonties, or of judicial sale. But if the passage of Mr Erskine referred to be held to express anything beyond a statement, and that, too, in itself vague, of the progress of the law, it must be disallowed as plainly of no authority. Lord Stair, I. 7, 15, says expressly, "under the obligation of restitution is comprehended the obligation of division, whereby that we possess in common with others, or indistinct from that which they possess, we are naturally obliged to divide with them, whensoever they desire to quit the communion, for thereby we restore what is their own, and we are not obliged thereto by any contract or delinquence. It is true the contract of society includeth the obligement to divide after the society is ended. But communion falleth many times when there is no society nor contract;" he then refers to the actions in the Roman law already mentioned, but adds, "because they do chiefly concern immoveables or ground rights," he proposes to treat of them thereafter. Accordingly, in his fourth book, in mentioning the brief of division in which the partition is to be made by the writ of division between the *portionarios dictarum terrarum*, he defines portioners to be such "as bruik, *pro indiviso*, whether they be heirs portioners or portioners by apprising or adjudication, or if there be divers tercers who have not been kenned to a particular division, for in that case the brieve of terce is not the competent way of division, for that is only competent between the tercer and the heir." There can be no question, it is thought, after the authority of Lord Stair, referring to the Roman law, that an action for division of heritable property held *pro indiviso*, though by singular titles, was imported into the common law of Scotland in the form of a brief of division in very ancient times; Bell's Comm., vol. i. p. 64. The remedy easily assumed the form of an ordinary action, the brief of division being one of those which was subject to advocation, even where the proceedings before the inquest resulted in verdict, and an ordinary action being of itself more suitable, when, as in this case, the equitable powers of the Court might require to be interposed. This was strongly recognised in the case of Milligan, February 8, 1782, as reported in the Faculty Collection, and also in Lord Hailes, volume ii. p. 897. The discussion there did not depend upon the fact that the subject had been employed in a copartnery, but resolved simply into the rights of parties holding, and by singular title, a common subject. And though the more recent case of Stewart, Shaw, vol. xiv., p. 106, 4th December 1835, may have depended upon the subjects having been at one time copartnery property, the action was sustained upon the principles of the Roman law, which applied not only to copartnery, but in those circumstances which created *quasi ex societate* the relation of co-copartnery.

But the defender, while he admitted under these and other authorities that an action of division would lie at common law, as it might be held to have come in place of a brief of division, denied entirely the competency of this action, limited as its conclusions practically must be, by the shewing of both parties, to a sale under

infer that the Court is of opinion that the Lord Ordinary is not entitled to pronounce these interlocutors. No. 152.

Mar. 11, 1857.

Anderson v. Anderson.

authority of the Court and division of the price, contending that the reference to the Roman law had no place here, sale and division of the price being matters simply of remedy, not necessarily flowing from the principle upon which the action *de communi dividundo* proceeds. The Lord Ordinary cannot concur in this view, or in any such restriction in the reference to the Roman law. That law and our common law following it, proceed upon the principles that no one should be bound to remain indefinitely *in communione* with another or others as proprietors of a common property; that for reasons of public policy, and especially to ensure the advantageous management of such property, any joint proprietor should have it in his power, against the will of the others, to put an end to the communion; and that there arises out of the situation itself an obligation to divide, or where division or any other arrangement is impracticable, consistently with retaining the property, to adjust their respective interests by sale and division of the price. Under the civil law accordingly, *subhastatio* was had recourse to in the last resort; and so it is in most countries in Europe that have adopted the Roman law; but all this is founded upon the obligation which arises *ex contractu*, where there is a proper contract of society; and *quasi ex contractu*, where the relation has arisen, not under contract, but by succession or any other title or titles through which parties may hold a subject as joint proprietors. In this last case they were considered by the Roman law as *socii* in the matter, and because as either party could put an end to this, it might be involuntary, society when he chose, there emerged similar obligations to those which arose on the termination of copartnery, and the law gave similar remedies. Pothier accordingly treats the subject in his appendix to the Contract of Society. It is not a matter therefore of remedy as regards its form, that the conclusion of sale and division of the price is granted; it is the appropriate remedy in justice, resulting from the situation of the parties, where the easier and more obvious remedy of division has no place. The Roman law looked in the first instance to division, and that was the leading conclusion and object of the action, *de communi dividundo*, but when that could have no effect from the nature of the subjects, or where the parties could not agree, that one should take the subjects, paying the other the value of his share, and especially where the different estimates of value excluded any similar adjustment, public sale, under authority of the Court, became plainly the only course.

The Lord Ordinary, therefore, can have no doubt that the action is clearly competent in all its conclusions, and he thinks the Court has full equitable jurisdiction in the matter. He does, not, however, think the pursuer bound to shew equity for division, or, where division is impossible, for sale. He considers the pursuer's right, in that respect, to be clear. But circumstances may easily exist in which the defender may shew, in equity, a good defence against the demand for division or sale. No such defence, however, had been made here; for the Lord Ordinary cannot consider the circumstance, that the defender may draw a larger income from the subjects as they now are than the interest of any price that is likely to be realised, affords any ground for binding the pursuer to remain in communion, especially where the rental has fallen, and is probably falling, and where one of the co-proprietors has become bankrupt.

The Lord Ordinary has not thought it necessary to make any observation on the specialty, that the pursuer in this action is trustee on the bankrupt estate, who has an immediate and direct interest in the proper administration of the estate, to dissolve the communion and wind up the affairs of the bankrupt. He wishes to put the case at once upon the broad and satisfactory grounds on which he thinks it would rest if the bankrupt had been pursuer,—and the specialty, at any rate, might be subject to the answer, that the trustee might sell his interest. Further, all the difficulties in the case would arise if the action were brought at the instance of any purchaser from the trustee.

On 27th January 1852, the Lord Ordinary pronounced the following interlocutor: —"The Lord Ordinary interpones his authority to the minute of the parties, and decerns in terms thereof in all respects."

[illegible] & Jamieson, W.S.—Morton, Whitehead, & Greig, W.S.—Agents.

No. 152. The case was again continued, to adjust the interlocutor.

Mar. 11, 1857. Bell v. Williamson.

LORD DEAS.—The remit now to be made proceeds on the footing that an action of this kind is a common law proceeding. The pursuer of it does not appeal to the *nobile officium* of the Court. He merely seeks to enforce his common law rights, which entitle the *pro indiviso* proprietor to have the subject divided, and, if not divisible, to have it sold. The ordinary rule is, that no man is bound to remain longer in communion than he pleases.

THE COURT then pronounced the following interlocutor:—"11*th March*.—The Lords, on the report of Lord Ardmillan, Ordinary, of new appoint the subjects described in the summons to be sold by public roup, and remit to the Lord Ordinary to take and authorise such steps as may be necessary for carrying through the sale, and for disposing of the cause."

On 17th March 1857, the Lord Ordinary pronounced the following interlorlocutor:—"Having resumed consideration of this cause, and the remit from the Lords of the First Division, ordains the subjects described in the summons to be exposed to sale, by way of public roup, within the Parliament or new Session House of Edinburgh, upon Wednesday the 20th day of May next, between the hours of two and four o'clock afternoon, at the upset price of L.182 sterling, being the value fixed by the proof for the pursuer, No. 70 of process, upon minutes and articles of roup, to be adjusted at the sight of the Lord Ordinary. Ordains intimation of the roup of the said subjects, the yearly rent or value, and upset price thereof, and time and place of the roup, to be made in the North British Advertiser and Perth Courier newspaper, once each fortnight, to the day of sale.

JOHN WALLS, S.S.C.—Pursuer's Agent.

No. 153.

JAMES BELL, Petitioner.—*Macfarlane.*
JAMES WILLIAMSON, Respondent.—*Pattison.*

Judicial factor—Joint adventure—Special powers.—A judicial factor appointed of consent on a joint adventure, with power to wind up the concern, and take all steps necessary for the protection of the interests of the adventure, and with power to sell the whole property or carry on the business.

Mar. 11, 1857.

1ST DIVISION. L.

BELL presented this petition, on the allegation that in May 1855 he and the respondent entered into a joint adventure, without a written contract, having for its object the publication of a newspaper called "The North Briton," which had ever since been published in Edinburgh. That the respondent represented that the capital required from the petitioner would not exceed L.150, and he had on this understanding agreed to enter into the adventure. That, nevertheless, he had been called upon, out of his own private funds, to advance L.907, besides which he had become personally responsible to the extent of L.170, in addition to liability for the rent of premises. That to account of his advances he had only received about L.30; that although the respondent, the ostensible publisher of the paper, had contributed only L.96, 10s., large sums had passed through his hands, he having the whole management of the business. That he (Bell) was satisfied that there ought to be a handsome return from the property, and had demanded to see the books, including the bank-book, as he had learnt that the respondent was in the habit of depositing the monies of the adventure in bank in the name of his father-in-law, but that the respondent refused to show the books, and denied that the paper was paying.

The petition further narrated negotiations which had followed between the parties with a view to the respondent's purchasing the petitioner's interest, or to an adjustment of their interests, which, however, had led to no result, and stated that the defender not only refused explanations he was

ound to give, but "avowed his intention to collect and draw all the monies e could, and which he is now doing, but refuses to pay any part of the urrent expenses."

The petitioner therefore prayed "to grant warrant for serving this petition n the said James Williamson, and to appoint him to lodge answers thereto ithin a certain short space; and on resuming consideration hereof, with or ithout answers, to nominate and appoint the said James Cunningham, or uch other fit and proper person as your Lordships may fix upon, to be idicial factor on the estate and affairs of the said joint adventure, he findg caution before extract in common form, with all the usual and necessary owers for winding up as speedily as practicable the affairs of the said joint lventure; and in particular, with power immediately to enter into possesson of the said newspaper, and of the premises in which the business of the int adventure is carried on, and to take possession and charge of the whole oks and effects belonging to the joint adventure; as also with power to ke all steps that may be necessary for the protection of the interests of e joint adventure, and for the realisation of the whole property and effects longing to it; and especially with power to sell and dispose of the said wspaper and good-will of the business of the joint adventure, as well as of e whole printing machines, steam engine, and other printing materials, d that either by public roup or private bargain, as he may judge best, d to hold the proceeds thereof, and any other monies that may come into hands after defraying the necessary charges and disbursements for hoof of all parties interested, and subject to the orders of the Court; with wer also to the said factor to manage and carry on the said newspaper siness, and to employ suitable persons for that purpose, till the same can disposed of to advantage: and in the meantime, and as the interests of parties in said joint adventure are subject to the imminent risk of being rificed if a neutral party is not appointed to take immediate charge of same, your Lordships are prayed to appoint the said James Cunningham, such other person as your Lordships may think proper, to be judicial tor foresaid *ad interim* until the case comes to be further advised by your rdships, and that with all necessary powers of interim management, and ecially with power to take charge of the said newspaper business, and tive books, steam engine, printing machines, and others; as also to erdict, prohibit, and discharge the said James Williamson from collecting in any way intromitting or interfering with the money due to said cern, or with the management thereof; and in the event of his making unnecessary opposition to this application, to find him liable to the itioner in the expenses that may be thereby occasioned to him; or to do rwise," &c.

Answers were lodged by the respondent. He stated that the petitioner, knew that the respondent had no great amount of capital, undertook agreed to make all advances necessary for the purchase of types, ses, &c., in order to set the paper a-going,—the respondent, on the other d, agreeing to give his time and attention to the management of the er and the details of the business of printing and publishing it and keepof the books, an editor being appointed for the literary department. as also agreed that the profits of the paper, when it should yield any, ld be divided equally between the petitioner and the respondent. In ring into this agreement it was well understood by both parties that it ld take some time before the newspaper could be so established as to i any profits, and that considerable advances would require to be made. as equally well understood that much care and attention would be red in the conducting of it, so as to make it profitable. And it was ed that the respondent, while giving his time and attention, was

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to receive in the meantime a moderate allowance for his subsistence out of the proceeds.

He then stated that for a long time he had got no remuneration for his services; and, after narrating at great length the proceedings which had taken place between himself and the petitioner, and denying the allegations in regard to his management of the funds, he stated that he was quite "willing that all proper means be taken for realising the property of the "copartnery, and winding up the affairs. And he has no objection to the "appointment of a judicial factor, with the requisite powers. The powers "proposed in the prayer seem to be unusual, and to exceed what the Court "is in use to grant. But the respondent objects entirely to the appointment "of Mr Cunningham."

The Court then pronounced the following interlocutor:—"Of consent, appoints James Torrop, residing in Argyle Place, Edinburgh, to be judicial factor on the estate and affairs of the said joint-adventure, with the powers prayed for, and with the usual powers, he always finding caution before extract, and decern *ad interim;* and remit to the Lord Ordinary on the Bills to proceed with the farther adjustment and execution of this matter, in so far as may be necessary, during vacation, and also with powers, in case of the present appointment falling, or not being timeously carried out by finding caution, or otherwise, to appoint another person as factor *ad interim.*"

James Bell, S.S.C.—J. M. Macqueen, S.S.C.—Agents.

No. 154. Alexander Johnston, Pursuer.—*Lord Adv. Moncreiff—Penney—Pattison.*

John Somerville Johnston and Others, Defenders.—*D. F. Inglis—Baillie.*

Process — Reduction — Preliminary plea — Jury trial — Issues — Facility.—An heir-at-law, on the ground of misrepresentation, concealment, and essential error, brought a reduction of an agreement he had signed, whereby, on the narrative that it was doubtful whether a certain sum was heritable or moveable, he had agreed that it should be dealt with as moveable—Issues adjusted to try the question.

Counter issue, that the investment of the sum referred to was not the act of the deceased, refused, in respect it was incompetent in this cause to adjudicate incidentally upon his state of mind *ope exceptionis.*

Preliminary plea, that the sum was truly moveable, reserved, on the ground that that question could only arise if the pursuer should succeed in his reduction.

Mar. 11, 1857. — 2d Division.

Thomas Johnston, a farmer in Roxburghshire, died without issue, leaving a disposition and settlement, whereby he disponed to and in favour of his brother, Alexander Johnston, the pursuer, all "subjects of an heritable nature" which should belong to him at the date of his death, and to and in favour of his brothers George and William, and the said Alexander, and a niece, all his moveable estate, of every description; "as also all debts and sums of money due and owing to me by bond, bill, &c., or any other manner of way whatever (provided the same is not heritage, and as such belonging to my heir-at-law, the said Alexander Johnston)." George Johnston predeceased the testator, and John Somerville Johnston, and other defenders, were his children.

Thomas Johnston died on the 2d, and was buried on the 8th of July 1855. According to the pursuer, "a meeting of certain of the relatives was agreed to be held on 9th July. Mr Robert Swan, writer in Kelso, had been law-agent for the deceased, and knew the fact of his having left a disposition and settlement, and the contents and import thereof. He also knew the extent and particulars of his property, heritable and moveable, and of the

securities on which it was invested. Of all these matters the pursuer did not know anything until sometime after his said brother's death, and then all the information he got was very general and imperfect—given him verbally by Mr Swan, upon whom, as having been in some matters his law-agent, though he was not then acting for him, the pursuer relied. Mr Swan, in giving him such information, erroneously and improperly told the pursuer that a sum of L.1600, secured by bond of Mr Baillie of Jerviswoode, was moveable. In this situation of matters, Mr Swan, at his own hand, and without instructions from the pursuer, did, previous to the said meeting at which he was to be present, prepare and cause to be written out a minute," &c., in which, after a narrative of the opening of the repositories, and of the provisions of the settlement, there was the following passage:—"A note of the whole estate which belonged to the deceased is annexed, and subscribed by the above named parties, with reference hereto; and considering that it is doubtful whether the said sum of L.1600 mentioned in the said estate be heritable or moveable, and as Mr Alexander Johnston will be entitled to the sum of L.2000, lent to the Misses Whale, it is agreed by the said Alexander Johnston that the said sum of L.1600, which is held in trust by Messrs George Johnston and John Johnston, shall be considered moveable, and be divided as such in terms of the said disposition and settlement."

The first two items of the note of funds were these:—

"To sum lent to Misses Whale, Earlstoun, upon their bond and disposition in security to Mr Peter Johnston deceased, assigned to Mr Johnston, L.2000.

"To sum lent to George Baillie, Esq. of Jerviswoode, part of L.2800 in bond and disposition in security to Messrs George and John Johnston, 1600."

Of this minute and agreement the pursuer brought the present reduction, so far as regarded the said sum of L.1600, and the pursuer's right thereto."

The facts with regard to the security for the L.1600, seem to have been these:—At the term of Whitsunday 1846, Mr Baillie of Jerviswoode required a sum of L.2800, to replace a similar sum called up by a Mr Nisbet, to whom the late Mr Baillie had granted a bond and disposition in security over the lands and barony of Langshaw. Through Mr Swan, who also acted as factor for Mr Baillie, the Johnstons agreed to make up among their friends the sum required to meet the demand made by Mr Nisbet. It was arranged that an assignation to the security held by Mr Nisbet should be taken to the lenders George Johnston junior, and John Somerville Johnston, in *ex facie* absolute terms. At the sametime a declaration of trust was executed by them in favour of the various parties who had contributed the money, which, after setting forth the assignation, proceeds,—"We hereby bind and oblige ourselves, and our successors, as assignees foresaid, to account for the principal sums advanced by them to us for the purpose of obtaining said assignation, viz., to Thomas Johnston, tenant in Primside, for sixteen hundred pounds," &c.

As to what passed at the meeting when the agreement was signed, the pursuer alleged—"At the meeting Mr Swan read the above minute and agreement hurriedly; and no further information or explanations were given, and no discussion or deliberation took place regarding it. The pursuer was not informed what reason there was for holding that the defunct's right to the L.1600, contained in the security over Langshaw, was moveable. It was not stated when, or under what circumstances, the money was so invested; nor was the declaration of trust mentioned. The existence and terms of that deed were not known to the pursuer, who had no knowledge of or information regarding this and the other subjects and investments of which

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the deceased's estate consisted. So far as regards this part of the minute and agreement, for which he had previously given Mr Swan no authority whatever, the pursuer subscribed the minute at the request and by the directions of Mr Swan, without really understanding, or having the means o understanding, the matter, and on the faith of Mr Swan's representation that the right to the L.1600 was of a moveable nature. The pursuer wa the more induced to rely on Mr Swan's statements, for that he had acted a the pursuer's agent for some time, and in some matters, although he wa then acting for others having an adverse interest to the pursuer, which wa not known to the pursuer at the time. The arrangement was a contrivanc of Mr Swan's, principally in order to benefit another party not present a the meeting, and without the least regard to the pursuer's legal rights. Th pursuer was thus kept in ignorance, and was under essential error as to th nature of his rights, and the effect of this agreement. Any informatio which was given to him was intended, at least was calculated, to mislea and deceive.

"The statement that the right in the person of the defunct to the L.160 was moveable, was a misrepresentation. It was an estate heritable *natura*, and the defunct's right to, and interest in it, was of an heritab nature. But of all this the pursuer was at the time ignorant, and was ke in ignorance, or rather was misled and misinformed in regard to it, and the surrender of his right he did not stipulate or receive any value or co sideration whatsoever, nor was any value or consideration expressed in t agreement."

The defenders pleaded as preliminary defences;—That the sum L.1600 must be held moveable as in a question as to the right of succes to the deceased Thomas Johnston, in respect, 1, that the investment was the act of the deceased; and, 2, even if it had been, the right vested in h was merely to call upon the trust-assignees to account for and pay to h that sum.

The first of these pleas was based on the following allegation :—" the time the investment was made in the name of Messrs Johnston, Thomas Johnston did not act in the management of his own affairs from then state of his health; and from mental imbecility and the failure of memory, he was incapable of giving directions in regard to his mo matters, or other transactions, and, though he continued to sign orders his bank-account, according to the request of his nephew, he was not aw of, and was not capable of, understanding the purposes for which s orders were signed. His whole farming and other concerns were sol managed by his nephew, George Johnston, and in so far as Mr Swan, had all along been Thomas Johnston's agent, acted in his affairs at this ti he did so under the instructions, and by the authority of George Johnst In the matter of the advance of the L.1600, which was made on the secu of the assignation by Mr Nisbet, and which was made by uplifting belonging to Thomas Johnston from a bank, and which had never bee vested on heritable security, the transaction was carried through solely the authority and under the instructions of Mr George Johnston, acti manager in his uncle's affairs: and if Thomas Johnston was himself, then or at any subsequent period, informed of the fact that such an inv ment had been made, he was entirely incapable, from the state of his of appreciating its nature, or of understanding its effect."

The preliminary defences were reserved, and a record made up merits, the defenders contending that the pursuer's allegations were founded in fact and irrelevant to infer reduction, and that at any had acted under and homologated the minute and agreement.

The Lord Ordinary pronounced the following interlocutor :—"Finds is alleged by the pursuer that the sum of L.1600 was advanced by

late Thomas Johnston, in order to be invested on heritable security; and hat the said sum, along with other smaller sums advanced by other parties, vas invested on the security of the assignation to the heritable bond for L.2800 referred to on the record; and the assignation was taken in name of George Johnston and John Johnston, but the same was held by them in trust or the parties severally advancing the money, and, in particular, in trust for Thomas Johnston, to the extent of the L.1600 so advanced by him: Finds hat, assuming these averments to be correct, the right of Thomas Johnston n the heritable security to the extent of L.1600 so advanced by him, and eld by his trustees for him, was heritable; but that the defender's averents that Thomas Johnston did not effect, and was not a party to the fecting the investment of the said sum on heritable security, remain to be quired into, and are now reserved: Finds that, by the minute of agreement ught to be reduced, the pursuer appears to have abandoned and departed om the claim for L.1600 without any consideration whatever, and not on transaction or compromise, or mutual adjustment of opposing interests: inds that the pursuer has alleged facts and circumstances relevant to infer duction of the said minute: Therefore repels the objection to the relevancy eaded by the defenders; and appoints the pursuer to lodge issues within ght days." *

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The defenders reclaimed, contending that the pursuer's case on record ally amounted to nothing more than,—that he had himself committed an or in judgment in trusting to Mr Swan's advice, and that he was entitled prevail in his reduction, because Swan was wrong in saying that the ture of the fund was doubtful;—but even if he were wrong, that would not a ground for reduction.

ORD JUSTICE-CLERK.—This is a speech on the merits. It must be perfectly n to Mr Baillie to maintain all he has now said upon the documents themes, and the whole circumstances; but this is too early a stage for his argut.

The following interlocutor was pronounced:—" 14*th February* 1857.—all the interlocutor of Lord Ardmillan reclaimed against: Find that the suer has averred on the record facts and circumstances relevant to be t to probation: Reserve all questions of expenses; and allow the parties odge issues within ten days."

The following were the issues which were at first proposed by the pur r:—" It being admitted that the pursuer is nearest and lawful heir of and of conquest of the said deceased Thomas Johnston, late tenant in nside, and is also disponee of the said Thomas Johnston, in his whole ls, heritages, and other subjects of an heritable nature:

1. Whether the defenders, or any of them, did by themselves, himself,

* NOTE.—The Lord Ordinary is of opinion that the right of Thomas Johnston e sum of L.1600, standing on heritable security, was heritable. It was his money, advanced by himself, and invested in name of trustees, who declare they hold for his behoof. The declaration of trust qualifies the investment; ubject of the trust is the heritable security, the right of the truster to the herit investment made with his money, and held for his behoof, cannot be otherwise heritable. Then, assuming as must be done *in hoc statu*, the truth of the uer's statements, that the minute sought to be reduced was brought ready ared to the meeting by Mr Swan, and that the pursuer, acting with no other e than Mr Swan, and being in ignorance of his rights, signed it to the effect solutely giving away L.1600 without equivalent or consideration,—the case s to be within the principle of Dickson v. Halbert, 17th February 1854. It not appear that anything was done on the faith of the minute before the purobjected, so as to bar his doing so; and, on the whole matter, the Lord nary is of opinion that the facts must be investigated.

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or herself, or by another or others, induce the pursuer, by misrepresentation of material facts, to enter into the minute and agreement No. 6 of process?

"2. Whether the defenders, or any of them, did by themselves, himself, or herself, or by another or others, induce the pursuer, by concealment of material facts, to enter into said agreement?

"3. Whether the said minute and agreement, so far as it relates to the sum of L.1600 therein mentioned, and security therefor, was entered into by the pursuer without value, and in ignorance of his legal rights?"

The defenders objected to these issues. So far as laid on fraud they were utterly unsupported by any averment on record.

The averments merely amounted to an allegation that Swan intimated an opinion which may have been correct or otherwise. There was no averment of any concealment of any material circumstances by them (the defenders), or by those for whom they were responsible. Therefore there remained no ground on which the pursuer was entitled to rest, except essential error.

The pursuer replied;—That his averment of concealment of the ground on which Swan rested his opinion, and of the fact of the existence of the declaration of trust, was quite sufficient to support his issues; and if the defenders stood by the agreement, that made them responsible for the acts of Swan.

Lord Justice-Clerk.—In regard to the case for the pursuer, it appears to me when there are separate grounds of reduction, always to be a simpler matter for the jury to have separate issues. The directions of the Judge can be simpler, and will be more easily understood. Whether the issue of "essential error" alone will enable the pursuer to prove all he avers on record, is another matter. I should think it hazardous before the trial to decide that point. If essential error will enable the pursuer to prove misrepresentation or concealment, then I think it better to make the latter the subject of a separate issue. But it is objected that it is not averred that there was any misrepresentation or concealment *by the defenders*, or those acting at the time for them, and hence that no issue ought to be granted on these grounds. To that objection I am decidedly opposed. In the first place, it is to be remembered that by the interlocutor of 14th February we have already found that the "pursuer has averred on record facts and circumstances relevant to be sent to probation." I think the issues should be so framed as distinctly to set forth the averments so made, without restricting the case to one ground. The defenders support and adhere to the minute of agreement as duly obtained, and as binding on the pursuer. Now, if the family agent present at this meeting (whether intending to favour the defenders or not) did mistake the question which the pursuer had to consider when he entered into the agreement, or concealed, whether wilfully or by ignorance, facts which it was material for the pursuer to know, and if the pursuer was thereby induced to enter into this agreement to his own prejudice, and if the defenders, getting the benefit of such agreement by means of that misrepresentation and concealment, adhere to the deed, and insist that it is binding on the pursuer, they adopt the act so brought about, and must meet the allegation of such misrepresentation or concealment, although not aware of it at the time. They make themselves parties to it to the extent to which the pursuer avers it, not as their act, but as an act bringing about the agreement, and if they deny that it was so brought about, and adhere to the deed, he is entitled to prove it against them, just as much as if they had been cognisant of it at the time. The man of business referred to was not, I assume, their agent at the time. But he may have intended to favour them. But whether he did or not, when they insist that the agreement is binding on the pursuer, they must meet any relevant ground of reduction;—and that it is a relevant ground for setting aside the agreement, that the pursuer was induced to enter into it by misrepresentation or concealment, cannot, in my opinion, be made matter of controversy.

Lord Murray agreed with the Lord Justice-Clerk.

Lord Cowan.—There are no facts averred in the record to permit of an issue

n the ground of misrepresentation or concealment of material facts *on the part of* ie *defender, or others acting for him* in the transaction. Had there been such averments, the pursuer would have got the issue usual in such a case, in addition to that n the ground of essential error. But when the alleged misrepresentation or concealment is not connected directly or indirectly with the defender, I do not think here is room for the issue proposed on the specific ground of the one or other as istinct from the general issue. Not that the pursuer is to be excluded from roving any of his allegations in the record. In the trial of an issue on essential ror, the whole circumstances in which the minute of agreement was entered into ust be laid before the jury. I think that great embarrassment may arise from lowing both of the proposed issues. What would become of this case if there re two contrary verdicts—for the one party on the first, and the other on the cond issue? If there were a denial of misrepresentation on the first issue, how uld we deal with a verdict for the pursuer on the second? I think the splitting of these issues perils the case so far as laid on essential error.

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The pursuer then proposed the following amended issues:—

"1. Whether, at a meeting of the relatives of the said deceased Thomas hnston, held on 9th July 1855, the pursuer was induced, by misrepresentation or concealment of material facts, to enter into the minute of reement No. 6 of process?

"2. Whether the said minute of agreement, so far as it relates to the sum L.1600, therein mentioned, and security therefor, was entered into by the rsuer, without value, and under essential error?"

The defenders proposed to take a counter issue, to which they prefixed a rative of the uplifting the L.1600 from bank, the investing it in the ignation, and the declaration of trust:—

"Whether the said investment was not the act of the said deceased Tho- s Johnston?"

This issue they contended that they were entitled to take, as the real stion between the parties was the true character of a sum of money, and hey could prove that the acts founded on as having changed its character heritable were not the acts of the deceased at all, but of one who managed him, then the pursuer's whole case was excluded; for no one managing another is entitled to do any act which shall affect his succession.[1]

The pursuer objected to the defenders' issue as wholly inadmissible. It quite incompetent in such a process to make the acts of the manager a party, not under legal disability, the subject of judicial inquiry.

ORD JUSTICE-CLERK.—There can be no doubt that the defender's proposed e as to the alleged imbecility of the old gentleman cannot be entertained in this n. It is open to numerous objections—1. It has no relation to the real merits his cause, and the only question truly to be decided. The pursuer alleges, on grounds set forth, that he is entitled to get rid of the document by which he unced, as heir, a claim to the heritable security to which he says he was tled as heir. He may have no such right as heir. The subject may turn out to be heritable in the view of law. But, in the meantime, his claim is excluded barred by this deed of renunciation. The defenders stand by that deed, and l he reduces it he cannot raise the question whether the subject was heritable, whether, as heir, he is entitled to it. Now in this reduction, the only issue is, there grounds for reducing the agreement so far as it relates to the L.1600. may be entitled to reduce the deed, and yet, when he raises the point (which annot now do), the subject may turn out not to be heritable. But the defen- say the heritable title was taken when the old gentleman was in mental imbe- y, and, at all events, not cognisant of how his matters were managed by rela- s, and that this state of things had continued for years, and hence, that these ives could not, by any investment of money, make that heritable by their act h in fact was moveable. This may be proved in another process. But it is

[1] Kennedy v. Kennedy, 15th Nov. 1843, ante, vol. vi. p. 40.

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no answer to the case of the pursuer that he was deceived, or in error, in renouncing at once his claim, whether good or bad. 2. The matter could not be finally disposed of in this action, even if the defender's issue were allowed. 3. It is utterly impossible to allow the defender, *ope exceptionis*, to attempt to establish the imbecility of the old gentleman. There is no instance of such a procedure. They must proceed in the usual way to establish his incapacity, and hence that the investment of the money was not his act. 4. I should, at all events, be prepared to say that the allegations on this record were not sufficient to entitle them to try such a point But this last matter it is unnecessary to consider. The matter attempted to b raised is quite incompetent in this action.

Lord Murray concurred.

Lord Wood was absent.

Lord Cowan.—I am still of opinion that the only ground of reduction relevantl set forth in the record is essential error, which is the subject of the second issu and that the first issue proposed by the pursuer ought to be disallowed.

I concur in holding that the issue proposed by the defenders is inadmissibl under this record.

The Court approved of the issues last proposed by the pursuer, an disallowed that proposed by the defenders.

W. Mason, S.S.C.—Douglas & Mosilaws, W.S.—Agents.

No. 155.

James Hamilton and Others, Pursuers.—*F. W. Clark.*
John Christie and Thomas Hamilton (Stonehouse Road Trustees), Defenders.—*Brown.*

Process—Reclaiming note—Decree by default—Interlocutor—Clerical error.—Decree by default was pronounced in the Outer House against the pursuers. O a reclaiming note they were reponed. In default of making payment of the expens found due by the Lord Ordinary, decree was again taken. After this interlocut had become final, the Lord Ordinary corrected a clerical error, pronouncing decr of new. The Court refused a second reclaiming note as incompetent, and found t reclaimers liable in expenses.

Mar. 11, 1857. — 2d Division. Ld Mackenzie. L.

The record in this case was made up and closed, and an order to deba granted on 8th June 1855. On 16th July 1856, an interlocutor was pr nounced dismissing the action, "in respect the pursuer had made no appea ance at repeated callings in the debate roll." On a reclaiming note, t Court remitted to repone. After hearing parties, the pursuer was repon on condition of paying eight guineas of expenses within eight days. O 18th December 1856, the Lord Ordinary pronounced this interlocuto —"In respect the pursuer has failed to make payment to the defenders L.8, 8s., on the motion of the defender, the Lord Ordinary of new dismiss the action: Finds the pursuer liable in expenses," &c. After this inte locutor had become final, it was noticed that the word "pursuer" w erroneously used for "pursuers." On 17th February the Lord Ordina pronounced a new interlocutor, in which the mistake was rectified.

The pursuers reclaimed, and prayed the Court to recall the interlocut complained of as incompetent.

Lord Justice-Clerk.—We cannot permit such a practice. If a party is to reponed against one decree by default after another, there is no saying wh such a system may end.

The Court refused the reclaiming note, and found the defend entitled to the expense of discussing its competency; modified t same to four guineas.

William Mackersy, W.S.—John Phin, S.S.C.—Agents.

Mrs Janet Duff or Crichton and Mandatory and Others, Pursuers.—*Macfarlane—Black.* No. 156.

The Baroness Keith and Nairn and Others, Defenders.—*Sol.-Gen. Maitland—Ross.* Mar. 11, 1857. Duff v. Lady Keith.

Lease—Construction of clause of destination—Mora—Abandonment.—The destination of a lease was in favour of the tenant and his heirs, secluding assignees, unless with consent of the proprietor, without prejudice to an assignation in favour of one of the tenant's children; declaring that when the succession fell to heirs-female without any assignment, the eldest should succeed without division, "such assignment or succession not to become effectual without the proprietor's approval." The proprietor declared no option;—*Held* (*aff.* judgment of the Lord Ordinary, *abs.* Lord Wood), (1) that the eldest heir-female was entitled to the farm; (2) that she was not barred by *mora* from taking it up, although fourteen years had lapsed after her father's death without her claiming it, in respect she had been all the time in America, and the defenders did not aver that she knew the terms of the lease; (3) on the same ground a plea of abandonment was repelled.

Judicial manager—Expenses—Mandatory.—On allegations of the farm being mismanaged and understocked, as the tenant was in America, the Court appointed a person to manage the farm for behoof of all concerned, but found that the pursuers' mandatory could not be held liable for the expense of the management.

The late Charles Duff in 1839 entered into a lease of the farm of Milltown of Tullybeagles, in the county of Perth, the property of Lady Keith, to endure for nineteen years from the term of Whitsunday 1840, and the separation of the crop of that year. The clause of destination in the lease was as follows: "To the said Charles Duff and his heirs, but expressly secluding assignees and sub-tenants, legal or voluntary, unless with the special consent and approbation of the proprietrix or those acting for her, but without prejudice to the tenant assigning the lease to any one of his children, and declaring that in all cases where the succession shall devolve on heirs-female, and no special assignment, that the eldest shall always succeed without division; but declaring that no such assignment and succession shall become effectual without being approved of by the proprietrix or those acting for her at the time." . . . . . . 2d Division. Lord Handyside. I.

Charles Duff occupied the farm till his death in 1840. He left a widow and three daughters, the oldest, Mrs Crichton, residing in North America; the second, Mrs Gellatly, and her husband, were resident with her father at his death; and the third, Mrs Reid, at her father's death, resided in Caithness-shire. Duff left no son, and did not execute any assignation of the lease of Milltown. The widow resided on the farm till her death in 1846. Mrs Gellatly and her husband afterwards continued to reside there, and managed the farm. On Gellatly's death in 1851, Mrs Gellatly emigrated to America, leaving the farm in the occupation of her son James Gellatly.

This action was raised by Mrs Crichton and Mrs Reid, against Lady Keith, the Count de Flahault, her husband, for his interest, and James Gellatly. The summons concluded for declarator that the lease of the farm of Milltown was, notwithstanding Charles Duff's death, an unexpired and subsisting lease, and that the parties therein specified as his successors were entitled to enter to the occupation of the farm; that the pursuer Mrs Crichton, as his eldest heir-portioner, or, in the option of Lady Keith, she and Duff's two other daughters were his successors in the lease, and that the defenders should be decerned to cease from molesting the pursuer Mrs Crichton, or her and her sisters, in entering upon and continuing to occupy

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the farm. The pursuers alleged that, being resident, the one in America, and the other in Caithness-shire, at the date of their father's death, they were unaware of their rights under his lease, which they were only informed of in 1854, and shortly afterwards this action was raised.

The defenders pleaded;—Heirs-portioners were excluded from the lease and the succession of an eldest heir-female could only take place with th approbation of the proprietrix;—the claim of the pursuers was barred b *mora*, no claim to occupy the farm having been made for fifteen years aft their father's death;—the pursuer Mrs Crichton, by her continued residen abroad since her father's death, must be held to have abandoned any rig she might have under the lease, and she was by such residence abroad di qualified from being a tenant under it.

The Lord Ordinary pronounced this interlocutor:—"Finds that the pu suer, Mrs Janet Duff or Crichton, as eldest heir-female of her father, t late Charles Duff, is, under the lease libelled on, the successor in said leas and is entitled to enter into the occupation and tenancy of the lands a others let under said lease; and in respect the defender has not declar any option, in terms of the alternative conclusions of the action, of taki the whole heirs-portioners as the successors in the said lease, finds, decer and declares in favour of the pursuer, the said Janet Duff or Crichton, terms of the primary conclusions of the summons: Finds the defender lia in the expenses of process," &c.*

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* "NOTE.—There are three points of considerable importance to be separat considered and disposed of. The first is the construction to be put on the cl of destination of the lease. The tenant died, leaving three daughters, and with having executed any special assignment of the lease. The defender pleads t heirs-portioners are excluded, and that the eldest heir-female can only succ with the approval of the proprietor. The present action is to assert the right one of the pursuers, the eldest heir-female, but at the same time to give an opt to the proprietor to accept, if she chooses, the whole of the heirs-portioners as s cessors in the lease. The defender declines to recognise the right of succession the eldest heir-female, and resists the conclusions of the action *in toto*. U doubtedly the terms of the above clause are of difficult construction. The di culty lies in assigning the meaning and import of the words 'and succession' the last member of the clause, 'no such assignment and succession should bec effectual.' Does it qualify the previous declaration, that on the succession dev ing on heirs-female, the eldest should always succeed without division? Thi contended for by the defender, and if correct, it makes the succession of the el heir-female dependent on the approval of the proprietor. And farther, as by declaration, that when the succession devolves on heirs-female, the eldest sho always succeed, heirs-portioners are excluded, the result, this clause being so int preted, is to exclude female succession altogether, and at the will of the propri forfeit all right in the children of the tenant, being only females. There is certai room under the words 'and succession,' to hold by that construction, but the L Ordinary has been unable to adopt it. He thinks that the words used are not clear in their meaning as to necessitate a construction so severe in its operation. thinks there is ambiguity in the meaning of the words 'and succession,' coupled they are with those preceding—'no such assignation and succession,' and t without some additional words as—'of the eldest' or 'eldest heir-female,' follow the words 'and succession,' there is obscurity in the construction contended The preceding member of the clause declares positively that the eldest sho always succeed without division, in the case of succession devolving on he female and no special assignment, and it is thought that the effect of this decla tion is insufficiently qualified as to the eldest by the words of the declaration lowing. In a case such as the present, the Lord Ordinary apprehends it was duty of the proprietor to make *luce clarius* a stipulation, which was to take a the common law rights of the heirs of the tenant, by leaving them wholly dep

Lady Keith reclaimed. It was pleaded;—The lease excluded heirs-portioners, as was usual in agricultural leases; and the stipulation that No. 156.

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dent upon her pleasure. In the outset of the lease, the lands are let to the tenant and his heirs generally. It was for the landlord to take off the effect of this destination, by distinct stipulation, to meet apprehended circumstances; and if it was intended that females were to be excluded of all right to succession at common law as heirs-portioners, while the limitation to the eldest was to be defeasible by the landlord, it ought to have been made very plain indeed. The rule of law appears applicable—'in stipulationibus cum quæritur quid actum sit, verba contra stipulatorem interpretanda sunt.' It is not to be supposed that a tenant, and the circumstances of the present case are adverse to it, would readily take a lease, which made his heirs, as they existed at the time, incapable of succeeding to the benefit f the lease, except at the mere pleasure of the landlord. The Lord Ordinary thinks that, upon a fair and sound construction of the lease, the eldest heir-female entitled to succeed. Suppose the tenant had left an only daughter, would she have been excluded? Plainly not, when the clause is in the plural—heirs-female. But if the female succession is not wholly excluded, except with consent of the landlord, should not the declaration in favour of the landlord of the succession in case of heirs-female being to the eldest be construed as giving an absolute right of succession to the eldest, and not a defeasible one?

"If the Lord Ordinary should be mistaken on the first point, the other defences the proprietor are superseded. On the opposite view, the second point of *mora* to be considered. The defender raises that plea solely on the facts appearing on the pursuer's condescendence. There is no statement by the defender, which a significant circumstance. The plea of *mora* rests on the time which has elapsed between the date of the father's death and the bringing of the present tion. No doubt the number of years is very great. But the eldest daughter tes that she was ignorant of her rights—resident abroad at the time of her her's death, where she has continued to reside—and that the terms of the lease re unknown to her; and it appears, indeed, not to have been in possession of family, and a copy of it only obtained some few months before raising this ion. These averments of the pursuer are not denied upon record. The answer merely that they are not admitted. Then as to the possession of the farm, it ears all along to have been in the members of the family. The widow and her ond daughter continued to occupy until the widow's death, after which this ighter and her husband continued in the occupation till June 1854, after which daughter's son remained in the occupation, and still continues in it. These ts are admitted by the defender. If the legal right to the lease is in the elder suer, it is conceived that the delay in asserting her right will not forfeit it. d, indeed, the defender been able to aver that, relying on presumed abandonnt of the lease, the lands had been let to other parties, and new contracts ered into; or even that there had been an adoption of the second daughter as ant on presumed dereliction of the lease by the elder, there might have been unds for holding the pursuer precluded from now claiming possession of the n. But there is nothing on record alleging that the defender's interests have ered by the pursuer's delay, or will suffer by vindicating her right to the lease. l as to the sister, who has been in possession since the widow's death, and her the present possessor, they are both called as defenders in this action, and do resist its conclusions. Under these circumstances, the Lord Ordinary considers nnecessary to examine the application of the plea of *mora* to discharge the right n heir to a lease. He thinks the facts upon the record in this case do not it of the defender pleading *mora* with effect.

The third point is raised by the additional plea in law added by the defender r the debate. It is that the defender's continued residence abroad since her er's death is to be held as an abandonment of her right under the lease,—that it disqualification of her being tenant, and bars her present claim. The validity he plea of abandonment of her rights must, like the plea of *mora*, rest on her wledge of her rights under the lease, and which she forbore to claim. But knowledge is not averred by the defender, and the pursuer's allegation of her rance of her rights is not even denied by the defender. Mere residence

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the eldest daughter, or any of them to whom the tenant might assign it, should succeed to the lease only with the approval of the proprietrix, was a reasonable one to protect the proprietor from being obliged to receive a husband of one of the daughters, who might not be a desirable tenant.

The Court having intimated an opinion that Mrs Crichton was entitled to succeed, it was stated by the defenders' counsel that the farm had not been properly managed during last crop,—that part of the stocking had been sold,—what remained of it then was entirely insufficient, and had been sequestrated, and moved that in the meantime, and until it was possible for the pursuer Mrs Crichton, who was in America, to state whether she intended to enter to and stock the farm, measures should be taken to have it properly laboured, so as to protect the interests of the proprietrix.

> The following interlocutor was pronounced:—"Adhere to the interlocutor reclaimed against: Find the defenders liable in additional expenses, and remit, &c.; and in respect of the pursuer Mrs Jane Duff or Crichton being at present in America, and of the statement now made at the bar, by the defenders' counsel, and not denied by the pursuer's counsel, in regard to the present condition of the farm and lands of Milltown of Tullybeagles, described in the summons, on the motion now made for the defenders, Find that a manager ought now to be appointed to take possession of the said farm and lands, and labour and manage the same for behoof of all concerned, and appoint William Menzies, factor to the defenders, to be such manager accordingly, with all the powers usual and necessary, reserving all questions between the said pursuers and the said defenders of liability *inter se* arising out of the said appointment, but declaring that the pursuer's mandatory is free from all such liability and decern."

T. & R. Landale, S.S.C.—Russell & Nicolson, C.S.—Agents.

No. 157.

James Buchanan, Pursuer.—*F. W. Clark.*
John Cowan, Defender.—*Penney*—*W. Watson.*

Process—13 & 14 *Vict. c.* 36, *sects.* 46, 48—*Review.*—1. When the Lord Ordinary appoints questions to be tried before himself without a jury, these questions ought to be stated in his interlocutor specifically, and not by a reference to the record. 2. Where in the findings pronounced after such a trial, the Lord Ordinary finds facts which were not remitted to trial, it is incompetent for the Court to strike them out.

Mar. 11, 1857. — 2d Division. R.

James Buchanan, senior, the father of the pursuer, and father-in-law of the defender, died in August 1839, survived by Margaret M'Kinlay, his third wife, and by two sons by his first wife, Walter, and James the pursuer.

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abroad cannot of itself operate a forfeiture. Though there are no conventio[nal] irritancies in the lease, the pursuer, if she obtains decree in this action, is of co[urse] bound by the common law obligations incumbent on a tenant. She has stated [on] record her readiness to implement the lease, and proposed by minute, if requi[red,] to express her resolution to take possession and reside. Her present resid[ence] abroad, while this process is in dependence, is conceived to be immaterial, [the] defender resisting altogether her right as heir to the lease. She will, it is thou[ght,] be entitled to reasonable notice that personal residence is insisted on. In the c[ase] of Stirling v. Millar, June 29, 1813, Fac. Coll., where the heir in a lease, wh[ich] stipulated personal occupancy and residence, had gone with her husband [to] America, and an action of declarator of irritancy was brought against her [on] account of not residing upon the farm, time was allowed to her to return a[nd] [resume possess]ion."

eft a trust-disposition and settlement in favour of his two sons, the defender Cowan, and one William Marshall. His widow was to enjoy the liferent of ertain subjects, which, after her death, were to go to his son Walter in life-ent, and to his children in fee. Another heritable subject was to go to ames in liferent, and his children in fee; and another to the children of he defender Cowan in fee; but this last was under burden of payment of .50 to a third party, and of payment of feu-duties applicable to the subjects ferented by his widow. His trustees, who were also executors, were farher to pay the widow a sum for mournings, and a sum of L.200, in security f which the rents of the heritable subjects were assigned to her. It was lleged that Buchanan left considerable personal estate, and few debts, with e exception of one to the defender, amounting to L.200. And in the 8th rticle of his condescendence, it was stated, "the pursuer, although named an ecutor, never accepted the office, and he had no intromissions, either with e moveable estate of the deceased, or with the rents of the heritable proerties disponed by the settlement. The defender, who was a son-in-law of e testator, assumed the entire management of the personal estate of the eceased, and, as the pursuer believes, alone intromitted with the same. he defender never made up any title as executor, and although frequently illed upon to produce a state showing his intromissions with the moveable tate of the deceased, and the appropriation thereof, he has hitherto refused do so. The defender has farther intromitted with the rents of the herible subjects, other than those liferented by the widow, and, in particular, has intromitted with the rents of the property disponed to the pursuer in erent and his children in fee, and also with the rents of the subjects conyed to the testator's grandsons, John and James Cowan. The rents of the st mentioned subjects, and of the property conveyed to the pursuer in lifent and his children in fee, were assigned to the widow, in security of her ovision of L.200. The defender, and the widow of the deceased, have intly or severally drawn and uplifted the rents of the said heritable prorties for payment, as alleged by them, of the said provision of L.200, yable to the widow, and of the said debt of L.200, due to the defender by e testator at the time of his death. The pursuer was aware that the pernal estate of the deceased was insufficient to satisfy the claims of the dow and the defender, and that for a short period the rents of the property nveyed to him in liferent would be required in order to their liquidation. it although these claims have been long ago fully satisfied and paid, the rsuer, up to the present moment, has not drawn a single farthing of the its of the said property, the liferent of which belongs to him in terms of father's settlement."

On these allegations the pursuer brought the present action, in order to ng the defender to account for his intromissions with the deceased's estate, ether personal or moveable, either separately or jointly and severally with s Margaret M'Kinlay or Buchanan, the widow.

The defences, besides making various explanations as to the state of the eased's funds and affairs, contained the following statements:—(Stat. 2.) On the death of Mr Buchanan, which took place upon the 9th August 39, the four executors nominate appointed by him, including the pursuer, epted of the office, but made up no title by confirmation, as they were required to do so by any debtor, to the moveable estate of the deceased, d there was no reason why the expense of obtaining confirmation should entailed as a burden upon the estate, which was already far exceeded by liabilities. The executors, as such, held several meetings, at which nutes were drawn out and signed by those present, and on these occasions pursuer was present, and adhibited his subscription to the minutes, along th his co-executors; and from the time of Mr Buchanan's death, until a ry recent period, the pursuer acted and concurred with his co-executors

No. 154. — Mar. 11, 1857. Johnston v. Johnston.

the deceased's estate consisted. So far as regards this part of the minute and agreement, for which he had previously given Mr Swan no authority whatever, the pursuer subscribed the minute at the request and by the directions of Mr Swan, without really understanding, or having the means of understanding, the matter, and on the faith of Mr Swan's representation, that the right to the L.1600 was of a moveable nature. The pursuer was the more induced to rely on Mr Swan's statements, for that he had acted as the pursuer's agent for some time, and in some matters, although he was then acting for others having an adverse interest to the pursuer, which was not known to the pursuer at the time. The arrangement was a contrivance of Mr Swan's, principally in order to benefit another party not present at the meeting, and without the least regard to the pursuer's legal rights. The pursuer was thus kept in ignorance, and was under essential error as to the nature of his rights, and the effect of this agreement. Any information which was given to him was intended, at least was calculated, to mislead and deceive.

"The statement that the right in the person of the defunct to the L.1600 was moveable, was a misrepresentation. It was an estate heritable *sua natura*, and the defunct's right to, and interest in it, was of an heritable nature. But of all this the pursuer was at the time ignorant, and was kept in ignorance, or rather was misled and misinformed in regard to it, and for the surrender of his right he did not stipulate or receive any value or consideration whatsoever, nor was any value or consideration expressed in the agreement."

The defenders pleaded as preliminary defences;—That the sum of L.1600 must be held moveable as in a question as to the right of succession to the deceased Thomas Johnston, in respect, 1, that the investment was not the act of the deceased; and, 2, even if it had been, the right vested in him was merely to call upon the trust-assignees to account for and pay to him that sum.

The first of these pleas was based on the following allegation:—"At the time the investment was made in the name of Messrs Johnston, Mr Thomas Johnston did not act in the management of his own affairs from the then state of his health; and from mental imbecility and the failure of his memory, he was incapable of giving directions in regard to his money matters, or other transactions, and, though he continued to sign orders on his bank-account, according to the request of his nephew, he was not aware of, and was not capable of, understanding the purposes for which such orders were signed. His whole farming and other concerns were solely managed by his nephew, George Johnston, and in so far as Mr Swan, who had all along been Thomas Johnston's agent, acted in his affairs at this time, he did so under the instructions, and by the authority of George Johnston. In the matter of the advance of the L.1600, which was made on the security of the assignation by Mr Nisbet, and which was made by uplifting cash belonging to Thomas Johnston from a bank, and which had never been invested on heritable security, the transaction was carried through solely by the authority and under the instructions of Mr George Johnston, acting as manager in his uncle's affairs: and if Thomas Johnston was himself, either then or at any subsequent period, informed of the fact that such an investment had been made, he was entirely incapable, from the state of his mind, of appreciating its nature, or of understanding its effect."

The preliminary defences were reserved, and a record made up on the merits, the defenders contending that the pursuer's allegations were unfounded in fact and irrelevant to infer reduction, and that at any rate he had acted under and homologated the minute and agreement.

The Lord Ordinary pronounced the following interlocutor:—"Finds that it is alleged by the pursuer that the sum of L.1600 was advanced by the

late Thomas Johnston, in order to be invested on heritable security; and No. 154.
that the said sum, along with other smaller sums advanced by other parties, — Mar. 11, 1857.
was invested on the security of the assignation to the heritable bond for Johnston v.
L.2800 referred to on the record; and the assignation was taken in name of Johnston.
George Johnston and John Johnston, but the same was held by them in trust for the parties severally advancing the money, and, in particular, in trust for Thomas Johnston, to the extent of the L.1600 so advanced by him: Finds that, assuming these averments to be correct, the right of Thomas Johnston on the heritable security to the extent of L.1600 so advanced by him, and held by his trustees for him, was heritable; but that the defender's averments that Thomas Johnston did not effect, and was not a party to the effecting the investment of the said sum on heritable security, remain to be inquired into, and are now reserved: Finds that, by the minute of agreement sought to be reduced, the pursuer appears to have abandoned and departed from the claim for L.1600 without any consideration whatever, and not on a transaction or compromise, or mutual adjustment of opposing interests: Finds that the pursuer has alleged facts and circumstances relevant to infer reduction of the said minute: Therefore repels the objection to the relevancy pleaded by the defenders; and appoints the pursuer to lodge issues within eight days." *

The defenders reclaimed, contending that the pursuer's case on record really amounted to nothing more than,—that he had himself committed an error in judgment in trusting to Mr Swan's advice, and that he was entitled to prevail in his reduction, because Swan was wrong in saying that the nature of the fund was doubtful;—but even if he were wrong, that would not be a ground for reduction.

Lord Justice-Clerk.—This is a speech on the merits. It must be perfectly open to Mr Baillie to maintain all he has now said upon the documents themselves, and the whole circumstances; but this is too early a stage for his argument.

The following interlocutor was pronounced :—" 14*th February* 1857.—Recall the interlocutor of Lord Ardmillan reclaimed against: Find that the pursuer has averred on the record facts and circumstances relevant to be sent to probation: Reserve all questions of expenses; and allow the parties to lodge issues within ten days."

The following were the issues which were at first proposed by the pursuer:—" It being admitted that the pursuer is nearest and lawful heir of line and of conquest of the said deceased Thomas Johnston, late tenant in Primside, and is also disponee of the said Thomas Johnston, in his whole lands, heritages, and other subjects of an heritable nature:

" 1. Whether the defenders, or any of them, did by themselves, himself,

* " Note.—The Lord Ordinary is of opinion that the right of Thomas Johnston to the sum of L.1600, standing on heritable security, was heritable. It was his own money, advanced by himself, and invested in name of trustees, who declare that they hold for his behoof. The declaration of trust qualifies the investment; the subject of the trust is the heritable security, the right of the truster to the heritable investment made with his money, and held for his behoof, cannot be otherwise than heritable. Then, assuming as must be done *in hoc statu*, the truth of the pursuer's statements, that the minute sought to be reduced was brought ready prepared to the meeting by Mr Swan, and that the pursuer, acting with no other advice than Mr Swan, and being in ignorance of his rights, signed it to the effect of absolutely giving away L.1600 without equivalent or consideration,—the case seems to be within the principle of Dickson v. Halbert, 17th February 1854. It does not appear that anything was done on the faith of the minute before the pursuer objected, so as to bar his doing so; and, on the whole matter, the Lord Ordinary is of opinion that the facts must be investigated.

No. 154. — Mar. 11, 1857. Johnston v. Johnston.

or herself, or by another or others, induce the pursuer, by misrepresentation of material facts, to enter into the minute and agreement No. 6 of process?

"2. Whether the defenders, or any of them, did by themselves, himself, or herself, or by another or others, induce the pursuer, by concealment of material facts, to enter into said agreement?

"3. Whether the said minute and agreement, so far as it relates to the sum of L.1600 therein mentioned, and security therefor, was entered into by the pursuer without value, and in ignorance of his legal rights?"

The defenders objected to these issues. So far as laid on fraud they were utterly unsupported by any averment on record.

The averments merely amounted to an allegation that Swan intimated an opinion which may have been correct or otherwise. There was no averment of any concealment of any material circumstances by them (the defenders), or by those for whom they were responsible. Therefore there remained no ground on which the pursuer was entitled to rest, except essential error.

The pursuer replied;—That his averment of concealment of the ground on which Swan rested his opinion, and of the fact of the existence of the declaration of trust, was quite sufficient to support his issues; and if the defenders stood by the agreement, that made them responsible for the acts of Swan.

Lord Justice-Clerk.—In regard to the case for the pursuer, it appears to me, when there are separate grounds of reduction, always to be a simpler matter for the jury to have separate issues. The directions of the Judge can be simpler, and will be more easily understood. Whether the issue of "essential error" alone will enable the pursuer to prove all he avers on record, is another matter. I should think it hazardous before the trial to decide that point. If essential error will enable the pursuer to prove misrepresentation or concealment, then I think it better to make the latter the subject of a separate issue. But it is objected that it is not averred that there was any misrepresentation or concealment *by the defenders*, or those acting at the time for them, and hence that no issue ought to be granted on these grounds. To that objection I am decidedly opposed. In the first place, it is to be remembered, that by the interlocutor of 14th February we have already found that the "pursuer has averred on record facts and circumstances relevant to be sent to probation." I think the issues should be so framed as distinctly to set forth the averments so made, without restricting the case to one ground. The defenders support and adhere to the minute of agreement as duly obtained, and as binding on the pursuer. Now, if the family agent present at this meeting (whether intending to favour the defenders or not) did mistake the question which the pursuer had to consider when he entered into the agreement, or concealed, whether wilfully or by ignorance, facts which it was material for the pursuer to know, and if the pursuer was thereby induced to enter into this agreement to his own prejudice, and if the defenders, getting the benefit of such agreement by means of that misrepresentation and concealment, adhere to the deed, and insist that it is binding on the pursuer, they adopt the act so brought about, and must meet the allegation of such misrepresentation or concealment, although not aware of it at the time. They make themselves parties to it to the extent to which the pursuer avers it, not as their act, but as an act bringing about the agreement, and if they deny that it was so brought about, and adhere to the deed, he is entitled to prove it against them, just as much as if they had been cognisant of it at the time. The man of business referred to was not, I assume, their agent at the time. But he may have intended to favour them. But whether he did or not, when they insist that the agreement is binding on the pursuer, they must meet any relevant ground of reduction;—and that it is a relevant ground for setting aside the agreement, that the pursuer was induced to enter into it by misrepresentation or concealment, cannot, in my opinion, be made matter of controversy.

Lord Murray agreed with the Lord Justice-Clerk.

Lord Cowan.—There are no facts averred in the record to permit of an issue

executors, where the pursuer was also present, but that Marshall was much No. 157.
assisted by the defender, who is an accountant in a bank in Glasgow, and to —
whom the factors appointed by the whole executors communicated their Mar. 11, 1857.
accounts and balances, which were by the defender reported and accounted Buchanan v.
for to the executors: Finds that the defender was a creditor of the late Cowan.
James Buchanan, and was, in terms of an arrangement by the executors, paid his debt by them, and this was partly done by their applying to that purpose the balances handed to the defender, as aforesaid, by the factors and by him, as aforesaid, accounted for to the executors, and partly by bills granted to him by the executors, including the pursuer, for balances from time to time remaining due, after taking credit for such partial payments: Finds that the defender is not proved to have received any of the rents or funds of the estate from the tenants or debtors, but only from the factors as aforesaid, and then from the executors, in payment of his debt: And, 3d, Finds, further, in point of fact, that the pursuer accepted and acted as an executor of the late James Buchanan, attended meetings, took part in the business, signed minutes, bills, and other documents, as executor, and concurred with the defender and the other executors in the appointment of factors to uplift the rents, in the taking credit to the executry for the partial payments to the defender's debt made out of the rents, and in granting bills to the defender for the balances so brought out. Appoints the cause to be enrolled, that the parties may be heard on such points of law as they are advised to urge in respect of these findings." *

"*12th February* 1857.—The Lord Ordinary having heard the counsel for the parties, on the note for the pursuer and proof, and considered the same ... avizandum, refuses the motion of the pursuer for alteration of the findings ... fact, contained in the interlocutor of 20th December 1856, and adheres ... the findings in the said interlocutor, and appoints the cause to be again enrolled, that parties may be heard on such point of law, as they may be advised to urge, in respect of the said findings in fact." †

The pursuer presented a reclaiming note, praying the Court to recall or alter the interlocutor complained of, in so far as it affirms such findings in fact contained in the former interlocutor of date 20th December 1856, as are *ultra vires* of, and inconsistent with, the questions directed to be tried before the Lord Ordinary in the interlocutor of date 3d July 1856, and thereafter remit to the Lord Ordinary to prepare findings in terms thereof, &c.

It was argued, that the finding in the interlocutor, wherein it was found that Cowan had accounted, was wholly *ultra vires* of the Lord Ordinary, as it was no part of the question settled for trial. The directions of the statute were that he should "find on each such question separately," and, if he did so, his findings were to be final. Where questions of law and fact

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* "Note.—The above special findings in fact seem to exhaust what is required by the interlocutor of 3d July last. It is understood that vitious or unauthorised intromission is not now alleged, and it is proved that whatever part the defender took as one of the executors, was with the concurrence of the pursuer. What the defender did as a creditor, in receiving from all the executors payment of his debt, it is difficult to perceive how any intromission by him, as is ... alleged, can be involved. But on these points the pursuer will be heard, if he wishes it."

† "Note.—At the close of the trial of the questions of fact, it was the express ... of both parties, that the Lord Ordinary should pronounce special findings in ... of fact, so as to preserve ample materials for disposing of such questions of ... as might be afterwards raised. This he has done, and, on reconsidering the evidence, with the pursuer's argument, he is quite satisfied that the findings, to which he now adheres, are according to the truth of the case, as appearing from the ... led, and the documents in process."

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no answer to the case of the pursuer that he was deceived, or in error, in renouncing at once his claim, whether good or bad. 2. The matter could not be finally disposed of in this action, even if the defender's issue were allowed. 3. It is utterly impossible to allow the defender, *ope exceptionis*, to attempt to establish the imbecility of the old gentleman. There is no instance of such a procedure. They must proceed in the usual way to establish his incapacity, and hence that the investment of the money was not his act. 4. I should, at all events, be prepared to say that the allegations on this record were not sufficient to entitle them to try such a point. But this last matter it is unnecessary to consider. The matter attempted to be raised is quite incompetent in this action.

Lord Murray concurred.

Lord Wood was absent.

Lord Cowan.—I am still of opinion that the only ground of reduction relevantly set forth in the record is essential error, which is the subject of the second issue, and that the first issue proposed by the pursuer ought to be disallowed.

I concur in holding that the issue proposed by the defenders is inadmissible under this record.

The Court approved of the issues last proposed by the pursuer, and disallowed that proposed by the defenders.

W. Mason, S.S.C.—Douglas & Monilaws, W.S.—Agents.

No. 155.

James Hamilton and Others, Pursuers.—*F. W. Clark.*
John Christie and Thomas Hamilton (Stonehouse Road Trustees), Defenders.—*Broun.*

Process—Reclaiming note—Decree by default—Interlocutor—Clerical error.—Decree by default was pronounced in the Outer House against the pursuers. On a reclaiming note they were reponed. In default of making payment of the expenses found due by the Lord Ordinary, decree was again taken. After this interlocutor had become final, the Lord Ordinary corrected a clerical error, pronouncing decree of new. The Court refused a second reclaiming note as incompetent, and found the reclaimers liable in expenses.

Mar. 11, 1857.
2d Division.
Ld Mackenzie.
I.

The record in this case was made up and closed, and an order to debate granted on 8th June 1855. On 16th July 1856, an interlocutor was pronounced dismissing the action, "in respect the pursuer had made no appearance at repeated callings in the debate roll." On a reclaiming note, the Court remitted to repone. After hearing parties, the pursuer was reponed on condition of paying eight guineas of expenses within eight days. On 18th December 1856, the Lord Ordinary pronounced this interlocutor:—"In respect the pursuer has failed to make payment to the defenders of L.8, 8s., on the motion of the defender, the Lord Ordinary of new dismisses the action: Finds the pursuer liable in expenses," &c. After this interlocutor had become final, it was noticed that the word "pursuer" was erroneously used for "pursuers." On 17th February the Lord Ordinary pronounced a new interlocutor, in which the mistake was rectified.

The pursuers reclaimed, and prayed the Court to recall the interlocutor complained of as incompetent.

Lord Justice-Clerk.—We cannot permit such a practice. If a party is to be reponed against one decree by default after another, there is no saying where such a system may end.

The Court refused the reclaiming note, and found the defender entitled to the expense of discussing its competency; modified the same to four guineas.

William Mackersy, W.S.—John Phin, S.S.C.—Agents.

MRS JANET DUFF OR CRICHTON AND MANDATORY AND OTHERS, Pursuers.—*Macfarlane—Black.* No. 156.

THE BARONESS KEITH AND NAIRN AND OTHERS, Defenders.—*Sol.-Gen. Maitland—Ross.* Mar. 11, 1857. Duff v. Lady Keith.

Lease—Construction of clause of destination—Mora—Abandonment.—The destination of a lease was in favour of the tenant and his heirs, secluding assignees, unless with consent of the proprietor, without prejudice to an assignation in favour of one of the tenant's children; declaring that when the succession fell to heirs-female without any assignment, the eldest should succeed without division, "such assignment or succession not to become effectual without the proprietor's approval." The proprietor declared no option;—*Held* (*aff.* judgment of the Lord Ordinary, *abs.* Lord Wood), (1) that the eldest heir-female was entitled to the farm; (2) that she was not barred by *mora* from taking it up, although fourteen years had elapsed after her father's death without her claiming it, in respect she had been all the time in America, and the defenders did not aver that she knew the terms of the lease; (3) on the same ground a plea of abandonment was repelled.

Judicial manager—Expenses—Mandatory.—On allegations of the farm being mismanaged and understocked, as the tenant was in America, the Court appointed a person to manage the farm for behoof of all concerned, but found that the pursuers' mandatory could not be held liable for the expense of the management.

2D DIVISION. Lord Handyside. I.

THE late Charles Duff in 1839 entered into a lease of the farm of Milltown of Tullybeagles, in the county of Perth, the property of Lady Keith, to endure for nineteen years from the term of Whitsunday 1840, and the separation of the crop of that year. The clause of destination in the lease was as follows:—"To the said Charles Duff and his heirs, but expressly secluding assignees and sub-tenants, legal or voluntary, unless with the special consent and approbation of the proprietrix or those acting for her, but without prejudice to the tenant assigning the lease to any one of his children, and declaring that in all cases where the succession shall devolve on heirs-female, and no special assignment, that the eldest shall always succeed without division; but declaring that no such assignment and succession shall become effectual without being approved of by the proprietrix or those acting for her at the time." . . . . . .

Charles Duff occupied the farm till his death in 1840. He left a widow and three daughters, the oldest, Mrs Crichton, residing in North America; the second, Mrs Gellatly, and her husband, were resident with her father at his death; and the third, Mrs Reid, at her father's death, resided in Caithness-shire. Duff left no son, and did not execute any assignation of the lease of Milltown. The widow resided on the farm till her death in 1846. Mrs Gellatly and her husband afterwards continued to reside there, and managed the farm. On Gellatly's death in 1851, Mrs Gellatly emigrated to America, leaving the farm in the occupation of her son James Gellatly.

This action was raised by Mrs Crichton and Mrs Reid, against Lady Keith, the Count de Flahault, her husband, for his interest, and James Gellatly. The summons concluded for declarator that the lease of the farm of Milltown was, notwithstanding Charles Duff's death, an unexpired and subsisting lease, and that the parties therein specified as his successors were entitled to enter to the occupation of the farm; that the pursuer Mrs Crichton, as his eldest heir-portioner, or, in the option of Lady Keith, she and Duff's two other daughters were his successors in the lease, and that the defenders should be decerned to cease from molesting the pursuer Mrs Crichton, or her and her sisters, in entering upon and continuing to occupy

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the farm. The pursuers alleged that, being resident, the one in America, and the other in Caithness-shire, at the date of their father's death, they were unaware of their rights under his lease, which they were only informed of in 1854, and shortly afterwards this action was raised.

The defenders pleaded;—Heirs-portioners were excluded from the lease, and the succession of an eldest heir-female could only take place with the approbation of the proprietrix;—the claim of the pursuers was barred by *mora*, no claim to occupy the farm having been made for fifteen years after their father's death;—the pursuer Mrs Crichton, by her continued residence abroad since her father's death, must be held to have abandoned any right she might have under the lease, and she was by such residence abroad disqualified from being a tenant under it.

The Lord Ordinary pronounced this interlocutor:—"Finds that the pursuer, Mrs Janet Duff or Crichton, as eldest heir-female of her father, the late Charles Duff, is, under the lease libelled on, the successor in said lease, and is entitled to enter into the occupation and tenancy of the lands and others let under said lease; and in respect the defender has not declared any option, in terms of the alternative conclusions of the action, of taking the whole heirs-portioners as the successors in the said lease, finds, decerns, and declares in favour of the pursuer, the said Janet Duff or Crichton, in terms of the primary conclusions of the summons: Finds the defender liable in the expenses of process," &c.*

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* "Note.—There are three points of considerable importance to be separately considered and disposed of. The first is the construction to be put on the clause of destination of the lease. The tenant died, leaving three daughters, and without having executed any special assignment of the lease. The defender pleads that heirs-portioners are excluded, and that the eldest heir-female can only succeed with the approval of the proprietor. The present action is to assert the right of one of the pursuers, the eldest heir-female, but at the same time to give an option to the proprietor to accept, if she chooses, the whole of the heirs-portioners as successors in the lease. The defender declines to recognise the right of succession in the eldest heir-female, and resists the conclusions of the action *in toto*. Undoubtedly the terms of the above clause are of difficult construction. The difficulty lies in assigning the meaning and import of the words 'and succession' in the last member of the clause, 'no such assignment and succession should become effectual.' Does it qualify the previous declaration, that on the succession devolving on heirs-female, the eldest should always succeed without division? This is contended for by the defender, and if correct, it makes the succession of the eldest heir-female dependent on the approval of the proprietor. And farther, as by the declaration, that when the succession devolves on heirs-female, the eldest should always succeed, heirs-portioners are excluded, the result, this clause being so interpreted, is to exclude female succession altogether, and at the will of the proprietor, forfeit all right in the children of the tenant, being only females. There is certainly room under the words 'and succession,' to hold by that construction, but the Lord Ordinary has been unable to adopt it. He thinks that the words used are not so clear in their meaning as to necessitate a construction so severe in its operation. He thinks there is ambiguity in the meaning of the words 'and succession,' coupled as they are with those preceding—'no such assignation and succession,' and that without some additional words as—'of the eldest' or 'eldest heir-female,' following the words 'and succession,' there is obscurity in the construction contended for. The preceding member of the clause declares positively that the eldest should always succeed without division, in the case of succession devolving on heirs-female and no special assignment, and it is thought that the effect of this declaration is insufficiently qualified as to the eldest by the words of the declaration following. In a case such as the present, the Lord Ordinary apprehends it was the duty of the proprietor to make *luce clarius* a stipulation, which was to take away the common law rights of the heirs of the tenant, by leaving them wholly depen-

Lady Keith reclaimed. It was pleaded;—The lease excluded heirs-portioners, as was usual in agricultural leases; and the stipulation that No. 156.

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dent upon her pleasure. In the outset of the lease, the lands are let to the tenant and his heirs generally. It was for the landlord to take off the effect of this destination, by distinct stipulation, to meet apprehended circumstances; and if it was intended that females were to be excluded of all right to succession at common law as heirs-portioners, while the limitation to the eldest was to be defeasible by the landlord, it ought to have been made very plain indeed. The rule of law appears applicable—'in stipulationibus cum quæritur quid actum sit, verba contra stipulatorem interpretanda sunt.' It is not to be supposed that a tenant, and the circumstances of the present case are adverse to it, would readily take a lease, which made his heirs, as they existed at the time, incapable of succeeding to the benefit of the lease, except at the mere pleasure of the landlord. The Lord Ordinary thinks that, upon a fair and sound construction of the lease, the eldest heir-female is entitled to succeed. Suppose the tenant had left an only daughter, would she have been excluded? Plainly not, when the clause is in the plural—heirs-female. But if the female succession is not wholly excluded, except with consent of the landlord, should not the declaration in favour of the landlord of the succession in case of heirs-female being to the eldest be construed as giving an absolute right of succession to the eldest, and not a defeasible one?

"If the Lord Ordinary should be mistaken on the first point, the other defences of the proprietor are superseded. On the opposite view, the second point of *mora* is to be considered. The defender raises that plea solely on the facts appearing from the pursuer's condescendence. There is no statement by the defender, which is a significant circumstance. The plea of *mora* rests on the time which has elapsed between the date of the father's death and the bringing of the present action. No doubt the number of years is very great. But the eldest daughter states that she was ignorant of her rights—resident abroad at the time of her father's death, where she has continued to reside—and that the terms of the lease were unknown to her; and it appears, indeed, not to have been in possession of the family, and a copy of it only obtained some few months before raising this action. These averments of the pursuer are not denied upon record. The answer is merely that they are not admitted. Then as to the possession of the farm, it appears all along to have been in the members of the family. The widow and her second daughter continued to occupy until the widow's death, after which this daughter and her husband continued in the occupation till June 1854, after which this daughter's son remained in the occupation, and still continues in it. These facts are admitted by the defender. If the legal right to the lease is in the elder pursuer, it is conceived that the delay in asserting her right will not forfeit it. Had, indeed, the defender been able to aver that, relying on presumed abandonment of the lease, the lands had been let to other parties, and new contracts entered into; or even that there had been an adoption of the second daughter as tenant on presumed dereliction of the lease by the elder, there might have been grounds for holding the pursuer precluded from now claiming possession of the farm. But there is nothing on record alleging that the defender's interests have suffered by the pursuer's delay, or will suffer by vindicating her right to the lease. And as to the sister, who has been in possession since the widow's death, and her son, the present possessor, they are both called as defenders in this action, and do not resist its conclusions. Under these circumstances, the Lord Ordinary considers it unnecessary to examine the application of the plea of *mora* to discharge the right of an heir to a lease. He thinks the facts upon the record in this case do not admit of the defender pleading *mora* with effect.

"The third point is raised by the additional plea in law added by the defender after the debate. It is that the defender's continued residence abroad since her father's death is to be held as an abandonment of her right under the lease,—that it is a disqualification of her being tenant, and bars her present claim. The validity of the plea of abandonment of her rights must, like the plea of *mora*, rest on her knowledge of her rights under the lease, and which she forbore to claim. But that knowledge is not averred by the defender, and the pursuer's allegation of her ignorance of her rights is not even denied by the defender. Mere residence

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the eldest daughter, or any of them to whom the tenant might assign it, should succeed to the lease only with the approval of the proprietrix, was a reasonable one to protect the proprietor from being obliged to receive a husband of one of the daughters, who might not be a desirable tenant.

The Court having intimated an opinion that Mrs Crichton was entitled to succeed, it was stated by the defenders' counsel that the farm had not been properly managed during last crop,—that part of the stocking had been sold,—what remained of it then was entirely insufficient, and had been sequestrated, and moved that in the meantime, and until it was possible for the pursuer Mrs Crichton, who was in America, to state whether she intended to enter to and stock the farm, measures should be taken to have it properly laboured, so as to protect the interests of the proprietrix.

The following interlocutor was pronounced:—"Adhere to the interlocutor reclaimed against: Find the defenders liable in additional expenses, and remit, &c.; and in respect of the pursuer Mrs Janet Duff or Crichton being at present in America, and of the statement now made at the bar, by the defenders' counsel, and not denied by the pursuer's counsel, in regard to the present condition of the farm and lands of Milltown of Tullybeagles, described in the summons, on the motion now made for the defenders, Find that a manager ought now to be appointed to take possession of the said farm and lands, and labour and manage the same for behoof of all concerned, and appoint William Menzies, factor to the defenders, to be such manager accordingly, with all the powers usual and necessary, reserving all questions between the said pursuers and the said defenders of liability *inter se* arising out of the said appointment, but declaring that the pursuer's mandatory is free from all such liability, and decern."

T. & R. Landale, S.S.C.—Russell & Nicolson, C.S.—Agents.

No. 157.

James Buchanan, Pursuer.—*F. W. Clark.*
John Cowan, Defender.—*Penney*—*W. Watson.*

Process—13 & 14 *Vict. c.* 36, *sects.* 46, 48—*Review.*—1. When the Lord Ordinary appoints questions to be tried before himself without a jury, these questions ought to be stated in his interlocutor specifically, and not by a reference to the record. 2. Where in the findings pronounced after such a trial, the Lord Ordinary finds facts which were not remitted to trial, it is incompetent for the Court to strike them out.

Mar. 11, 1857. — 2d Division. R.

James Buchanan, senior, the father of the pursuer, and father-in-law of the defender, died in August 1839, survived by Margaret M'Kinlay, his third wife, and by two sons by his first wife, Walter, and James the pursuer. He

abroad cannot of itself operate a forfeiture. Though there are no conventional irritancies in the lease, the pursuer, if she obtains decree in this action, is of course bound by the common law obligations incumbent on a tenant. She has stated on record her readiness to implement the lease, and proposed by minute, if required, to express her resolution to take possession and reside. Her present residence abroad, while this process is in dependence, is conceived to be immaterial, the defender resisting altogether her right as heir to the lease. She will, it is thought, be entitled to reasonable notice that personal residence is insisted on. In the case of Stirling v. Millar, June 29, 1813, Fac. Coll., where the heir in a lease, which stipulated personal occupancy and residence, had gone with her husband to America, and an action of declarator of irritancy was brought against her on account of not residing upon the farm, time was allowed to her to return and assume possession."

left a trust-disposition and settlement in favour of his two sons, the defender Cowan, and one William Marshall. His widow was to enjoy the liferent of certain subjects, which, after her death, were to go to his son Walter in liferent, and to his children in fee. Another heritable subject was to go to James in liferent, and his children in fee; and another to the children of the defender Cowan in fee; but this last was under burden of payment of L.50 to a third party, and of payment of feu-duties applicable to the subjects liferented by his widow. His trustees, who were also executors, were farther to pay the widow a sum for mournings, and a sum of L.200, in security of which the rents of the heritable subjects were assigned to her. It was alleged that Buchanan left considerable personal estate, and few debts, with the exception of one to the defender, amounting to L.200. And in the 8th article of his condescendence, it was stated, "the pursuer, although named an executor, never accepted the office, and he had no intromissions, either with the moveable estate of the deceased, or with the rents of the heritable properties disponed by the settlement. The defender, who was a son-in-law of the testator, assumed the entire management of the personal estate of the deceased, and, as the pursuer believes, alone intromitted with the same. The defender never made up any title as executor, and although frequently called upon to produce a state showing his intromissions with the moveable estate of the deceased, and the appropriation thereof, he has hitherto refused to do so. The defender has farther intromitted with the rents of the heritable subjects, other than those liferented by the widow, and, in particular, he has intromitted with the rents of the property disponed to the pursuer in liferent and his children in fee, and also with the rents of the subjects conveyed to the testator's grandsons, John and James Cowan. The rents of the last mentioned subjects, and of the property conveyed to the pursuer in liferent and his children in fee, were assigned to the widow, in security of her provision of L.200. The defender, and the widow of the deceased, have jointly or severally drawn and uplifted the rents of the said heritable properties for payment, as alleged by them, of the said provision of L.200, payable to the widow, and of the said debt of L.200, due to the defender by the testator at the time of his death. The pursuer was aware that the personal estate of the deceased was insufficient to satisfy the claims of the widow and the defender, and that for a short period the rents of the property conveyed to him in liferent would be required in order to their liquidation. But although these claims have been long ago fully satisfied and paid, the pursuer, up to the present moment, has not drawn a single farthing of the rents of the said property, the liferent of which belongs to him in terms of his father's settlement."

On these allegations the pursuer brought the present action, in order to bring the defender to account for his intromissions with the deceased's estate, whether personal or moveable, either separately or jointly and severally with Mrs Margaret M'Kinlay or Buchanan, the widow.

The defences, besides making various explanations as to the state of the deceased's funds and affairs, contained the following statements:—(Stat. 2.) "On the death of Mr Buchanan, which took place upon the 9th August 1839, the four executors nominate appointed by him, including the pursuer, accepted of the office, but made up no title by confirmation, as they were not required to do so by any debtor, to the moveable estate of the deceased, and there was no reason why the expense of obtaining confirmation should be entailed as a burden upon the estate, which was already far exceeded by its liabilities. The executors, as such, held several meetings, at which minutes were drawn out and signed by those present, and on these occasions the pursuer was present, and adhibited his subscription to the minutes, along with his co-executors; and from the time of Mr Buchanan's death, until a very recent period, the pursuer acted and concurred with his co-executors

No. 157. in all their actings connected with the management of the estate under their charge. The actual management of, and intromission with the funds belonging to it, was assumed by William Marshall, one of their number, who resided in Kirkintilloch, the place of residence of the deceased, and the place also where his estate of every description was situate." (Stat. 5.) " . . . . In these circumstances it was arranged, for the benefit of all parties concerned, and with the approbation and consent of all the executors, that a factor should be employed to uplift the rents assigned to the widow, under the superintendence of William Marshall, the resident executor, and that, after satisfying the wants and necessities of the widow, the surplus of these rents should be applied in extinction of the testator's debts, which, in strict law, formed a preferable charge upon them. Accordingly, three factors were successively appointed for the widow, who levied the rents of the said heritage over which the executors had no power, and small payments were made, as before stated, from time to time to the defender in extinction of the debt due to him by the testator until fully paid, and also towards other purposes provided in the deed of settlement, the remainder of the rents so drawn being appropriated by the widow in satisfaction of the liferent and other provisions in her favour, all as will appear from the accounts of the factors so appointed and acting."

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The Lord Ordinary pronounced the following interlocutors:—"*3d July* 1856.—The Lord Ordinary having heard the counsel for the parties, and made avizandum, and considered the closed record, debate, productions, and whole process, Finds that it is desirable and expedient that the following questions of fact, raised in the record, be investigated without trial by a jury:—1st, Whether, as alleged by the pursuer in the eighth article of the revised condescendence, the defender John Cowan assumed the management of the personal estate of the late James Buchanan, and did by himself, or any factor or other person appointed by him, and acting for his behoof, intromit with the personal estate of the said late James Buchanan, and with the rents of the heritable property of the said late James Buchanan, and what was the nature and extent of the said intromissions with the personal estate and rents as aforesaid? And 2dly, Whether, as alleged by the defender in the second and fifth articles of the revised statement of facts for him, the pursuer accepted and acted as an executor of the said late James Buchanan, and as such concurred with the co-executors in the management of the executry estate, and in an arrangement for the appointment of a factor to uplift the rents of the heritable estate of the late James Buchanan? And appoints the cause to be enrolled, to fix a day for the trial proceeding before the Lord Ordinary."

"*20th December* 1856.—The Lord Ordinary having heard the cause without a jury, on the 10th current, on the questions of fact specified in his interlocutor of 3d July last, and having thereafter, on the 18th current, heard counsel for the parties on the proof led at the trial, and made avizandum, and considered the closed record, debate, proof, and productions—1st, Finds in point of fact, that the defender John Cowan did not 'assume the entire management of the personal estate of the late James Buchanan,' and did not by himself, or any factor or other person appointed by him, or for his behoof, intromit with the said personal estate, or with the rents of the heritable property of the late James Buchanan, as alleged by the pursuer in the eighth article of the revised condescendence: Finds that all the persons, including the pursuer himself, who were named executors by James Buchanan, accepted and acted as executors, but no confirmation was expede: Finds that Mr Marshall, one of these executors, and residing in Kirkintilloch, took much personal charge of the business, and kept the book, No. 139 of process, to show his intromissions, and that any entries by the defender in that book were made in presence and by desire of Marshall, and at meetings of

executors, where the pursuer was also present, but that Marshall was much assisted by the defender, who is an accountant in a bank in Glasgow, and to whom the factors appointed by the whole executors communicated their accounts and balances, which were by the defender reported and accounted for to the executors: Finds that the defender was a creditor of the late *James* Buchanan, and was, in terms of an arrangement by the executors, paid his debt by them, and this was partly done by their applying to that purpose the balances handed to the defender, as aforesaid, by the factors and by him, as aforesaid, accounted for to the executors, and partly by bills granted to him by the executors, including the pursuer, for balances from time to time remaining due, after taking credit for such partial payments: Finds that the defender is not proved to have received any of the rents or funds of the estate from the tenants or debtors, but only from the factors as aforesaid, and then from the executors, in payment of his debt: And, *2d, Finds*, further, in point of fact, that the pursuer accepted and acted as an executor of the late James Buchanan, attended meetings, took part in the business, signed minutes, bills, and other documents, as executor, and concurred with the defender and the other executors in the appointment of factors to uplift the rents, in the taking credit to the executry for the partial payments to the defender's debt made out of the rents, and in granting bills to the defender for the balances so brought out. Appoints the cause to be enrolled, that the parties may be heard on such points of law as they are advised to urge in respect of these findings." *

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Mar. 11, 1857.
Buchanan v. Cowan.

"*12th February* 1857.—The Lord Ordinary having heard the counsel for the parties, on the note for the pursuer and proof, and considered the same at avizandum, refuses the motion of the pursuer for alteration of the findings in fact, contained in the interlocutor of 20th December 1856, and adheres to the findings in the said interlocutor, and appoints the cause to be again enrolled, that parties may be heard on such point of law, as they may be advised to urge, in respect of the said findings in fact." †

The pursuer presented a reclaiming note, praying the Court to recall or alter the interlocutor complained of, in so far as it affirms such findings in fact contained in the former interlocutor of date 20th December 1856, as are *ultra vires* of, and inconsistent with, the questions directed to be tried before the Lord Ordinary in the interlocutor of date 3d July 1856, and thereafter to remit to the Lord Ordinary to prepare findings in terms thereof, &c.

It was argued, that the finding in the interlocutor, wherein it was found that Cowan had accounted, was wholly *ultra vires* of the Lord Ordinary, as that was no part of the question settled for trial. The directions of the statute were that he should "find on each such question separately," and, if he did so, his findings were to be final. Where questions of law and fact

* "NOTE.—The above special findings in fact seem to exhaust what is required under the interlocutor of 3d July last. It is understood that vitious or unauthorised intromission is not now alleged, and it is proved that whatever part the defender took as one of the executors, was with the concurrence of the pursuer. In what the defender did as a creditor, in receiving from all the executors payment of his debt, it is difficult to perceive how any intromission by him, as is here alleged, can be involved. But on these points the pursuer will be heard, if he wishes it."

† "NOTE.—At the close of the trial of the questions of fact, it was the express wish of both parties, that the Lord Ordinary should pronounce special findings in point of fact, so as to preserve ample materials for disposing of such questions of law as might be afterwards raised. This he has done, and, on reconsidering the evidence, with the pursuer's argument, he is quite satisfied that the findings, to which he now adheres, are according to the truth of the case, as appearing from the proof led, and the documents in process."

No. 157. were mixed up in the findings, the Court could review and correct his findings. The part of the interlocutor to which the pursuer felt entitled to object, was from the words "accounts and balance" down to "payments."

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The defender replied — That the question by implication related to a number of facts, from which intromission was to be made out, and the nature and extent of the intromissions was also set down for investigation, so that, if the questions were well framed, the findings were strictly competent under them—the rehearing of the statute had reference simply to whether the facts were well founded, not to the competency of the findings. If the Court found that there had been an entire miscarriage, that might be a ground for ordering a new trial, but none for altering the interlocutor complained of.

Lord Justice-Clerk.—I consider any such question of the highest importance in regard to the successful working and operation of the 48th section of the Act. I think the distinction between it and the 46th section shews clearly what was intended—namely, not that a general issue should be tried, but particular questions of fact as to which the parties could not agree—such questions of fact as should be exhaustive of the debateable matter, and so framed that the answer should be just a repetition of the question.

Whatever the views of the Lord Ordinary in point of law in this case may have been, we must look at it as a direction as to the matter of fact. He has, instead of framing a question for a simple answer—yea or nay—framed one that embraces a general enquiry, and that can only be safely conducted *according to the words he uses:* otherwise a party, by consenting to this mode of trial, might be led into general findings, quite different from what he intended as to the matter embraced in them.

According to the view I take of the question, "nature and extent of intromission," I understand that he should have found whether, with concurrence of his co-executor, he had done what he did, and that he had drawn the whole rents, or some part of them, during so many years, and the amount I expected to have been also stated. But by the answer we have got, we don't know anything, except that he accounted to the other executors, but we get no information, either as to the nature or as to the extent of the intromissions. It is no answer to the question that was put to say that, if you compared one side of the account and the other, it appears he has discharged himself of all the money he received. But though that question has no place here, it will be quite open to the defender to insist afterwards for that result. But the Lord Ordinary has pronounced a finding that he has accounted. Now I cannot by any interpretation of the words "nature and extent," think that he was entitled to exhaust the case. The part of the interlocutor beginning "and this was partly done," &c., seems to me to be beyond any conceivable interpretation of the question.

That the Lord Ordinary had it in view so to exhaust the case is clear, because he has done it, but that only shews what a mistake it was to frame such a general question. The House of Lords will not interpret issues, or allow the views of the Judges who grant them to have any weight whatever.

The Lord Ordinary has interpreted this question by what he intended, — but I think that, in his findings, he has gone far beyond the question, and that from "which were by the defender," down to "such partial payments," they cannot be allowed to stand. This will leave the whole matter open for investigation, and the defender will be entitled to prove that he has discharged himself of that balance in any lawful manner.

Lord Murray.—I agree. This question is not a good one—it is much too general. The points put should be definite. There may be any number of points, but they should be clear. I think, too, the Lord Ordinary has committed a mistake in his answer, but we may retain so much of it as promotes the cause, and strike out the remainder.

Lord Cowan.—I look upon this as a most important case in practice, and as regards the effective working of the statute; and the first point is to consider how an interlocutor should be framed, bringing out the questions into which the case resolves. It is most important that it should be known that the interlocutor should

be most specific. Parties should be fully satisfied that all the material facts in dispute, and intended to be subject of proof, are within the interlocutor. I remember consulting with Lord Rutherfurd when in the Outer-House, and we agreed that the way was carefully to eliminate whatever the parties were not in dispute about, and whatever we thought was not material to the case; and then bring out in distinct questions what remained, so that an answer of yes or no should suffice, as your Lordship said.

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Thom v. Bridges.

The importance of this provision is its finality as regards all matters of fact, for it is only as regards questions of law that the Lord Ordinary's judgment is to be subject to review.

Now I come to the second point,—Can we here review the judgment in the case before us? I am of opinion that the prayer of the reclaiming note is competent. I think, if the Lord Ordinary pronounces findings which are not embraced in the order for proof, a party is quite entitled to complain; so if he returns as answers matters which are not within the questions, he has clearly gone beyond his jurisdiction.

Let us look at the first question put in the interlocutor of 3d July, and see what it was that was put in issue. I hold that it excluded anything like a question of accounting; that was matter not for trial before the Lord Ordinary under the interlocutor of July; and if so, does not the interlocutor of December go beyond the question?—"balances which were by the defender reported and *accounted for to the executors*," &c. These words imply that the defender has accounted for his intromissions. This was clearly *ultra vires* and beyond the matter sent for trial.

THE COURT pronounced the following interlocutor:—"Find that the following parts of the findings of the Lord Ordinary in his interlocutor of 20th December 1856, 'which was by the defender reported and accounted for to the executors: Finds,' &c., down to 'after taking credit for such partial payments,' went beyond the question sent to be tried by the Lord Ordinary, according to the true import and meaning of that question: Therefore find the above findings to be incompetent, and recall the same, *quoad ultra*: Find the whole other findings in the said interlocutor, being within the terms of the question framed by the Lord Ordinary, are competent and final; but declare that the defence that the defender has fully accounted for the whole funds, which he, as executor, received, remains entire and unaffected by this interlocutor, so that the matter of his accounting and discharge remains to be investigated before the Lord Ordinary in the way he may think fit, and remit to the Lord Ordinary, with power to proceed farther in the cause, consistently with the remaining findings in the said interlocutor of the 20th day of December last; reserving all questions of expenses."

WILLIAM MACKERSY, W.S.—JOHN FORRESTER, W.S.—Agents.

No. 158.

JAMES THOM, Pursuer.—*Pattison—Watson.*
SAMUEL RALEIGH (Thom's Trustee), Compearer.—*Macfarlane.*
BRIDGES AND MACQUEEN, S.S.C., AND JAMES BRIDGES, Defenders.—*D. F. Inglis—Fraser.*
J. M. MACQUEEN, S.S.C., Defender.—*Scott.*

Title to sue—2 & 3 Vict., cap. 41—Bankrupt—Trustee—Reparation—Solatium—Expenses.—A bankrupt discharged on payment of a dividend (not of a composition), while the sequestration still subsisted, brought an action for reparation for injury to credit and *solatium* for injury to reputation and feelings, arising out of conduct prior to the date of the sequestration. On the action being intimated to the trustee, he proposed to sist himself in room of the pursuer. *Held* (*aff.* judgment of Lord Benholme, *abs.* Lord Wood) that he was entitled to do so, having a right to insist in all the claims made,—even that for *solatium*. *Question*, whether the bankrupt had a right to recover from the trustee the expenses of the record?

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2D DIVISION.
Ld. Benholme.
R.

JAMES THOM raised an action against the dissolved firm of Bridges and Macqueen, law agents, Edinburgh, and James Bridges, Writer to the Signet,

No. 158. — Mar. 11, 1857. Thom v. Bridges.

and John Moir Macqueen, Solicitor before the Supreme Courts, sole partners of the said dissolved firm, and against the said James Bridges, as an individual, concluding to have them ordained, "conjunctly and severally, or severally, and according to their respective liabilities in the premises, to make payment to the pursuer of the sum of L.10,000 sterling, in name of damages and *solatium*." He alleged that, throughout all the transactions he complained of, Bridges and Macqueen had been his agents, but the action was mainly directed against Bridges, who, it was alleged, had, contrary to his duty, defeated several loans which were on the point of being effected over an estate he possessed, and had further frustrated a proposed sale of the lands, at a price which would have enabled him to meet all his liabilities; and had, further, the more to get him under his control, imprisoned him on a charge to pay a bill, and got his estates sequestrated; in all which he maintained that the defenders had acted in gross violation of their duty, and to the serious injury of the pursuer's credit, character, reputation, and feelings.

Under the sequestration, Thom had been discharged upon a payment of sixpence per pound before raising the action, but his trustee was not discharged.

Apart from denial of the facts averred, and of their relevancy even if true, the defenders pleaded; — That the pursuer had no title to sue, and, "even supposing that any grounds of action had been set forth sufficient to infer liability for damages, the pursuer had no right to recover these, in respect that any claim of damage competent to him, was transferred to his creditors by the sequestration, and he had not been reinvested in his estate, not having been discharged upon composition."

Intimation of the action was ordered to be made to Mr Raleigh, the trustee on the pursuer's sequestrated estate, and he lodged a minute sisting himself "as pursuer of said action in the room and stead of the said James Thom." This was opposed by Thom, but the Lord Ordinary pronounced the following interlocutor: — "Having heard parties' procurators on the proposal of the trustee on the pursuer's sequestrated estate to sist himself in place of the pursuer, James Thom,—Sists the said trustee, Samuel Raleigh in terms of the minute." *

Thom reclaimed, praying the Court to refuse the motion of Samue Raleigh "to be sisted as pursuer of the said action in the room and stead c the reclaimer; or at least to find that, in so far as regards the conclusion of the summons for damages in *solatium*, the reclaimer is entitled to insis in the action."

It was maintained for him;—That, being discharged regularly under th Bankrupt Act, he had a full title to pursue all claims whatever; but, eve if this trustee were entitled to insist in the conclusions for direct damage for injury to the estate,—so far as the claim was for *solatium* for injury t his feelings from imprisonment or otherwise,—it was a claim of so pe sonal a nature that it could not have been vested by the sequestration in th trustee.[1]

It was replied;—That, if these claims were good, they should have bee given up in the sequestration as part of the bankrupt's estate; and that, n so given up, they had nevertheless, by force of statute, vested in the truste and he was entitled to pursue equally for the damages and *solatium*; th transmissible nature of which last had been subject of express decision.[2]

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* "NOTE.—The Lord Ordinary is of opinion that the summons does not rai any relevant case of damages or *solatium*, that would not pass by sequestratio the trustee on the bankrupt pursuer's estate."

[1] 2 & 3 Vict., cap. 41, sects. 13, 78, 123.

[2] Milne v. Gauld's Trustees, 14th January 1841, ante, vol. iii. p. 345; Nel v. Rodger, 24th December 1853, ante, vol. xvi. p. 325.

LORD JUSTICE-CLERK.—I am afraid the trustee here is entitled to insist in this action. No 158.

Mar. 11, 1857. Hamilton.

I say nothing as to a question of defamation, or a case where character is involved, but speak merely of the case before us of *solatium* for imprisonment. This may have implied great hardship on the individual, but the sequestration has supervened, and the trustee is entitled now to say, I claim what is due as *solatium* as a part of the estate. We have no question here such as where a trustee has refused to sist himself; for, on this action being intimated, he takes it up, and is entitled to recover from the defender if he prevail. I think the case of *solatium* for imprisonment is one which the trustee is entitled to pursue, although the bankrupt might go on if he declined.

I do not say anything as to a separate case being possible where the trustee might have no title, but I think that, for injury to credit, if that led to the bankruptcy, or to property to the detriment of the estate belonging to the creditors, the trustee is fairly entitled to pursue.

LORD MURRAY.—I entirely agree. I think the Lord Ordinary is quite right. If the trustee did not prosecute, the case would be a quite different one, but he is going to prosecute here.

Milne v. Gauld's Trustees went beyond the circumstances here, and determined the right of the representatives of a husband after his death to prosecute an action for damages for the wrongous imprisonment of the wife. That was a much stronger case than the present, and I consider it settles the law to be applied to it.

LORD WOOD was absent.

LORD COWAN.—Were it necessary that this case should depend upon the decision in Milne v. Gauld's Trustees, I should desiderate more argument, for the views expressed in the other Division in 1850 seem to shake the authority of that case. I do not think, however, that we need found on that case, in order to dispose of the one before us.

If this claim were one in which the trustee could not insist, the party might be entitled to go on. But, under the reclaiming note, no attempt is made to turn the trustee out of the action, and there is no ground of action separate from that made by the trustee. The whole claims made are to be measured by pecuniary damages, and the whole grounds of action had arisen before sequestration. The effect, then, of the sequestration was to vest every right in the trustee, if he chose to take it up. It would have been very well for Thom to maintain his right to insist if the trustee had not come forward; but, now that the trustee has sisted himself in this action, I hold him to have the exclusive interest in all the claims concluded for in the summons.

THE COURT pronounced the following interlocutor:—"Refuse the said reclaiming note, and adhere to the interlocutor reclaimed against; reserving to the reclaimer the expenses of record so far as prepared before the trustee appeared, if not recovered from the defenders, or if the trustee cannot shew cause to the contrary, and to the trustee his claim for the expenses of this discussion, and reserving to the defender his claim for expenses."

JAMES SOMERVILLE, S.S.C.—JOHN ROSS, S.S.C.—HUGH LYON, S.S.C.—J. M. MACQUEEN, S.S.C.—Agents.

HUGH HAMILTON, Petitioner.—*D. F. Inglis—Boyle.* No. 159.

Entail—I. What are improvements in the sense of the Entail Amendment Act 1848.

The expense of building a wool-carding mill and repairing a corn mill objected to as not being improvements under the Entail Amendment Act, and objection acquiesced in.

The expense of building a bridge over a river which intersected an entailed estate, and of approaches to the bridge, sustained as improvement expenditure, under the Entail Amendment Acts.

II. Aberdeen Act 5 Geo. IV. c. 87.—*Held* that institute heirs of entail come under

No. 159. the provisions of the Aberdeen Act, authorising heirs of entail to grant provisions to younger children.

Mar. 11, 1857. Hamilton.

III. 11 & 12 *Vict. cap.* 36, *sects.* 14, 18, 19, 20, 21, 25.—*Question*, Whether, under the Entail Amendment Acts, in constituting improvement debts, the sum which may be charged is limited by any reference to the rental, as in the Montgomery Act; but *Held* (*dub.* Lord Ivory (1), that if free rental be the measure of the amount of an improvement debt to be constituted under the Entail Amendment Acts, it is the rental, not as at the first term of Whitsunday after the heir's death, but as at the date of the decree constituting the debt; (2), that the interest of the debt so to be constituted does not form a deduction in estimating the free rental; (3), that where a debt has been already constituted against the estate, it is only necessary, in calculating under the 18th section, the four years free rent, to take into account the sum actually charged on the fee.

Question, whether, and to what extent, a contingent jointure and provisions to younger children form deductions in estimating the free rental.

1st Division. Ld Mackenzie. C.

The petitioner was heir of entail in possession of the estate of Pinmore. The present was an application, 1st, to have it found that the fee of the estate was in 1854, and still is, 'validly charged' with L.2684, 18s. 8d. of improvement debt; 2d, That the petitioner had, since the date of the statute of 1848, expended L.7205, 14s. 5d. upon additional permanent improvements, and in respect thereof was entitled to charge the fee with a farther sum of L.4803, 2s. 11d.; 3d, To have it found that he was also entitled to charge the fee with L.4931, 3s. 6d. of children's provisions granted by the last heir of entail; and the ultimate object of the application was, 4th, That the Court, after having ascertained the total amount of debt chargeable against the fee of the entailed estate, might select a fitting portion of the lands, and authorise it to be sold by the petitioner, in order to pay off the debt.

The application was founded mainly upon the 14th, 21st, and 25th sections of the Act 11 & 12 Vict. c. 36.

The sum of L.7205, 14s. 5d. under the second head of the application, consisted of L.6449, 13s. 9d. expended in improvements on the entailed lands, and of L.705, 0s. 8½d., expended in improvements on the mansion-house.

On 21st May 1856, the Lord Ordinary remitted to Mr James Duncan, Writer to the Signet, and to Mr John Dickson, farmer, Saughton Mains, to examine and to report.

Various points noticed in the reports of Mr Duncan and Mr Dickson were now brought under the notice of the Court by the Lord Ordinary.

I. Under the head of improvements executed since 1848, it was proposed to disallow L.741, 1s. 10d. for building a wool-carding mill and repairing a corn mill, as not being improvements of the nature contemplated by the Act. The petitioner acquiesced in this proposal.

A sum of L.421, 1s. 10d. expended in building a bridge over a river which intersects part of the entailed lands, and in making approaches to the bridge, was reported on specially. Mr Duncan was of opinion that it came within the scope of the 20th section of the Act 11 & 12 Vic. c. 36, as to "private road through any entailed estate, or by way of immediate access thereto." Mr Dickson stated that the bridge, "although not literally a road, is the only way of access to the farm of Laggansarroch, the old road to the farm being by a dangerous ford, in crossing which the former tenant was drowned, and the present tenant agreed to pay an additional rent on having a bridge built."

The Lord Ordinary reported favourably, and the Court allowed the expenditure.

II. The next point was whether the petitioner was entitled to charge the fee of the estate with L.4931, 3s. 6d. of provisions for younger children

No. 158. — Mar. 11, 1857. Hamilton.

The sum was within the amount authorised by the Aberdeen Act, but the reporter brought under the notice of the Court the fact that Mr Hamilton, the granter of bonds of provision, was the institute under the deeds of entail, and not strictly and technically the "heir of entail" in possession; whereas the Aberdeen Act does not, in express words at least, authorise an institute of entail to exercise the powers granted by that Act. The reporter's opinion was, that the provisions had been competently granted, and that a sound construction of the Aberdeen Act would include the institute.[1]

The Lord Ordinary concurred in this opinion.

Lord President.—I have no doubt about this point. The meaning of the statute is quite plain. The reporter has arrived at a right conclusion.

Lord Deas.—We are not to read the statute as if it were a deed of entail. The question is, what is the popular meaning of the phrase "heir of entail?" most certainly that phrase is held to include the institute. In construing the statutes which apply to entails, the proper course is to take the reading which is most favourable to freedom, and that rule cannot possibly prevent us reading a statute like this, according to the plain and ordinary meaning of the words.

Lord Ivory.—To construe the statutes otherwise would be to place a man who should make an entail in his own favour, with power to alter it, in a worse position than the parties in whose favour he has made it. You are not to construe an entail strictly against the fetters, but liberally as to the enabling clauses within it, and much more here in regard to a statute where there is a broad general principle meant to be introduced for the benefit of all parties holding estates under these limitations. It would be straining it very hard to exclude the petitioner in this case from the benefit of the statute.

Lord Curriehill.—This may be illustrated by taking a case under the Lands Clauses Act. Could it be said that the statute authorising an heir of entail to sell his lands to a Railway Company did not include the institute heir?

Lord President.—There is a general rule for construing statutes which are intended to correct an evil and give a remedy, and that rule simply is to extend that remedy as far as we can.

III. The last point was, what was to be taken as the free rental on which to calculate the improvement expenditure?

The rental of the estate produced by the petitioner showed the annual rents to amount to L.3190, 13s. 9d., from which fell to be deducted,—

1, Public burdens, L.345, 14s. 6d;

2, Annuity to the Ayr Academy, L.10;

3, Interest on provisions to the petitioner's sisters, L.200;

4, Interest on bond for improvements at 4 per cent, L.107, 7s. 3d.;

5, Interest on L.4309, 1s. 9d. (being two-thirds of L.6499, 13s. 9d. and of L.705, 0s. 8½d., less L.741, 1s. 10d. disallowed as above mentioned) expended by the petitioner on the entailed lands and mansion-house, and which, under the present application, might be constituted a burden on the fee of the estate, at 4 per cent, L.172, 5s.;

6, Contingent liferent annuity of L.700 to the petitioner's wife, but to be restricted to L.350 in the event of her entering into a second marriage, L.700.

The first five heads made in all a sum of L.835, 6s. 9d. to be deducted, which left a free rental on which to calculate improvement expenditure (keeping out of view the contingent jointure), L.2355, 7s., which would give for improvements on the lands, L.9421, 8s. (four years' free rents); and for improvements on the mansion-house, &c., L.4710, 14s. (two years' free rents.) The expenditure on the mansion-house was greatly within the statutory limits.

Under this head the reporter suggested two points for consideration,—

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[1] Porterfield, Feb. 24, 1853, ante, vol. xv. p. 428; Duff on Entails, p. 79; 6 & 7 Will. IV. c. 42, section 20; 11 & 12 Vict. cap. 36, sect 52; 16 & 17 Vict. c. 93, sect. 25; Bell's Prins. sect. 1745 (2.)

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(1.) "With regard to the expenditure on the lands, the improvement debt already constituted by decree in 1850 applies wholly to improvements on the lands as distinguished from the mansion-house, and amounts to L.4027, 8s., with two-thirds of which, or L.2684, 18s. 8d., the petitioner has already charged the fee of the estate." . . .

"The important question arises here, whether the improvement debt charged by the petitioner upon the fee of the estate requires to be taken into account in estimating whether the improvement debt with which the petitioner proposes to charge the estate does not exceed the statutory limit. It humbly appears to the reporter that the limit prescribed by the 13th section of the Montgomery Act is still in force to the effect that no one heir is entitled, during his own life, to become a creditor of the next heirs of entail or of the estate for more than four years' free rents; but that the 19th section of the Rutherfurd Act seems to give an heir this advantage, that in estimating the four years' free rents in a case like the present, he does not require to take into account 3-4ths of the whole expenditure, but only the sum actually charged on the fee. In other words, the petitioner here seems only, in calculating the four years' free rents, to require to state the actually existing improvement debt, namely L.2684, 18s. 8d.; whereas before the passing of the Rutherfurd Act he would have required to have stated it at L.4027, 8s., being a difference of L.1342, 9s. 4d." . . .

(2.) "In estimating the four years' free rents at the above sum of L.9421, 8s. no deduction has been made from the yearly rental in respect of the contingent jointure of L.700 to the petitioner's lady. It has not yet, it is believed, been decided whether, in calculating the improvement debt, it is indispensable for the heir to deduct such a provision, which, although already granted, has not yet come into operation." The reporter referred to the case of Lady Keith,[1] as bearing on but not ruling this point; "all that was decided in that case having been that the possible contingency of the rental at the term after the petitioner's death being reduced by provisions to husbands, wives, or children, not granted at the date of the application to charge the estate with improvement debt, but capable of being granted by the heir in possession subsequent to that date, did not require to be taken into account."

The reporter was of opinion "that the equitable mode of dealing with the contingent burden, as regards its effects upon the statutory amount of improvement expenditure, would be to have the present value of the contingent jointure fixed by an actuary, and instead of deducting four years of the full amount of the jointure, which in this case would be L.2800, to deduct four years of the interest on the present value of the annuity."—That present value had been ascertained to be slightly under L.3000, the interest of which, at four per cent, would be about L.120 a-year. If four years' interest, or L.480 were deducted from the above sum of L.9421, 8s., that would still leave a considerable surplus margin within the statutory limit; whereas, if L2800—four years of the full jointure—were deducted, the expenditure for which decree was sought, added to that for which it had been obtained, would exceed the statutory limit. The reporter held that it was "not necessary to deduct from the rental the full amount of this contingent provision. Under the old law, the Montgomery Act, while it allowed an heir of entail to obtain in his own lifetime a decree of declarator which fixed the amount expended by him, did not until after his death positively determine the amount chargeable against the succeeding heirs of entail: that was made to depend upon the state of the annual charges upon the land, 'as the same shall happen to be at the first term of Whitsunday after the death of the heir who expended the money claimed.' On the other hand, the Entail Amendment Act, instead of leaving the amount of improvement debt undetermined until after the improver's

[1] Keith, 9th July 1850, ante, vol. xiii. p. 43.

death, permits him to have it determined at present, and charged upon the lands. The reporter humbly thinks that in the matter of improvement debt, as well as in all other respects, the general spirit of the Entail Amendment Act was to enlarge the powers of heirs of entail, and therefore that the Court may be disposed to give a liberal interpretation to the provisions of the Entail Amendment Act, where these, as in the present case, do not seem to adjust themselves well with the unrepealed provisions of prior Acts."

On 27th February 1857, having advised with the Court, the Lord Ordinary again remitted "to Mr Duncan to consider the point, whether, in estimating the free rental, any deduction should be made for the interest of the improvement expenditure now sought to be made a burden on the estate."

Mr Duncan returned an elaborate report, in which the following passages occurred:—

"It humbly seems to the reporter that it can scarcely be doubted but that the 10th section of the Montgomery Act and the 16th section of the Rutherfurd Act do not very well adjust themselves to each other; for while the 10th section of the Montgomery Act postpones the period at which the calculation as to the amount of the debt chargeable is to be made—to the first term after the heir's death—the 16th section of the Rutherfurd Act, while permitting the debt to be fixed and ascertained at present, in the heir's lifetime, does not make a corresponding alteration, to the effect of declaring that in calculating the four years' free rents there shall only be deducted the liferents, interest of debts, &c., which exist at present, instead of the unknown quantity of interests of debts, liferents, &c., as these shall exist after the heir's death. It may be that the legislature may purposely have refrained from allowing the calculation of the expenditure about to be constituted in the heir's own lifetime to be based upon the liferents, debts, &c., as existing at present, because the practical effect of this would have been to have allowed the heir of entail, in calculating at present the four years' rents, to have got quit of the deduction of the provisions to his own family, including both the jointure to his widow and the provisions to his younger children. Accordingly the Court in construing the power to constitute improvement debt at present, have (notwithstanding the impossibility of complying literally with the direction to deduct burdens, &c., as these shall exist at the heir's death) avoided going to the other extreme of holding that it was the present burdens only which should be deducted. They have therefore (following, as the reporter humbly thinks, the plain spirit in place of the letter of the Act) held, as in the case of Lady Keith and Nairn, that the interest of contingent provisions to children already granted by an heir of entail, although not yet come into operation (and which, being contingent provisions, may never come into operation), require to be deducted. The report of that case bears that, in calculating the statutory limit of the improvement expenditure, the sum of 'L.222,' being the interest of children's provisions granted by the petitioner Lady Keith, and therefore depending on the contingency of her being survived by her children, was deducted in estimating the free rental.

"The petitioner holds that the case of Lady Keith is an authority in his favour, and that on the principle on which that decision rests, it should be held in this case that the interest of the improvement debt should not form a deduction from the rental. It is humbly thought, however, that it is not clear that the decision in that case goes so far as to warrant such an inference. It seems to the reporter that all that was decided in that case was, that the interest of provisions which the heir in possession had it in her power to make, but had not, in point of fact, made, at the date of the petition, did not require to be deducted. And the reason of the decision seems to be plain. Such possible future provisions depended not on such a contingency as survivance (the value of which can be made the subject of arith-

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metical calculation), but depended on the contingency of whether the heir might or might not choose to exercise her power to enlarge the children's provisions,—the value of which contingency, of course, being incapable of computation.

"It may be observed, however, that the improvement debt, which is the subject of consideration at present, seems to be in a very different position from that in which the possible future additional provisions to children in Lady Keith's case stood. This improvement debt has not only been constituted by decree against the next heirs,—it is not merely capable of being made a charge upon the fee of the entailed lands,—but the very object of the present application is to make good the improvement debt out of the very *solum* of the estate, by getting the Court to authorise part of the lands to be sold in order to pay it off. In the sense of the Rutherfurd and Montgomery Acts, therefore, this improvement debt humbly appears to the Reporter to be in the same position as regards the point in question as if it were already a burden.

"It seems evident that this question could not have arisen before the passing of the Rutherfurd Act, because the interest of debts which fell to be deducted under the 10th section of the Montgomery Act was that of debts 'which may affect the estate' (sect. 10.) But the principle of the Montgomery Act was to make the improvement debt affect the immediately succeeding heir, not the estate, whereas the principle of the Rutherfurd Act is just to reverse this, and to relieve the heir of the burden, and to charge it on the estate. The question humbly seems to the reporter to resolve itself into this, namely,—Is the improvement debt in question a debt which 'may affect the estate' at the term after the heir's death? To which the reporter humbly thinks there can be no other answer than that it not only may, but that it certainly shall. If, in Lady Keith's case, there was deducted the interest of contingent children's provisions already granted, but which, being contingent, might not affect the estate at the heir's death, much more clear is it, in the reporter's humble view, that the interest of this debt, which is not contingent, must be deducted.

"The heir in possession is not obliged to adopt the provisions of the Rutherfurd Act on this subject; he may if he please abide by the provisions of the Montgomery Act. But if he adopts the former, it is feared he must read the 10th section of the Montgomery Act as imported into the 16th section of the Rutherfurd Act, as meaning, not merely that interests of debts which under the Montgomery Act alone would have been deducted, but also those of debts affecting the estate under whatever Act imposed."

On 10th March the case was again called. The petitioner pleaded;—That this point must be solved by the provisions of the new Entail Act,—and not with reference to the Montgomery Act. It would be unreasonable to import by implication into these Acts a provision that you are to do something which it is almost impossible to do; for who can tell what is to be the condition of the estate at the death of the petitioner? You cannot anticipate. You cannot tell what will be the rent, much less the nett rent. The plain answer to the difficulty is, that this new Act of Parliament has introduced a new point of time at which the condition of the estate is to be considered; and that point of time is the time when judgment is pronounced fixing the amount of debt that is to be constituted. Had the Montgomery Act not suggested a time, no other time would have been thought of than this plainly pointed out by the new Act. But, if the time suggested by the old Act be inapplicable, the time pointed out under the new Act must be taken; and, therefore, the question now is, what is the amount, as at this date, of four years free rental? So taking it, the difficulty is solved, for the burden is not yet imposed. What is proposed to be deducted is the interest

on the improvement debt; but what the amount of that debt is you cannot yet tell. No. 159.

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Lord President.—The important question here is, Whether the item No. 5 in the list of deductions from the rental ought properly to be a deduction in estimating the rental? For if that item is not deducted, the sum sought to be constituted does not exceed what, in any view of the meaning of the statute, the petitioner is entitled to have charged against the estate. I have carefully considered Mr Duncan's report, and I confess that it does not appear to me to afford satisfactory reasons for that deduction. I see no ground on which it can be made a deduction. It is not a burden on the estate, nor can it under the strict letter of the statute be so construed; therefore, it cannot be deducted as "a burden on the estate." I do not mean to express any opinion as to the extent to which these provisions of the Montgomery Act are imported into this statute. It is not necessary to do so for this case. There are questions, and important questions, that may be raised as to that point, but I abstain from expressing any opinion in regard to them, for the reason I have just mentioned. The reporter seems to think that this Montgomery Act is imported into the Entail Amendment Act to this effect,—that you must ascertain what will be the rental of the estate as at the death of the party who has made the improvements, and that the burdens then attaching to the estate are to be made a deduction from that rental; and he says that this sum we are now dealing with not only may affect the estate at the death of the party in the words of the Montgomery Act, but must affect it. It is not very clear how that is to be accomplished; I do not myself see how you are to take the rental as at the death of the party in reference to transactions which are to be completed now, and more especially considering how such burdens may be exhausted or redeemed before his death. I cannot see how you are to conjecture what the rental is to be at the date of his death; but at any rate I do not see how this sum is to be deducted, for I hold that the principle is to take the rental as at the date of the transaction which is to constitute the burden on the estate.

But, further, I do not think that under the Montgomery Act this item would form a deduction, and I am not aware that any such deduction was ever attempted to be made under that Act. The principle which operated in constituting a debt under that Act was to attach it to succeeding heirs. It is a different thing altogether that is to be done now, and under the strict letter of the Entail Amendment Act this sum clearly could not be deducted, nor do I see any satisfactory ground on which you can import from the Montgomery Act, or read in this Act a deduction of this sort. I therefore think that this deduction ought not to be made, and if so, the prayer of the petition being in that case within the statutory limit, there is no occasion for deciding more in this case.

Lord Ivory.—I cannot say that I have a clear opinion upon this matter. This is a very important question, and has arisen now for the first time. The case of Lady Keith is not applicable, for the discussion there was as to provisions, which had not been granted even contingently,—although there existed powers of granting which had not been exercised,—and all that the Court did was to hold that burdens which might be made to affect the estate through the exercise of powers existing but which had not been exercised, did not require to be taken into calculation; but they said nothing as to the provisions which had been granted, and were contingent in their nature, for it was not necessary to do so, as whether they were deducted or not there was a margin of free rent. That case not being authority, there is no other authority of which I am aware.

Then we get at once into an apparent conflict of expression between two statutes, and I do not see my way to the extrication of the difficulty on the footing on which this petition is presented. It assumes that the extreme limit to which an heir can go in his own lifetime in constituting improvement debts is four years free rental. I doubt whether that can be read out of the one statute or the other. I am not able to follow the reporter with reference to the way he deals with the free rents, for he mixes the question up with the debts chargeable on the estate, and with which it has nothing to do. If this point is such a novelty, we ought to hear more argument before we commit ourselves to what will be a precedent. The difficulty arises here, that the Montgomery Act says that the heir shall be entitled to

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make any expenditure he pleases, provided always that no more than four years free rent shall form a charge against the succeeding heir. The rental comes to be considered only when it is sought to charge the expenditure against the succeeding heirs, and as the margin of relief is four years free rent, it is clear that the statute pointed to an expenditure, not of four years free rent, but a sum of which four years free rent was only three fourths. That Act looks to the expenditure with reference to the liability of the heir, and the deductions spoken of in it have reference to a period which I hold to be absolutely excluded by the Entail Amendment Act. It is very difficult to say that the two systems can be worked together. The limitation of the expenditure is in section 16. The expressions in sections 14 and 16 of the Rutherfurd Act are embarrassing. I doubt whether, under that Act, we have anything to do with burdens; but if we are to take them into account, this much is clear,—we cannot take them as they shall stand at the time of the death. That is excluded by every possible construction of the statute. But I am very much puzzled, and the question altogether is so new that I should like to hear a discussion of the principle on which these two statutes are to be construed together. But if the only question we have to deal with is the one to which your Lordship adverted, I have no difficulty about it.

Lord Curriehill.—When this petition was under consideration some time ago, it was stated to us that if this sum be not deducted from the rental, there is a sufficient margin to give this petitioner all he asks for. I take that statement as it was given. If there is any error in the calculations, that is a different matter altogether. But I have not any hesitation in making up my mind that it is impossible in this inquiry as to the amount of the rental to hold that this sum is a burden now existing, and as to which we have not determined whether it shall be a burden or not. That is the only question I have been considering, and it is the only question upon which I am now to give an opinion. The matter at first appeared to me clear to demonstration; but, as the reporter has presented it in a different view, I have reconsidered it, and having done so, I can now say that the longer I look into the matter the clearer it becomes. I cannot see the vestige of a doubt on the subject; and I am a good deal surprised that any doubt should be thrown on it, for there is not any judgment pronounced by your Lordships under the Aberdeen Act that is correct if these doubts are at all good.

The application now before us is for authority to sell part of this entailed estate for payment of an improvement debt of about L.7000. The improvements have been made since 14th August 1848. As to those improvements made before that date, they have already been dealt with and made a burden on the estate, and accordingly the application is to sell for two-thirds, not of three-fourths, but of the whole subsequent expenditure. Now it has been suggested that this sum is larger than that which the Entail Amendment Act authorises, and the objection is reared up in this way,—it is said (1) that there is a limit put upon the amount for which certain burdens may be created; that the total amount of the expenditure shall not exceed four years free rent of the estate; and (2), that on ascertaining the amount of the free rent, you are to make certain deductions, and that one of those is the interest of the very sum that you are going to rank as a burden on the estate, and for which a portion of the estate is to be sold. Now, as to the first assumption, I will not say anything. I have given it a good deal of consideration, and I may be prepared to give my opinion upon it when it is presented to us for decision. I believe that, generally speaking, there has been an idea that there is such a limitation in the Act, and many applications, if not all of them, have proceeded on that assumption. Whether it is well founded or not, I will not give an opinion, but this petition proceeds on that assumption. So dealing with it as presented to us, I inquire, how is the rental to be ascertained of which it is said that this multiple is to be taken as the limit of the expenditure to be made a burden on the estate? At what point of time is the rental to be fixed? That is the question. Are we, now when we are giving this remedy, to take the rental as it shall be at Whitsunday after the death of the petitioner? If the petitioner had been contented with the remedy given by the 10 Geo. III, that would have been the case. That statute points out distinctly that it is the rental as at Whitsunday after the date of the improver's death that is to be taken. That period of time is the terminus at which the amount of the rental is to be ascertained. Now, the question raised here for considera-

tion is, shall that be taken as the period at which the rental is to be taken, according to which the remedy given by the Disentail Act of 1848 is to be calculated? Now, I would only say, that not only is there a difficulty, but there is an utter impossibility in doing that. You cannot tell what the rental will be at Whitsunday after the death of the petitioner. It may be double, or it may not be half of what it is now. So also all the deductions as at that date are now unknown. Provisions may yet be granted, and it may happen that where an estate belongs to a lady, and the right of courtesy is not excluded, her husband may possess the whole rental of the estate. That happened in the case of Gibson of Clifton Hall. But I merely mention that for the purpose of saying that it is here impossible to make a calculation of the rental under the rule of the Montgomery Act. The amount of the annual rent must be fixed now, for it is to be made a real burden on the estate, and therefore must be certain in amount and not problematical.

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But that it is not all; we are asked here to fix the sum for which the petitioner is to be entitled to grant a real security over the estate and sell the estate. We are to fix how much of the estate is to be sold, and to be sold *now*, so that, while on the one hand it is impossible to tell what the rental may be at the time described by the Montgomery Act, it is indispensable that that rental shall be fixed as at the date of our judgment. Now, is this sum as at this moment a burden on the estate? It is impossible to say that; and it is equally impossible to say that the interest of that sum is an existing burden on the rental of the estate, but that is the only question now before us. I go upon this, that the time at which the calculations are to be made is not at Whitsunday after the death of the improver, but now.

Lord Deas.—This is a question of general importance—affecting the position of the great majority of entailed proprietors in Scotland. It arises for decision in the unsatisfactory form in which many of these questions occur, upon an *ex parte* argument for the petitioner, although we have here, no doubt, the advantage, which I do not underrate, of the able and perspicuous observations made by the reporter. But as I cannot concur in the construction put upon the statute, either by the counsel for the petitioner or by the reporter, I am glad to have had opportunity of maturing for myself, so far as I can at present do so, the opinion which I have formed,—subject to reconsideration when a contested case occurs, in which I am very sensible much light may be obtained from farther argument.

The present discussion relates to a sum of L.7205, 14s. 5d., expended by the petitioner in permanent improvements since the passing of the Rutherfurd Act, with reference to which expenditure no decree has been obtained; and with two-thirds of which he proposes (*inter alia*) to charge the fee of the estate, and ultimately to sell a portion of the estate for payment thereof. The question occurs, whether, and to what extent, the petitioner is limited in regard to the amount of improvement debt with which he can so charge the estate?

The view of the reporter appears to be, that the proviso in sect. 10 of the Montgomery Act is imported into sect. 16 of the Rutherfurd Act, and, consequently, that the improvement debt chargeable upon the fee of the estate is limited to four years free rent, "after deduction of all public burdens, liferents, and interests of debts which may affect the estate, as the same shall happen to be at the first term of Whitsunday after the death of the heir who expended the money claimed."

I have two objections to this view. The one is, that I do not find it expressed in the Rutherfurd Act. The other is, that, if it had been so expressed, it would have been impracticable to carry it into effect. A present value may, no doubt, be put upon provisions already granted, subject to the contingency of surviving the granter, as the reporter, properly enough, says might be done with reference to the jointure provided to the petitioner's wife. But no present value could possibly be put upon provisions which an heir in possession has or may come to have power to make, but has not yet made; and the making of which, as well as the power to make them, may depend upon the birth of children not yet born, or the contingency of a marriage not yet contracted. Accordingly the reporter finds it impossible, consistently, to carry out this view, and (subject to the equitable qualification of putting a present value upon the provisions), rather points at the course followed by the applicant in Lady Keith's case, where the interest of contingent provisions already granted, but not yet come into operation, was deducted, although (as the reporter states, quite accurately), the Court decided nothing except that the interest

No. 159. of provisions, which the heir had the power to make, but had not yet made, did not fall to be deducted. It is obvious, however, that a middle course of this kind would be a total departure from the principle of holding sect. 10 of the Montgomery Act to be imported into sect. 16 of the Rutherfurd Act. Nor do I find any words in sect. 16 of the Rutherfurd Act which bear out this construction. The only words suggestive of it (and which create the whole puzzle in the present case), occur in the middle of the section, where it is enacted, that "it shall be lawful for such heir to apply by summary petition to the Court in manner hereinafter provided, setting forth such improvements, and the amount of money, not exceeding the amount authorised by the said Act, expended thereon." These words are somewhat obscure, and, in any view of their meaning, seem to me less happily chosen than the general phraseology of this Act. But, mean what they may, it will be observed that they are descriptive only of something which is to be set forth in the petition. They do not at all apply to the thing to be prayed for, nor to the thing to be found and granted by the Court. This observation is equally applicable to the petitioner's view of the meaning and effect of the above words, as to the view taken of them by the reporter. But the petitioner's view is subject to the farther observation that, if these words—upon which his whole argument must rest—could be held to import into the Rutherfurd Act any part of the proviso embodied in sect. 10 of the Montgomery Act, they must import the whole of that proviso. The substantive enactment is not that the heir shall be a creditor for three-fourths of the money not exceeding four years rent, subject to the proviso that the rent is to be estimated as at the first Whitsunday after the heir's death. But the substantive enactment is that which is contained in sect. 9 of the statute, that the heir shall be a creditor for three-fourths of the money, and the whole matter of limitation to four years free rent, as the same may be at the first Whitsunday after the heir's death, is made the subject of a distinct and separate section, viz., sect. 10, which forms a single proviso, and is, in fact, a single sentence. I see no way, therefore, of importing part of the proviso without importing the whole of it. To import the whole of it would imply the enactment of an impossibility,—a view not readily to be taken, and I adopt, therefore, what I think the only alternative open,—viz., the alternative of holding no part of it to be imported. The result of this, of course, is that two-thirds of the improvement debt may be charged upon the estate, whatever the free rental of the estate may be either now or at the petitioner's death.

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I am much confirmed in this view by attending to the terms of sections 13 and 14. Section 13 provides, that if the heir in possession shall have executed improvements previous to the passing of the Act, and obtained decree for three-fourth parts of the sums expended thereon, it shall be lawful for him to execute a bond of annualrent at a rate not exceeding, for a certain period, "the legal interest of the said three-fourth parts of the sums expended as aforesaid," and at a rate not exceeding, for a certain additional period, L.7, 2s. "for every L.100 of such three-fourth parts as aforesaid."

Then section 14 provides, that, if the heir shall execute improvements subsequent to the passing of the Act, "and obtain decree for three-fourth parts of the sums expended thereon," it shall be lawful for him to execute a bond of annualrent, to endure for a certain period, at a rate not exceeding L.7, 2s. "for every L.100 of the whole sums expended as aforesaid."

Now, I cannot see a shadow of ground for holding that the annualrent for which bond is to be granted under section 13 is to be other than an annualrent corresponding to three-fourths of the sums expended; or for holding that the annualrent for which bond is to be granted under section 14 is to be other than an annualrent corresponding to "the whole sums expended." The words of both sections are express, and no limitation, in respect of rental, is, in any way, alluded to in either of them.

These two sections provide for improvement expenditure, whether made before or after the passing of the Act, for which decree has been obtained. Then section 16 provides for improvement expenditure, whether before or after the Act, for which no decree has been obtained; introducing, in consequence, machinery for ascertaining that the improvements are of the kind for which, had certain precautions been adopted, decree might have been obtained. There is no other difference: and it is not, therefore, surprising that there should be no difference between the

mode of ascertaining the amount to be sanctioned under this section and under the others. Accordingly, the prayer of an application under this section is to be "for authority to grant bond of annualrent as is herein before provided in the case of improvements for which decree in terms of the said Act has been obtained." And the Court, if satisfied as to the nature of the expenditure, is to find so, "and shall also grant warrant for execution of a bond of annualrent as herein provided in the cases of improvements for which decree in terms of the said Act has been obtained:" that is, as I read the statute, for a bond of annualrent corresponding to three-fourths of the expenditure, if made prior to the Act, and corresponding to the full amount of expenditure if made subsequent to the Act. No. 159. — Mar. 11, 1857. Hamilton.

In further corroboration of this view it will be observed that, under section 13, the representatives of the heir get only L.7, 2s. per cent for twenty-five years upon the same three-fourths of which, if the free rental happened to be large enough, they would get full payment under the Montgomery Act. And under section 14, although they may happen to get L.7, 2s. per cent for a certain period on the whole sum expended, they may, on the other hand, get nothing at all, as the heir may survive during the twenty-five years which constitute the whole currency of the bond. The position of the heir's representatives, therefore, would have been greatly less favourable under the Rutherfurd Act than under the Montgomery Act had the limitation as respects rental in the one Act, or any analogous limitation, been imported into the other Act.

Nor does this view impose any material hardship upon the subsequent heirs of entail. For the effect of section 18, as to granting bond and disposition in security for two-thirds of the capital on which the annualrent is calculated (which bond may now contain a power of sale), coupled with the effect of section 25, which enables the heir in possession to sell for payment of debt, is to provide an easy method of getting rid of the debt whenever the interest presses heavily upon the rental; while the expenditure upon the lands may fairly be supposed to render the improved portion of them, left unsold, equally valuable, or more valuable, than the whole were before the improvements had been effected.

In this point of view there is no omission whatever in the clauses now under consideration of the Rutherfurd Act. To have inserted the limitation supposed to be omitted would have been contrary to the policy of the Act, which appears to me to be as large and enlightened as the legal knowledge, displayed throughout its enactments generally, is comprehensive and profound.

An additional appendix was now lodged, containing tabular statements shewing the results on the free rental of the different views as to what burdens ought to be considered deductions, and shewing also the result if in estimating the sum for two-thirds of which bond could now be granted, it was necessary to take into account three-fourths of the whole expenditure before the date of the Entail Amendment Act, or only the sum actually charged on the fee. After considering this appendix,—

Lord Ivory.—If your Lordships are prepared to grant this petition, I should like not to be called on to agree or differ. I am not prepared to agree to any definite judgment now, and would like to have further argument. I still feel difficulty on the assumption that we are to take four years free rental as the measure of the expenditure.

Lord President.—The question now is, whether, on the arithmetic as presented to us, the conclusion I arrived at yesterday was good or not? A difficulty suggested is, that, in estimating whether four years rental has been exhausted or not, we must take, not the sum for which bond has been granted, but the sum of which it was two-thirds. I think that the smaller, and not the larger sum, is the true sum to be estimated; and, if that be so, then the four years rent are not exhausted. Upon the other and larger point, as to whether we have anything to do here with the four years rent, I reserve entirely my opinion; and, if we are to go upon that, we would require to give more consideration to the question.

Lord Deas.—I wish to explain that I was very desirous, as your Lordships know, to avoid forming any opinion on the general and important question relative to the true construction of the Rutherfurd Act,—and therefore I would have preferred that one of two courses had been followed,—either to have heard an argu-

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ment on the general question, or to have consulted our brethren upon the subject. But, as two of your Lordships thought the prayer of this petition might be granted without going into that general question, and were therefore opposed to either of the above courses, I considered myself bound, in justice to the petitioner, to form the best opinion I could on that general question, and having taken a view of it which enabled me to concur in granting the petition, I thought myself called upon to do so on my own grounds, in place of dividing the Court upon the subordinate question (on which alone we differed), whether it was necessary to go into the general question or not? For, upon the general question, itself, we have not (as yet at least) differed,—your Lordships having reserved your opinions upon it. And, although the Dean of Faculty has now admitted that the petition is based upon the footing of taking four years free rent as the measure of charge, I do not look upon this as making it incompetent for me to concur, upon my own grounds, in granting the prayer of this petition; although it confirms me in the view I expressed yesterday that it is necessary here to deal with the general question. If, therefore, the petitioner is disposed, as I understand him to be, to take the risk of my vote on the grounds on which I can alone put it, I do not see now, any more than I did yesterday, why I may not concur in granting the prayer of the petition to the extent now insisted in and explained in Mr Duncan's original report.

The Court pronounced the following interlocutor:—"The Lords, on report of Lord Mackenzie, Ordinary, and having heard counsel for the petitioner, Find, (1), That the fee of the entailed estate mentioned in the proceedings is at present validly charged with the principal sum of L.2684, 18s. 8d.: Find, (2), That the petitioner has expended on improvements on the said estates mentioned in the petition, of the nature contemplated by the Act 10 Geo. III, cap. 51, and 11 and 12 Vict. cap. 36, the sum of L.6463, 12s. 7d., subsequent to the date of said last mentioned Act: Find that the sums were *bona fide* expended by the petitioner while heir of entail in possession of said estates, and that the same, along with the improvement debt already forming a charge on the fee of the said estate, does not exceed the amount authorised by the statute: Find that the petitioner is entitled to charge the fee of the said entailed estates (other than the mansion-house, offices, and policies thereof) with the farther sum of L.4309, 1s. 9d., exclusive of and over and above the sum of L.2684, 18s. 8d. with which the fee of the said estates is already charged: Find, (3), That the petitioner is entitled to charge the fee of the said estates with the farther sum of L.4931, 3s. 6d. of provisions to younger children mentioned in the petition: Find that the total amount, with which the fee of the said estate is already charged, or may be competently charged, is L.11,925, 3s. 11d. sterling: Find that authority may be granted to the petitioner to sell part of the said entailed estates, other than the mansion-house, offices, and policies, for the purpose of paying off the said debt of L.11,925, 3s. 11d. sterling; interpone their authority, and decern; Farther, they remit to the Lord Ordinary to take such steps as his Lordship may deem proper, with the view of selecting the most suitable portion of the entailed estates (other than as aforesaid), to be sold and disposed of for the purpose of paying off the said debt, and to report."

Hope & Mackay, W.S.—Agents.

No. 160. Mrs Jane Marshall or Houston, Pursuer.—*D. F. Inglis—Fraser.*
The Magistrates of Glasgow, Defenders.—*Penney—Macfarlane.*

Statute 9 & 10 Vict. c. 289, sect. 14—Construction—Church—Minister's Stipend.— "The common good and property, heritable and moveable, and means and revenues,

and income of every description," of "the barony of Gorbals," was transferred to and vested in the Magistrates and Town-Council of Glasgow;—*Held*, in an action raised by the minister of the parish of Gorbals (*aff.* judgment of Lord Mackenzie, *abs.* Lord Wood), that property belonging to the feuars and villagers of Gorbals, who were liable for the stipend of the minister of the parish of Gorbals, did not fall under this clause, and that the Magistrates were not bound to take over that property, which was not sufficient to meet the liabilities of the feuars and villagers whom the Court held to be the "community" of Gorbals, and to be quite distinct from the "barony of the same name, though residing within it."

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2d Division.
Ld. Mackenzie
I.

The barony of Gorbals was acquired from Sir Robert Douglas of Blackerstone by the Magistrates and Council of Glasgow, partly with the funds and for behoof of the Corporation of the City of Glasgow, partly those of the Incorporated Trades, and partly those of Hutcheson's Hospital. There existed at the time of this purchase the village of Gorbals, occupying part of the barony, and chiefly inhabited by feuars, who, by themselves or their predecessors, had obtained feus of portions of the barony, and erected houses thereon.

The pursuers alleged, "the barony, prior to the Glasgow Municipal Extension Act (27th July 1846), was administered by bailies appointed by the Magistrates and Council of Glasgow, the superiors of the barony. These bailies were magistrates not of the village only, but of the rest of the barony also. Along with these bailies the affairs of the village had been managed from a remote period by a preses and managers nominated and appointed by the heritors and feuars."

From funds raised partly by the voluntary imposition of two small taxes, and partly by contributions among the feuars, the community was enabled to acquire heritable property. Thus in 1713 they acquired "ane buriall place for the inhabitants of Gorbals," the title to which was said to have been taken "in favours of the community of Gorbals." They afterwards received a gift of a piece of ground, and built on it a chapel. This was in 1727. The disposition to this ground was "in favors of L. L., present preses of Gorbells, T. G., hammerman in Gorbells, G. M., maltman there, and R. W., maltman there, his assessors, and their successors in office, for the use and behove of the haill other feuars and inhabitants of Gorbels and muir thereof." Again, in 1748, they acquired land called the Community land, the titles being conceived in favour of "the preses and assessors of the community of Gorbells, and their successors in office, for behoof of the said community, and the assignees of the said preses," &c.

In 1770 the village of Gorbals having increased in size, a process was raised before the Court of Session, as commissioners for the plantation of kirks, and decree was pronounced disjoining the village of Gorbals from the parish of Govan, and erecting it into a new parish, to be called in time coming the parish of Gorbals, and ordaining "that the bailies of the said village, preses, and manager of the public funds thereof for the time being, shall be bound and obliged . . . to provide the minister who shall serve the cure at the said kirk with a competent and legal stipend, not under the sum of L.67 sterling, with L.23 money foresaid yearly, for manse and glebe, aye and until the same are provided both out of the public funds of the said village," &c.

The pursuer's farther allegations were,—"Sometime after the erection of Gorbals into a parish, the districts known as Hutchesontown, Tradeston, Kingston, and Laurieston, which includes Carlton Place, were annexed thereto in common form. The extended parish constitutes the barony of Gorbals."

The patronage, which was by the decree given to the University of Glasgow as patrons of the parish of Govan, was soon after sold to the feuars of Gorbals. Within a few months after the induction of the first minister of the new parish, "his stipend and allowance for manse and glebe were aug-

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mented to L.100 (being an augmentation of L.10), with L.12 for communion elements. This was done at meetings of the managers and feuars, held, the one on the 31st of October and the other on the 16th December 1771." A farther augmentation took place in 1802, and another in 1806, when the stipend and allowance in lieu of manse were fixed at L.200 in all, with L.20 for communion elements. These sums were paid from that time downwards to all the predecessors of the pursuer, who was, "in 1846, inducted as minister under a presentation from the feuars of Gorbals, which purported to secure to him the constant localled and modified stipend, the allowance for manse and glebe, and other profits and emoluments belonging to the church of Gorbals, and that during his serving the cure thereof. During the first four years and a-half of the incumbency of the said Robert Houston, there was paid to him half-yearly by the bailies, preses, and managers of Gorbals, the sum of L.60, to account of stipend and communion elements, instead of L.110 half-yearly. He did not even receive payment of the L.60 at the regular half-yearly terms, but only occasional small sums to account, in terms of a state produced," which shewed as due to Mr Houston at Whitsunday 1853, no less than L.1324, 10s. 5d.

As to the management of the affairs of Gorbals, the allegations were,—"The preses and managers named in the decreet of disjunction and new erection, in conjunction with the bailies appointed by the city of Glasgow, continued to manage the whole affairs of the community, until 1808, when an Act of Parliament was passed, vesting the management of the police affairs of the whole barony in a board of commissioners; but the bailies, preses, and managers continued to conduct all the business connected with the church and other property. About 1815 the chapel was sold by the bailies, preses, and managers, and the proceeds applied to extinguishing the debt incurred in the erection of another church built in the year 1810, the titles to which were taken in favour of the 'bailies' of the barony of Gorbals, the 'preses,' 'collector,' and 'managers,' and their successors in office, 'for behoof of the community.' No distinction is made in the accounts of the bailies, preses and managers, between the revenues drawn from the community lands, the burying-ground, and the church." "Up to 1848, the affairs of the parish and community of Gorbals were managed, and the payments to account of stipend were made, by the then bailies, preses and managers of Gorbals. These bailies were chosen by the Town-Council of the city of Glasgow, and the preses and managers were chosen by the heritors or feuars of the extended parish of Gorbals, which, as already stated, included the whole barony."

In 1846 there passed the Act 9 & 10 Vict. c. 289, whereby the municipal boundaries of Glasgow were extended so as to include the whole barony of Gorbals, of which the old village and parish still formed a part. By the first section all subordinate jurisdictions were abolished, and the powers transferred to the Magistrates and Council appointed under the Act. By the third section all titles are to remain as if the Act had never been passed, and the rights, privileges, and emoluments of the ministers, kirk-sessions, schoolmasters, and session-clerks of the parishes embraced in the extension are to remain unimpaired.

The 5th section provides, "That in respect of all public or parochial burdens not herein enumerated, other than the assessments to be levied under this Act, or the Acts before recited, for the purposes thereof, as hereinafter provided, which now affect or which may hereafter affect the parishes within the said extended limits, the said lands shall remain a part and portion of the said parishes respectively, and shall, together with the proprietors, tenants possessors, and inhabitants thereof, continue to be liable for a proportion of the said burdens, in the same manner as at present, and as if this Act had not been passed."

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By the 13th section it is declared, "that after the election and induction into office of the Councillors, Magistrates, and office-bearers in the said city, under this Act, and not sooner, the Magistrates, Councillors, and office-bearers previously in office in the said city, in the barony of Gorbals, in the burgh of Calton, and in the burgh of Anderston, shall go out of office, and their whole powers, duties, and functions shall cease and determine."

The 14th section of the Act, upon which the pursuer mainly relies, provides "that the common good and property, heritable and moveable, and means and revenues, and income of every description, leviable within or belonging to the said city of Glasgow, to the barony of Gorbals, to the burgh of Calton, and to the burgh of Anderston, within the limits of this Act, or to which such city, barony, or burghs, are respectively entitled, or which are held or administered by any person for or in behalf of the community of such city, barony, or burghs, for the public ends or purposes thereof (but subject to the liabilities to which the same are legally subject), shall be, and the same are hereby vested in the Council to be elected and chosen for the city under the provisions of this Act, with full power, right, and authority to levy, adjudge, sue for, and recover the same for the benefit of the city, except so far as the same are abolished by this Act."

The pursuer averred, that "immediately after the first election of magistrates and councillors under the Municipal Extension Act of 1846, the bailies of Gorbals ceased to exercise any power within the barony, and the preses and managers, conceiving the property which had been under the management of themselves and the bailies to be common good, also ceased to manage it. Application was made to the Lord Provost, Magistrates and Council of Glasgow, to assume, under the 14th section of the Act, the management thereof, and all the liabilities to which the property, and the bailies, preses and managers had been subject. The Lord Provost, Magistrates and Council did not assume the management of the property at the time when the bailies and managers of Gorbals ceased to exercise any management, and the property has been for some years under the charge of a judicial factor." But he alleged that the Magistrates had entered upon the discharge of a portion of the duties of the Magistrates and managers of Gorbals, in reference to matters in no way connected with police and statute labour purposes, and had ousted them from the management of certain charitable trusts.

In these circumstances, and founding on these averments, the Rev. Robert Houston brought this action (on his death insisted in by his widow) concluding to have it declared that the Lord Provost and Magistrates of Glasgow "are bound to take such steps as may be necessary for vesting in themselves the church, church-yard, community-land, and other heritable and moveable property of every description belonging to the bailies, preses, and managers, and feuars of the barony of Gorbals, with all the burdens and liabilities thereto attached: And they ought and should be decerned and ordained to make up titles thereto according to the state and position of the title: And it being so found and declared, or whether so declared or not, they ought and should be decerned and ordained to make payment to the pursuer of the sum of L.1324, 10s. 5d., being the arrears of stipend and allowance for communion elements due to him as minister of the said parish of Gorbals at the term of Whitsunday 1853, with the legal interest."

The pleas stated in support of these conclusions were:—The bailies, preses, and managers of the community of Gorbals, were bound to make payment to the pursuer of the stipend due to her late husband as augmented, and the common good of the said burgh, including the church and churchyard, could be attached for payment thereof.—The whole community property of Gorbals having now, by force of the Municipal Extension Act, fallen to the defenders, under the same burdens as it stood vested in the

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representatives of the Gorbals community, they are bound to pay the stipend due to the pursuer's husband.—The separate magistracy and jurisdiction of the bailies having been abolished and transferred to the defenders, they are not entitled to refuse to take up, with its corresponding liabilities, the property which belonged to the said community.—The common good and property of the barony of Gorbals having become vested in the defenders, for the benefit of the city of Glasgow, the defenders and the common good of the city are liable to the pursuer in the stipend, and arrears of stipend, sued for.

The main difference in point of statement between the pursuer and defenders was, that the latter averred that Gorbals was never erected into a burgh of barony; that the bailies of Gorbals, whether principal or resident bailies, were neither more nor less than baron bailies, appointed by the corporation of the city of Glasgow, as superior of the barony, whose ancient baronial powers remained entire. The resident bailies were also generally feuars, and often managers in the village. They maintained that the village of Gorbals and the barony always remained entirely distinct, and they founded upon a series of local acts, as shewing this. Thus in 1808, the Act 48 Geo. III., c. 42 was passed, entitled, "An Act for regulating the Police of the Barony of Gorbals, in the County of Lanark," &c., in the first section of which it was enacted, that the regulations therein made "with respect to the establishment of a general system of police, and for accomplishing the purposes of this present Act, shall extend over the old village of Gorbals, Hutchesontown, Laurieston, Tradeston and Kingston, being parts of the barony aforesaid," &c. Other Acts, all having relation to the entire barony, were passed in 1823, 1831, and 1837, by section 210 of which it was declared, "That there shall be, as at present, one principal and four resident bailies in the said barony of Gorbals, who shall be appointed annually, in the month of October, by the Lord Provost, Magistrates and Town Council of Glasgow, as baron and superior thereof, provided always that the principal and two of the said resident bailies only shall have the right of voting in the parochial matters of the old village of Gorbals." The parochial matters so referred to, according to the defenders, were those under the charge of the feuars, and related to the church and burying-ground, all other public affairs being managed under the statutes above-mentioned. Thus the old baronial hall was sold, and the purchaser taken bound to hold of the city of Glasgow, and new police buildings were erected for the purposes of the entire barony, upon ground purchased for the purpose, the titles being taken to the magistrates and commissioners of police, and their successors in office. These police buildings, they said, were of the nature of common property or common good, pertaining, not to the village of Gorbals, but to the whole barony; and they were administered quite separately and distinctly from the property or subjects administered by the preses and managers of the heritors of the village; nor had these latter parties any power to interfere with the court-house and prison buildings.

To this statement the pursuer replied,—If the corporation of Glasgow sold the buildings and got the price, they did so under the condition that they held them in trust for the feuars and heritors, and were bound to appropriate the money in rebuilding the premises, and, according to the shewing of the defenders, they did apply the money for that purpose; and the new buildings were, and continued to be, part of the common good of Gorbals. As to the subjects which the defenders were called upon to take up, with the liabilities attaching to them, they (the defenders) alleged that they believed the liabilities amounted to upwards of L.7000, while the "community-land" had been sold already by one of the creditors, under an heritable bond, and the church—said to have cost L.12,000—had been sold for L.2860, under an adju-

dication led by parties who had right to a feu duty of L.100 a year, which had been allowed to fall into arrear. No. 160.

Apart altogether from the question of their obligations under the various Acts, the defenders alleged that, during the whole period for which arrears were claimed, Mr Houston had been unfit properly to discharge the duties of the office, and had, in point of fact, not discharged them. Mar. 11, 1857. Houston v. Magistrates of Glasgow.

They pleaded;—According to the sound construction and intendment of the Act 9 & 10 Vict., cap. 289, the defenders are neither entitled nor bound to take the subjects in question, or to subject themselves in the liabilities contended for. More particularly, (1.) as the subjects and liabilities in question pertain to the village of Gorbals, and not to the barony, and have been acquired by and for behoof, and are under the management and control, and in the enjoyment of parties different from the barony and community of Gorbals, the action is untenable; (2) and, at any rate, all parochial burdens and affairs, such as that in question, are expressly excluded from the operation of the said act.

The Lord Ordinary pronounced the following interlocutor:—" Sustains the defences for the Lord Provost, Magistrates, and Town Council of Glasgow, and assoilzies them from the whole conclusions of the action: Finds the pursuer, Mrs Jane Marshall or Houston, liable in expenses to the defenders," &c. *

* " NOTE.—This action was raised by the late Robert Houston, sometime minister of Gorbals, against the Magistrates and Town Council of Glasgow, for payment of L.1324, 10s. 5d. of arrears of stipend, said to be due to him at Whitsunday 1853. The original pursuer was deposed from the office of a minister of the Church of Scotland in May 1853, and having died during the dependence of the action, it is now insisted in by Mrs Houston, his widow and executrix.

" The question raised, which is of considerable difficulty and importance, is, Whether the Magistrates of Glasgow are liable, under the Act 9 and 10 Victoria, cap. 289, to pay the stipend due to the minister of the parish of Gorbals? This question depends upon the construction to be put on certain clauses of what is called the Municipal Extension Act of 1846, and particularly the 14th section.

" It is contended by the pursuer, that under that Act the Magistrates are bound to take over certain public property which is said to have belonged to the community of Gorbals, subject to its debts and liabilities, and are liable for the stipend of the ministers of Gorbals, as a burden affecting that property. On the other hand, the defenders deny that they have incurred any such liability, and maintain that the subjects in question are not carried by the 14th section of the Act, because they belong to the feuars of the village or parish of Gorbals, and form no part of the common good or public property belonging to the barony of Gorbals.

" The barony of Gorbals, which is situated on the south side of the Clyde, was acquired from Sir Robert Douglas, about the middle of the 17th century, by the Magistrates and Council of Glasgow, partly for behoof of the corporation, and partly for behoof of Hutcheson's Hospital and the Trades House. There existed, at the time of this purchase, a village of Gorbals, usually called 'Bridgend,' from its being situated at the south end of the old Bridge of Glasgow, and occupying a part of the barony adjacent to that bridge.

" It is admitted that the Gorbals territory was never erected into a burgh of barony, and in this respect it differs from Calton and Anderston. The Magistrates of Glasgow, however, as superiors, appointed baron-bailies, whose jurisdiction extended not only over the whole village, but over the whole bounds of the barony, which was much more extensive.

" After the village of Gorbals or Bridgend increased in population, the feuars or heritors made rules and regulations for the common benefit, and appointed a preses and managers for the conduct of their affairs. It is admitted, that in 1727 and 1734 the feuars of the village of Gorbals acquired ground for building a church or chapel-of-ease, and for a burying-place; and in 1748 they acquired certain tenements or subjects in the village. The titles to those subjects appear to have been

No. 160. From a report obtained, of consent, upon the state of the property which had belonged to the community of Gorbals, it appeared that in 1846, at the

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taken to certain parties, as managers for behoof of the feuars of the village. In 1771 they obtained a decree from the Commissioners of Teinds, disjoining the village of Gorbals from the parish of Govan, and erecting it into a separate parish; and in 1810 they purchased ground for, and erected a new and larger church. Besides the parochial matters referred to, the feuars of the village of Gorbals, by their preses and managers, raised, by assessment or otherwise, a small public fund, which they applied to purposes of common concern, such as sinking wells, providing lamps, repairing causeways, and the like.

"By the decree of 1771, the heritors of Govan were declared not to be liable in payment of stipend to the minister of the new parish of Gorbals, or for the expense of building or repairing the kirk or burying-ground, or for any other parochial burden. All those burdens were laid on 'the bailies of the said village, preses, and managers of the public funds thereof.' The patronage of the newly erected parish, which was reserved by decree to the College of Glasgow, as patrons of Govan, was purchased by the feuars in 1771, under a disposition which was granted 'to the heritors or feuars of the said village and parish of Gorbals, and their heirs and successors, and to the elders of the said new erected parish, and their successors in office, in all time coming.'

"After the village was erected into a separate parish, according to well defined boundaries specified in the decree, Hutcheson's Hospital and the Trades House feued out extensive tracts of building ground according to regular plans, with spacious streets, and in progress of time the old village or parish of Gorbals was surrounded by buildings in the districts called Hutchesontown, Lauriston, Tradeston, and Kingston, which are all in the barony of Gorbals, but form no part of the village of Gorbals, or the parish of Gorbals, as fixed by the decree of the Court of Teinds in 1771.

"To meet the exigencies of an increased population, additional resident baron bailies were appointed by the Magistrates of Glasgow, as superiors, and a general system of police was introduced applicable to the whole barony of Gorbals, including the old village. The first Police Act, which was passed in 1808 (48, Geo. III, c. 42) is entitled 'An Act for regulating the police of the barony of Gorbals, in the county of Lanark, paving, lighting, and cleansing the passages thereof, erecting a bridewell or workhouse therein, and for other purposes relating thereto.' The first section declares, that the Act 'shall extend over the old village of Gorbals, Hutchesontown, Lauriston, Tradeston, and Kingston, being parts of the barony aforesaid, and in general over the whole and every part of the said barony, and also to the bridge leading from the said city of Glasgow to the said barony.' Another statute for regulating the police of the barony of Gorbals was passed in 1823, and in 1825 a separate Act was passed for regulating the conversion of the statute labour within the barony. Various other local Acts were obtained applicable to the police, and paving, and cleansing of the barony of Gorbals. These statutes did not interfere with the church and burying-ground, and other subjects which had been acquired by the feuars in the old village, and which remained under the administration of the preses and managers appointed to act for them; but, as disputes had arisen whether the bailies appointed by the Magistrates were entitled to vote in the parochial affairs of the old village, it was provided by the 210th section of the last Local Act passed in 1843, (6 & 7 Vict. c. 43), 'that there shall be as at present one principal and four resident bailies in the said barony of Gorbals, who shall be appointed annually in the month of October, by the Lord Provost, Magistrates, and Town Council of Glasgow, as baron and superior thereof, provided always, that the principal and two of the said resident bailies only shall have the right of voting in the parochial matters of the old village of Gorbals.'

"In the early titles the subjects acquired by the feuars appear to have been conveyed to the preses and his assessors *nominatim*, and their successors in office, 'for the use and behoof of the haill other feuars and inhabitants of Gorbals,' without mentioning the bailies. (See sasine, 15th April 1734, No. 73 of process. It was contended by the pursuer that the general term 'community' which occurs in some of the titles, must be held to apply not to the old village, but to the whole barony

date of the passing of the Act, the liabilities attaching to the heritors of the parish considerably exceeded their assets, and that the deficiency had ever since continued to increase.

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but this interpretation is inconsistent with the pursuer's statements and admissions on the record (pursuer's condescendence, articles 1 and 2), and particularly the answer made to article 4 of the defenders' statement. Where the terms 'community' or 'community of Gorbals' are used, they seem to refer to the feuars and inhabitants of the old village, afterwards erected into a separate parish by the Teind Court in 1771, and not to the heritors or inhabitants of the whole barony, and this is confirmed by the terms of the disposition by William Dixon in 1815, which is taken expressly in favour of the preses and managers and their successors in office, for 'behoof of the community of the said village.'

"It is proper, however, to mention, that the 'bailies in the village of Gorbals' are mentioned in the decree of the Teind Court of 1771. The bailies are also made parties to the contract of ground-annual under which ground was acquired from James Laurie, for building a new church in June 1810, the destination being taken to certain parties *nominatim* as the bailies, and to the preses, collector, and 'managers for the heritors of the parish of Gorbals, and to their successors in office, for the community thereof.' As the proper parish of Gorbals is co-extensive with the old village, this conveyance is necessarily limited to the feuars and heritors or inhabitants of the old village.

"For many years a court-house and prison existed in the barony, which were used for judicial and police purposes. About 1827, when the Barony Police Acts were in force, the old buildings were sold, and new buildings were erected for a court-house and police purposes, to the expense of which the Corporation of Glasgow appears to have contributed. The title to this property was taken to the bailies and 'commissioners of police of the said barony of Gorbals, and their successors in office, for the purpose of erecting a police office, and other buildings connected therewith;' and it was expressly declared in the conveyance 'that the said bailies of the said barony, and their successors in office, should have and exercise the uncontrolled use for judicial purposes of that part of the intended buildings destined for the court-hall and prison.'

"The subjects which the pursuer contends the defenders are now bound to take over under the burden of the minister's stipend, are, first, a tenement of land in Main Street of Gorbals, called the community land; second, the burying-ground; and, third, the parish church. All these subjects appear from the titles to have been acquired by the heritors or feuars of the old village of Gorbals, which was afterwards erected into a parish.

"It is said by the defenders that this property is now much dilapidated, and that the debts and liabilities affecting it greatly exceed its value. They allege that the community land, after becoming ruinous, was sold by an heritable creditor; that the parish church having bern burdened with a ground-annual, has been adjudged for the arrears due; and that the adjudger has sold his right under the adjudication to parties who have entered into possession; and that the only other property is the burying-ground, which is said to be of little value.

"By the Act 9 & 10 Vict. c. 289, passed in 1846, the municipal boundaries of Glasgow were extended, and made the same as the parliamentary boundaries of the city. The Police and Statute Labour Act for the city of Glasgow was extended over the same limits; and the several Police and Statute Labour Acts then existing for the barony of Gorbals and the burghs of Calton and Anderston, were repealed.

"The 3d section provides that the tithes payable out of the lands within the said extended limits shall be reserved to the owners.

"The 4th section declares that the Act shall not affect the poor's-rates, or the settlement of the poor."

His Lordship here quoted sects. 5, 13, and 14 given above, pp. 736–7.

"The 17th section relates to mortifications and trusts held or administered by the Magistrates of the separate jurisdictions by themselves, or in conjunction with others, and declares that the same shall be administered by the Magistrates under the Extension Act, or so many of their number to be chosen for the purpose as are appointed by the deeds of trust, together with the other trustees therein nominated,

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The argument turned mainly on the construction of the statutes as illustrated by the minutes of the proceedings of the preses and managers during a long series of years.

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and that with the powers and subject to the conditions specified in such deeds of trust or endowments.

"And, finally, by the 26th section, property connected with the police and statute labour of the united districts is vested in a committee appointed for police and statute labour purposes for the whole of the extended city.

"Such are the leading provisions of the Municipal Extension Act, under which the pursuer maintains that the defenders are bound to take over the tenement in Main Street, the burying-ground and parish church, under the burden of payment of stipend to the minister of Gorbals.

"It is not disputed by the defenders, that any public property belonging to the barony of Gorbals is now vested in the Magistrates of Glasgow by the 14th section of the Act; and they acknowledge, that under this clause they have acquired the police building which belonged to the barony: but they contend that the subjects in question do not belong to the barony, but are held in trust for the feuars of the old village of Gorbals, and consequently do not fall within the operation of the 14th section. They farther contend that the stipend payable to the minister of Gorbals is a parochial burden which falls to be borne in the same way as it was prior to the passing of the Act, as expressly provided for by the 5th section.

"Though the 14th section of the Act is not very happily expressed, the Lord Ordinary thinks it does not apply to the subjects in question, which were not the property of the barony of Gorbals, but were held in trust for the feuars of the old village. All magistrates, bailies, or other municipal officers, who had previously exercised separate jurisdiction in the annexed districts, were abolished by the 13th section of the Act; but it is thought the preses, collectors, and managers, who took charge of the property, and managed the affairs of the old village of Gorbals, were not thereby extinguished, but were entitled to act after the statute was passed in the same way as before. It has been shewn, that by a special enactment inserted in the last local Police Act for the barony of Gorbals, a certain number of the bailies was allowed to vote in the parochial affairs of the old village or parish of Gorbals; but with this exception, the right to vote seems to have been confined to the feuars or heritors within the old village to whom the property belonged. It is not pretended that the feuars of Hutchesontown, Laurieston, Tradeston, or Kingston, which formed important parts of the barony of Gorbals, had any right to interfere with the property in question. Supposing the property, in place of being burdened with debt beyond its value, had turned out a lucrative speculation, the feuars of the old village would have been entitled to the exclusive benefit of it, and they could not have been deprived of this against their will, either by the feuars of the adjoining districts within the barony, or by the Magistrates of Glasgow, under any of the clauses of the Municipal Extension Act. But if this be so it is clear the Magistrates cannot be compelled to take over the property against their will when the liabilities attached to it greatly exceed its value.

"It was argued by the pursuer, that if the subjects in question are not carried by the 14th section of the Act, there is no common good or public property belonging to the barony of Gorbals to which that clause can apply. To this it was answered by the defenders, 1st, that the police buildings, which stood vested in the bailies and commissioners of police of the barony of Gorbals, are the public property of the barony, and as such are vested in the Magistrates of Glasgow by the 14th section of the Act; and 2d, that even supposing there had been no public property belonging to the barony to satisfy the words of the 14th section, this would not render the clause applicable to property of a different description from that specified in it, so as to comprehend subjects belonging to or held in trust for the feuars of the old village of Gorbals.

"Another point maintained by the pursuer was, that the 14th section was unnecessary, so far as regards the police buildings of the barony of Gorbals, because the 26th section provides that all property relating to the police or statute labour of the barony of Gorbals and the other annexed districts 'shall, from and after the appointment of the said police and statute labour committee under this Act

LORD JUSTICE-CLERK.—In the view I take of this case, it would be very No. 160.
unprofitable to go over it in detail. I apprehend it to be quite clear that the —
Magistrates of Glasgow, under the 14th section of the Glasgow Municipal Act, take Mar 11, 1857.
up what was the common good of their barony of Gorbals, and the question comes Houston v.
o be, whether the property held by the preses, assessors, and bailies (or others Magistrates of
who administered on account of the Magistrates of Glasgow) for the community Glasgow.
f Gorbals falls to be considered as property of the barony?

The use of the word community seems to have misled the pursuer, but I hold it › be just the same as parish or burgh. The word may be used for the inhabitants enerally, or for any number of persons associated together for their common iterest, and I do not think that any clauses of the Act give us any aid in fixing s meaning.

As the Magistrates are entitled to claim all that belonged to the barony of orbals, so they cannot be subject to any obligations not truly laid on the barony, r can they be compelled to take up any property not truly belonging to the rony, in respect of which the Magistrates are to become liable for this debt?

I have looked into the titles, and am of opinion, 1st, That the pursuer cannot ate her case without an admission that there was a village of Gorbals different m the barony, and not coextensive with it. In most baronies there is a village the same name with the barony, as Hawick, Pollockshaws, &c., but the two are vertheless quite distinct. As the village increases in size, it becomes the more portant, and often absorbs the name so completely, that few people probably derstand that there is a barony in such cases.

Well, as this village of Gorbals increases in size, so it does in wants. It requires hapel; then a church; then a minister; then it is made into a parish, and gradu- comes to acquire property for the common good; although they do not seem have been very successful in their speculations, for their debts are said to exceed ir assets; but, such as their property was, the whole of it was acquired for the mmunity" of the feuars of the village, who chose managers just because the perty did not belong to the barony.

About 1780 there arose a question with the proprietors of the barony, which ilted in an arrangement that some of the baron-bailies should be introduced into management. It was a very natural object for the superior to get one or two ies associated with the managers, but the mere introduction of that set of bailies the management did not constitute "barony" property of the "community" erty. The two remained perfectly distinct. Naturally enough the names of

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me vested in and shall belong to the said police and statute labour committee, by constituted for the purposes of this Act, as fully and effectually, to all nts and purposes, as if the same had been formally and particularly conveyed nd vested in the said committee,' &c. Upon this, the defenders observed that object of the 14th section was generally to transfer all the common good and lic property of the barony of Gorbals and the other annexed districts to the istrates and Councillors to be elected under the new Act; and that the subse- t clause, providing for the appointment by the Town-Council of a police and ute labour committee out of their own number, and declaring that property ing to the police and statute labour should become vested in the said com- ee from and after their appointment, was a mere subordinate arrangement for dministration of such property, which was in nowise inconsistent with the ral vesting clause in the previous part of the Act.

As to the 17th section of the Act, which relates to mortifications and trusts held lministered by the Magistrates of the annexed districts, either by themselves conjunction with others, it was plainly intended to regulate trusts or endow- s similar to Macfarlane's school, mentioned in the record, so as to put it in power of the Magistrates and Councillors under the new statute to act as ees, or appoint some of their number to do so, and thereby carry into effect urposes specified in the deeds of trust. The pursuer, accordingly, did not her argument upon that clause of the Act.

On the whole, the Lord Ordinary is of opinion that the pursuer's construction e Municipal Extension Act cannot be adopted, and that judgment of absolvi- ust pass in favour of the defenders."

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bailies associated with the elected managers suggested the idea that the property did not remain distinct; but still what was acquired by the villagers must have belonged somehow to the feuars, and never did belong to the "barony" of Gorbals, or to the Magistrates or superiors thereof.

Thus the ground of action has failed, and the Magistrates, coming merely in the place of the superiors of the barony, have taken up no property to which any obligation for the stipend attached; therefore there is no ground for suing them for arrears of stipend.

Very likely it was intended that it should have been otherwise when the Act was framed, although we had an argument to the contrary on the part of the Magistrates; but, at any rate, we must construe the Act as we find it.

Lord Murray.—This case has been often before the Court, and each time my attention has been called to it I have come to the same view,—that the interlocutor of the Lord Ordinary is right. The pursuer must make out that the defenders have actually got, or are bound to take up, property which is liable for these payments; but, notwithstanding all the productions made, I think she has failed to prove that case. I am very sorry to have to pronounce this judgment, but a court of law cannot decide on considerations of generosity, or feelings of compassion for a widow, though these may be very properly taken into view by such a corporation as the Magistrates of Glasgow.

Lord Wood was absent.

Lord Cowan.—I agree. The whole question turns on the effect of the 14th section of the Glasgow Municipal Act. Is there any property belonging to the "barony" which the Magistrates are bound to take up, and because of their taking up which, liability for this stipend would attach to them? It seems to me that your Lordship's view is conclusive that the acquired property was vested, not in the "barony," but in the feuars and villagers of Gorbals.

There are two words from the use of which the difficulties seem to have sprung. The first of these is the word 'bailies,' but the bailies were merely associated with the managers, and allowed to aid them in the managing the property for the benefit of the villagers, and not of the "barony." The other word is "community;" that means the community of the village,—the feuars. I concur generally in the Lord Ordinary's note, which demonstrates that, though the Gorbals was erected into a parish, nothing can be more clear than the distinction between the feuars of Gorbals and the "barony." There were many other important districts in the barony,—Hutchesontown, Lauriston, and others. How could these have right to the property of the feuars of Gorbals? Yet they would, according to the pursuer's view. I think there was no property belonging properly to the barony, to which the obligation here sought to be enforced can attach. Therefore I hold that the entire ground of action has failed.

The Court adhered, and found additional expenses due.

D. Crawford, S.S.C.—Campbell & Smith, S.S.C.—Agents.

SUMMER SESSION.

No. 161.

May 20, 1857.
Hamilton v. Bruce's Trustees.

THOMAS MONTGOMERY M'NEILL HAMILTON, Petitioner.—*Patton.*
JAMES HENDERSON AND OTHERS (Bruce's Trustees), Respondents—
D. F. Inglis—Scott.

Diligence—Inhibition and arrestment—Recall.—One purpose of a trust was payment to the truster's widow of an annuity, to which she was entitled by her marriage-contract. A landed estate, by this contract destined to his daughter, was in her marriage-contract conveyed to her husband under burden of this annuity. The trustees, who had for some years paid the annuity, raised an action against the son-in-law for relief of the whole or a proportion both of the past and future payment, and on the dependence used inhibition and arrestment. The son-in-law maintained that the trust was primarily liable, and, at all events, that he was not personally bound;—*Held,* there being no allegation that the estate was insufficient as a security, or was about to be sold, that the diligence was nimious and oppressive, and therefore recalled.

1ST DIVISION.
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THE petitioner, Mr Hamilton, acquired right to the lands of Broomhill by antenuptial contract of marriage entered into in 1846 betwixt himself and his late wife, Mrs Jessie Bruce or Hamilton, to whom the same belonged. He now presented this application for recall of an inhibition and arrestments used by the trustees of the late Mr Bruce of Broomhill, on the dependence of an action lately raised at their instance against the petitioner, which action concluded for payment of the byegone annuities, or for such proportion as might be fixed according to the rental and value of the estate of Broomhill to be payable by the petitioner, and also to relieve them of the whole or a proportional part of all future payments from and after the term of Martinmas 1855.

In the petitioner's marriage-contract, these lands were conveyed under the burden of a yearly annuity to Mrs Bruce, now Henderson (the mother of the petitioner's late wife), payable under her marriage-contract with Mr Bruce, which burden was engrossed in the instrument of sasine in the petitioner's favour.

Mr Bruce died in 1835: By trust-disposition and settlement he had conveyed his whole estates to trustees, for the purpose, *inter alia,* of paying the annuity and other provisions settled upon Mrs Bruce by their contract of marriage. The petitioner afterwards reduced this deed of settlement, so far as it affected the estate of Broomhill; but in order to remove any doubt how far the intention to create a real security had been carried out, he granted a disposition in his own favour of the lands, under burden of Mrs Bruce's annuity, declaring that he incurred no personal liability, and reserving such relief as might be competent to him against the representatives of his late wife. The security thus granted to Mrs Henderson was assigned by her to the trustees.

Mr Bruce had left property other than Broomhill, yielding a return of from L.900 to L.1000 a-year. Mr Hamilton contended that the trustees held this property under the special direction that it should be applied in payment of the annuity. He admitted that in the event of any deficiency of trust-funds to meet the annuity, it might be made up from his lands of Broomhill; but until such deficiency arose, he submitted that no claim could be made against Broomhill, or against him as intromitter with its rents; and he alleged that,

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so far from there being any such deficiency, there was a large sum lying in bank.

He maintained that the inhibiters were themselves primarily responsible for the annuity, and, in making payment of it under the terms of the trust-deed, they were expending funds destined by the truster to be so applied. He produced a letter from Mrs Henderson, and other documents, by which she restricted her claim of annuity as against Broomhill.

He contended, that even although the property of Broomhill should be found to have been conveyed, under burden of the said annuity, without any right of relief, and that it forms a real burden over it in so far as it subsists and is effectual, he had come under no personal obligation or liability to pay the same. But, in any view, if the annuity was made contingently a real burden on the lands, and was so secured to the full amount to which it could be claimed against the petitioner, there was no room for the use of the diligence of inhibition. He could not sell or burden Broomhill without a full reservation of the burden, and in so far as related to alienation of his other property, there was no obligation against him to be enforced by diligence. The utmost that he could be asked to do was to account for any free surplus he might receive (and that only to the extent of the restricted annuity, and not to the extent of the whole annuity as is sued for), but he had received none, so had none to account for.

The diligence was thus nimious and vexatious, uncalled for, even although it had been meant solely to apply to Broomhill, but doubly so as affecting the petitioner personally, and his other lands and estate. Hamilton farther stated, he believed the raising of the action and use of this diligence to be merely a vindictive attempt to hurt his feelings, and to injure him in his credit."

The trustees lodged answers, in which they stated that in 1847 they raised a multiplepoinding for the distribution of the estate and effects of the late Mr Bruce, falling under his trust-settlement, to which all the beneficiaries were called, and which was still in dependence; that since 1846 Hamilton had collected the whole rents of Broomhill, and refused to pay any portion of the annuities due to Mrs Bruce or Henderson, amounting as at Martinmas 1855, to L.4000; that they had paid or allowed the whole annuity for that period, but that any further payment was objected to by the beneficiaries under the trust-deed, who maintained that they, the trustees, were bound to make their right of relief against the petitioner effectual: they had therefore been obliged, for their own safety, to raise this action.

The value of the estate of Broomhill was stated by the trustees to be worth, at a moderate estimate, L.15,000.

Lord President.—If we find that a party, pursuer in an action upon which diligence may be used for security, has already obtained that security, the question arises, whether the use of diligence in such circumstances is not such a hardship that the Court will not allow it? The value of the estate of Broomhill, according to the statement of the respondents themselves, is amply sufficient as a security for the annuity which is created a burden upon it. I perfectly understand that they are not bound by any separate transaction which the widow may have made with the petitioner, for they have to protect the interest of the beneficiaries under the trust, but it appears to me that in the present position of matters the security of the estate held by the petitioner, under that real burden, is a sufficient security for their claims, and that it is an oppressive proceeding to use diligence against the petitioner. If it should appear that the estate was being disposed of, or that there was not sufficient security, there might be a good reason for coming here again, but in present circumstances, looking to the value of the estate and the sum concluded for, the security is ample, and the diligence ought to be recalled.

Lord Ivory.—I am impressed with the same view. The question is, whether the

Mrs Henderson has not already got what the law considers a good security for her claim? If she had got caution for L.12,000 upon the dependence of an action for her annuity, it would have been difficult to say that that was not ample security. Are the trustees not in the same situation in regard to this property? There is a real burden constituted—I do not say whether there is a personal obligation constituted or not—but there is a real burden constituted against the lands in favour of the widow, and she has assigned it to the trustees who are asking the security. It seems to me that they are running no danger, and that when this depending action comes to an end, there will be ample means to pay the trustees, and leave a reversion. What more can they want? The diligence seems oppressive.

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Jack v. Jack.

Lord Curriehill.—I am of the same opinion. For a comparatively small claim the trustees have got a security that will be preferable, even although the petitioner should become bankrupt; and in such circumstances, I think it is a gross abuse of diligence to use it as has been done here.

There are conclusions in the action for future accounting; a person is not entitled to use such diligence without an express averment that the debtor is *vergens ad inopiam*. In every view it ought to be recalled.

Lord Deas.—I agree. The case stands thus: The late James Bruce dies, leaving a widow and daughter. By his antenuptial contract his widow was entitled to an annuity of L.300 a-year (afterwards enlarged to L.500), and his lands of Broomhill stood destined to the issue of the marriage. It has been found that the obligation to pay the annuity was a personal obligation upon Mr Bruce, and that he had no power by his subsequent deed to make it affect (as he attempted to do) the lands of Broomhill. Then the daughter, by her antenuptial contract of marriage, conveyed Broomhill to the issue of the marriage, whom failing, to her husband, under the burden of the annuity. The husband has succeeded under this destination, and the main question between the parties, in the depending action, is whether the clause in his contract constitutes a personal obligation on him for the annuity, or merely creates it a real burden on the estate of Broomhill? The trustees of Mr James Bruce, who have got all his other property except Broomhill, have paid the widow's annuity, and claim relief against Mr Hamilton, alternatively for the whole annuity, assuming him to have become personally bound for it, or, otherwise, for a proportion of it, supposing it to be merely a real burden on the lands. Now, even supposing Mr Hamilton to be personally bound for the annuity, the real burden created in favour of the widow, by the disposition latterly granted by him and infeftment thereon, stands assigned, by her, to the trustees in security and relief of the sums paid by them to her. This security is very considerable. For the trustees themselves say the lands are worth L.15,000 exclusive of the minerals. Holding such a security, I think the trustees would require to shew very clear grounds to justify them in resorting to the diligence of inhibition and arrestment. In place of this it appears to me that the question of personal liability (although I do not at present enter upon it) is, to say the least of it, attended with very considerable difficulty. And, upon the whole, I have no doubt that the diligence ought to be recalled without caution or consignation.

The Court pronounced the following interlocutor:—"Recall the inhibition referred to in the petition, and loose the arrestments used against the petitioner, and referred to in the petition, and grant warrant for marking the said inhibition in the record of inhibitions as discharged: Find the respondents liable in expenses," &c.

Murray & Rhind, W.S.—Wotherspoon & Mack, S.S.C.—Agents.

Mrs Margaret Jack or Craig, Pursuer.—*Logan.*
James Jack, Defender.—*Scott.*

No. 162.

Deathbed.—Question, whether, in a reduction *ex facie* gratuitous, on the ground of deathbed, it is competent to have effect given to claims of the disponee against the granter of the deed.

No. 162. — May 21, 1857. Jack v. Jack. — 1st Division. Ld Mackenzie. L.

Mrs Jack brought this action of reduction *ex capiti lecti* of a disposition granted by her late brother, Peter Jack, in favour of the defender, his half brother, of certain property in which the defender was now infeft. The pursuer proposed the usual issue:—

It being admitted that she was nearest and lawful heir, and that Peter Jack died on the 18th of July 1849; whether the disposition sought to be reduced, "was executed by the said Peter Jack on deathed?"

The defender stated that although the disposition bore to be granted for love, favour, and affection, he had made advances to his father and half brother for their support, and also for the repairs of house property, and that the pursuer had homologated the disposition; he therefore pleaded that the deed was truly onerous, and not reducible; in any event, that he was entitled to repayment of these advances before decree of reduction was pronounced.

He proposed the following issues:—"1. Whether the defender, for and on account of the deceased Peter Jack, made the disbursements contained in schedule I, hereunto annexed, or any part thereof, and what part? 2. Whether the defender, for and on account of the deceased William Jack, and of the said Peter Jack, or either of them, made the disbursements contained in schedule II, hereunto annexed, or any part thereof, and what part? 3. Whether the defender did work or make advances for additions to and repairs on the property contained in the disposition under reduction, to the amount of L.88, 4s., or to any part of said amount, and to what part? 4. Whether the disposition under reduction was granted for onerous causes? 5. Whether, after the death of the said Peter Jack, the pursuer homologated the said disposition."

The Lord Ordinary reported the cause.*

The case was called on 11th March.

Logan, for the pursuer, pleaded;—That the only question that could be competently raised was, whether this deed was invalid by reason of being executed on deathbed? This was *ex facie* a gratuitous deed, and the question is, whether the defender could convert this action into an action for constituting some illiquid debt which he says he has against the estate? There was no authority for doing so. The proposal now is really to try a question of accounting before a jury.

Scott, for the defender, pleaded;—That the claim against the estate was an equitable claim, which must be met before the pursuer could set aside this disposition.

Lord Deas.—If this person takes the property, must she not pay the debts? and if so, is not this the proper time for ascertaining what these debts are? But are they relevantly averred? I doubt whether this action ought not to be sisted until the defender bring an action of count and reckoning.

Lord President.—I think that the defender should bring a counter action for constituting his debt. We shall meanwhile delay the consideration of the case.

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* "Note.—The issue proposed by the pursuer is that usually taken where a deed is challenged on the head of deathbed, and no objections were stated to it by the defender.

"Various counter issues were proposed by the defender. The whole of these except the last were intended to allow the defender an opportunity of proving that the deed challenged was granted for onerous causes. But the deed itself bears to be granted for love, favour, and affection, and the Lord Ordinary does not see how the defender can be permitted in this action to contradict this by a proof that the deed was granted for onerous causes, whatever remedy he may be entitled to for his alleged advances in another form, if the deed shall be reduced on the head of deathbed. It is also objected by the pursuer that the defender's averments are not sufficient to entitle him to an issue of homologation."

The case was again called of this date. No counter action had been raised, but the defender craved leave to amend his defences, and make such specific statement of his advances as he thought would make them relevant to be tried in this action. No. 162. — May 21, 1857. Laing v. Adamson.

The pursuer objected to the course now proposed, and contended that he was now entitled to have an issue of deathbed, and to have the counter issues refused.

Lord Deas.—I wish to explain that I neither give nor indicate any opinion to the effect that the disponee under a disposition granted on deathbed may not hold the property till relieved of any debt relevantly averred to be due to him. I do not enter into that question at all. I go entirely on the ground that no debt is here relevantly averred to be due to the defender; and this, according to the note I made on my papers at the time, was the impression of all your Lordships at the last advising, although we were disposed to allow the defender an opportunity of bringing a counter action if so advised. But the defender not having brought his counter action, it is out of the question to allow him to cure the defects in his averments in the way he now proposes, by amending his record. I am therefore for refusing the counter issues in respect of the want of relevancy in the averments.

The rest of the Court concurred.

The Court pronounced the following interlocutor:—"Approve of the issue for the pursuer as now adjusted and settled, and remit to the Lord Ordinary to proceed farther as shall be just."

David Cormack, S.S.C.—John Walls, S.S.C.—Agents.

No. 163.

James Laing, Advocator.—*D. F. Inglis—Gifford.*
Christian Adamson or Fisher, Respondent.—*Penney—Maidment.*

Poor—Proof.—The case of Mackay v. Baillie, 20th July 1853, did not establish any abstract or absolute rule that the *onus* of proving that a woman applying for parochial relief for her child is an able-bodied person, capable of supporting herself and child, is laid upon the parochial board.

In an application for parochial relief by Christian Adamson or Fisher, residing in Tillicoultry, the declaration of the applicant was to the effect that her husband had deserted her, that she was unable to work, that she had a sickly child, four years of age, and that her own age was forty-five. May 22, 1857. — 1st Division. C.

Relief was refused, and in defence to an action before the Sheriff of Stirlingshire, the inspector of the poor stated that she was an able-bodied woman in the prime of life, and with only one child, nearly four years of age, to support, and that she had an older son, a collier, who earned large wages, and for whom she kept house.

A proof was allowed and taken.

The pursuer pleaded;—That the *onus* of proving that the applicant was able to support herself and child lay on the inspector, and that he had failed to establish that.[1]

The Sheriff-substitute (Hay) held that the defender had failed to prove that the applicant was an able-bodied woman, and therefore decerned against the defender.

On appeal the Sheriff-depute (Baillie) adhered, stating in a note, "that to his mind the judgment of the Court in the case of Mackay was not entirely satisfactory, or consistent with the judgment of the Court of Session and of the House of Lords in the case of an able-bodied male parent. But after considering the report of the case, he had come to the conclusion that the rule there established warranted the judgment under appeal."

[1] Mackay, 20th July 1853, ante, vol. xv. p. 971.

No. 163. In an advocation,—

May 27, 1857. Kerr v. James. Lord President.—We are all of opinion that the proof in this case is quite unsatisfactory; and, therefore, that a remit should be made to the Sheriff to allow a proof of new to both parties.

We do not consider that the case of Mackay fixed any abstract or absolute rule that, in such an application as the present, by a woman with one child, the burden of proving that she is able to support that child is necessarily thrown upon the parochial board. That depends on the circumstances of each case. The circumstances for consideration may vary much, and little may turn the *onus* one way or another.

The Court pronounced the following interlocutor:—"In respect the questions involved in the cause cannot be satisfactorily disposed of on the proof as it presently stands, remit the process to the Sheriff, with instructions to him to allow a proof to both parties of their averments on the record, and thereafter to proceed with the cause as shall be just; also to find the party applicant in the inferior Court entitled to the expenses incurred by her in leading the proof heretofore adduced, and to have the amount thereof ascertained, and to decern for payment of the same: Further, they find the said applicant in the inferior Court entitled to the expenses incurred by her in this Court, subject to modification: Modify the same to L.7, 7s., and decern for payment thereof, and generally in terms of this interlocutor."

Miller & Crawford, S.S.C.—Inglis & Leslie, W.S.—Agents.

No. 164. Christopher Kerr (Colville's trustee), Real Raiser.—*Macfarlane—W. Ivory.*

Mrs Mary Colville or James and Husband, Claimants.—*D. F. Inglis—A. R. Clark.*

Beckie and Margaret Colville and Others, Claimants.—*Young—Scott.*

Process—Multiplepoinding—How far a claimant is entitled to insist on consignation of a fund in medio.—The surviving trustee under a trust-settlement raised a multiplepoinding and exoneration, under which the Lord Ordinary found a certain claimant entitled to the whole fund *in medio*, but that it was the duty of the trustee, before paying over the fund, to provide for certain liferent annuities. The claimant—on the ground that he was entitled at once to payment of the whole fund, under burden of the annuities—reclaimed; and, while the reclaiming note was undisposed of, moved for consignation of a large portion of the fund, which was in bank in name of the trustee. *Held* (*aff.* judgment of Lord Ardmillan, *diss.* Lord Deas), as the trust was still subsisting, and there was no allegation of maladministration, or of danger to the fund, and the annuitants and trustee objecting, that the claimant was not entitled to get consignation.

May 27, 1857. 1st Division. Ld. Ardmillan. C. Christopher Kerr, writer in Dundee, as surviving trustee of the late Mr Colville, raised an action of multiplepoinding, with a view to the distribution of the trust-funds, and his own exoneration.

The fund *in medio* consisted of a sum of L.10,000.

Mr and Mrs James claimed to be preferred to the whole fund, "subject to the burden of paying the annuities provided by the will of the said William Colville."

The only other claimants were certain parties entitled to annuities under the deeds constituting the trust, who "claimed to have a sum set apart under the trust of Mr Kerr, or otherwise, to secure the regular payment of their annuities, or to have annuities purchased for them; or, at least, to have such security as will ensure the regular payment of their annuities."

On 19th February 1856, the Lord Ordinary pronounced the following

interlocutor: — "1st, Finds that in terms of the deeds produced, viz., the deed of William Colville in 1842; the deed of Helen Colville in 1847; and the last will and testament of William Colville in 1848; the claimants Mr and Mrs James are entitled to the fund *in medio*, they taking all usual and necessary steps to discharge the trustee of the same. But, 2dly, Finds that the trustee of William Colville is bound by his trust-deed in 1842 to fulfil the directions of Helen Colville in regard to this fund; that Helen Colville did by her deed in 1847 direct the trustees to pay over this fund 'in such way as her father William Colville might direct by a *mortis causa* deed;' that William Colville did by his will in 1848 effectually exercise this power of direction, and that the trustee is bound to pay the said fund 'in such way' as therein directed. 3dly, Finds that on a fair construction of the will of William Colville, read as an exercise of the reserved power of direction, the annuities therein set forth are so charged upon the fund, which the trustees are directed to pay; that it is the duty of the surviving trustee now holding that fund to see that the interest of the annuitants is reasonably secured before paying over the whole of the fund to Mr and Mrs James. With these findings, Appoints the cause to be enrolled with a view to farther procedure in distribution, and reserves all questions of expenses." *

Mr and Mrs James reclaimed; and, while that reclaiming note was undisposed of,—

Clark, for the claimants Mr and Mrs James, craved the Lord Ordinary "to ordain the raiser to make consignation in this process of the sum of L.7500, being that part of the fund *in medio* which, as appears from the condescendence thereof, is at present in bank; and he further stated that he made this motion on the footing that the pleas of parties should not in any way be affected or prejudiced by consignation being ordered and made as craved."

On 27th January 1857, the Lord Ordinary pronounced the following inter-

* "NOTE.—The fund *in medio* is brought into Court by the trustee, who craves to be exonerated. It is in his hands as trustee; he is called on for payment as trustee; for the act of payment he claims and is entitled to judicial exoneration. It is admitted to be his duty to pay 'in such way as William Colville might direct,' and Mr and Mrs James claim under the will of William Colville as a direction. It is as much a direction to the trustees as if it had been within the deed of Helen Colville. The bequest of the annuities is part of the will, and the annuities are, as part of the direction, made a burden on the fund bequeathed and directed to be paid. If there was insolvency, or the prospect of insolvency, on the part of Mr James, it is not disputed that the trustee could refuse to pay, and ought to refuse to pay, the whole fund to him and his wife. If so, then the interest of the annuitants is in the charge of the trustee, and cannot be disregarded by him, nor by the Court, from whom he craves exoneration. These annuitants are here enforcing their claim to obtain secure annuities out of this fund. The payment of the annuities is a burden and condition of Mrs James' right to the provision, and it is only as so burdened, and under that condition, that the trustee can make payment to Mr and Mrs James, or the Court can direct it.

"It may be observed that, on 20th December 1855, Mr James obtained warrant for payment to him of L.200, to meet annuities due to Beckie Colville and Margaret Colville or Blechynden, and this not in respect of his own or Mrs James' right to the whole fund, but in virtue of a power of attorney which he held from these ladies, who truly received their annuities from the trustee, under warrant of the Court, just in the same manner as the claimants Margaret and Christian Colville did on [illegible]th December 1855.

"Some arrangements for purchasing or securing these annuities should be made. The fact that Mr James does not reside within the jurisdiction of the Scottish Courts is not to be altogether overlooked. But the Lord Ordinary thinks that, looking to the terms of the deeds, there are materials for disposing of this question apart from the circumstance of English domicile."

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locutor:—"Having heard parties on the claimants', Mr and Mrs James', motion for consignation of the fund *in medio:* In respect that the other claimants, having a judgment in their favour now under review, insist on holding the trustees bound to retain the fund until they are secured in their annuities, and in respect that, in the present state of the process, Mr Kerr, the real raiser, objects to consignation, and that the fund is in bank, and deposit receipts therefor are in process, and insecurity thereof is not alleged, Refuses *in hoc statu* the motion for consignation, and reserves the question of expenses."

Mr and Mrs James reclaimed. They pleaded;—That the only part of the fund *in medio* which they wanted consigned, was that part of it which stood in bank in Kerr's name, he having power to draw it out whenever he pleased. That was a state of things which the Court would not sanction; and, considering the responsibility which attached to the trustee, it was not a little strange that he should oppose the motion. When the holder of a fund comes into Court as the raiser of a multiplepoinding, it followed, as a matter of course, that that fund should be consigned whenever any claimant so demanded. That was Kerr's position. He had no legitimate interest to retain the fund. It was not intended to deprive him of the trust-estate to such an extent as would deprive him of an ample margin to meet all necessary claims against him. Nor would the effect of the motion be to disturb the security of the annuitants. If it were so, that would be a good answer to the demand. But, on the contrary, their security would be strengthened. No relevant ground had been stated against this consignation by the trustee, who, in opposing it, only wished to retain unlimited control over so large a sum. It might be true that the annuitants would be obliged to come termly to this Court for an order on the consigned fund; but that they must do at any rate, as the trustee was not now safe to pay any part of the fund away of his own authority; for when a fund is put *in manibus curiæ* by the institution of a multiplepoinding, the holder of the fund pays only at his peril.

Pleaded for the trustee;—Although this process was brought for the purpose, *inter alia*, of getting exoneration for the trustee, it was not clear that he would get exoneration; and if Mr and Mrs James should be found to have no right to the fund, he might be answerable to other parties for the fund, which would no longer be in his possession. This consignation woul be irregular, and would be throwing a practical slur against the trustee which the Court would be unwilling to sanction.[1]

Lord President.—I cannot say that the reasons urged for altering this inter locutor are sufficient to my mind. Kerr is trustee in possession of the fund, an bound to execute the trust. There is no ground stated for putting an end to th trust, or for depriving Kerr of the management which belongs to a trustee. It usual in an ordinary process of multiplepoinding, or of multiplepoinding and exoner ation, that the fund *in medio* shall be consigned. But that is not an absolute rul and its application depends on the nature of the questions raised in the action. this particular case the multiplepoinding has been brought, mainly with referen to the determination of a question which might have been tried in another form,—f example, by declarator—the question being, whether Mr and Mrs James are entitle to have this fund paid over to them *de plano* under burden of paying these annu ties, or whether the annuities must be first provided for? A multiplepoindin seemed the better form for trying that question, for all parties might be broug into the field; and in the course of the process an arrangement might be mad whereby the interest of the annuitants might be satisfied, the trust wound up, an exoneration granted to the trustee. But until that question is determined, and a

[1] Ersk. (Ivory's Ed.) B. 4, T. 3, sect. 22 (Note); Donaldson v. Findlay, Ballan tyne, and Co., 5 Bell's Ap. 105; 2 Shand, p. 592; 36 Geo. III. cap. 32, sect. 1

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ong as Mr and Mrs James insist on that claim, and the annuitants and trustee lispute that construction of the trust-deed, the trust itself must be held to be subsisting trust, and Kerr to be under the obligation of a trustee to execute it.

Farther, the Lord Ordinary by his judgment has construed the trust-deeds to ean, that Mr and Mrs James are not entitled to have the fund paid to them under e burden of paying the annuities; but, on the contrary, that it is the duty of the ustee to see to the interest of the annuitants, and to execute the trust by fulfilling e obligations due to these annuitants. Mr and Mrs James have reclaimed against at judgment. On the other hand, Kerr has also reclaimed; and he contends that r and Mrs James are not in a position in any view to obtain judgment, to the ect that the fund shall be paid over to them. That question remains to be termined. In the meantime the claim is made for consignation—that is, for ing the fund out of the hands of the trustee. I do not enter into any considerm of the particular terms of the deposit receipts which are in Kerr's name; for resume that no form of deposit receipt by Kerr would satisfy Mr and Mrs James. e only question is, whether we are to order consignation.

Now, it appears to me, that while there is a going trust, and the interlocutor of Lord Ordinary stands unrecalled, it is incumbent on Kerr under this trust to nd to the interest of these annuitants, and, of course, to pay to them their uities. There is no tangible ground for taking the fund out of his hand. We told that the annuitants will have a better security by consignation. But those the annuitants who have appeared in this case are of a different opinion; and le the Lord Ordinary has held the duty of the trustee to be such as I have ed it, we cannot, until we dispose of that interlocutor, decide otherwise. We e not yet heard parties upon the question, whether the Lord Ordinary has put right construction upon the trust-deeds or not; and in that state of matters e is a presumption in favour of and not against his Lordship's interlocutor. If rder the fund to be taken out of the hands of the trustee—which I think would very unusual proceeding, where no complaint has been made of his managet—I see certain inconveniences which might attend such a proceeding, although mainly on the ground that a foundation has not been laid for depriving him of custody of the trust-fund. But, in the first place, consignation imposes a limit the revenue to be derived from the fund, for the trustee might find a safe stment to yield better interest than bank interest. In the second place, it d here impose certain difficulties and obstacles, for the annuitants could not aid without applying to the Court for authority. The expense attending that it perhaps be borne by the parties who now demand the consignation; but again, the annuitants are entitled to quarterly payment, and quarterly applins of that sort to the Court are not very usual, nor always possible when the t is not sitting. Therefore there are practical inconveniences attending contion; and why should they be imposed when no proper ground is stated for rbing the management by the trustee, except that the party who *prima facie* he greatest ultimate interest in the fund so demands it? But the annuitants the first interest, and the trustee requires to have funds in his hands to meet annuities. I do not go into the matter of accounting, which is not now before The question is, whether this sum of L.7500 is to be taken out of the control management of the trustee altogether, and put into the hands of the Court? night afterwards find, that if the trust is to continue, the trustee might get it But why do that? I see no ground for disturbing the interlocutor of the Ordinary.

RD IVORY.—I am clearly of the same opinion, and your Lordship has rested udgment on a sound principle. The question is simply—Is this a subsisting ? and if so, shall the Court force the trustee to give up the administration of d take it on themselves? That is a course which the Court will not take, if can by possibility avoid it. They may be obliged to do so, if there be misgement on the part of the trustee, or suspicions of the safety of the funds, or ther cause to render it expedient for the Court to interfere. But when a party funds in the hands of a trustee, he intends that they shall remain there, and that rustee shall not be interfered with by others while discharging his duty. Mr and James now claim, in point of fact, to be trustees for the annuitants, and have

No. 164. the fund paid into their hands without any conditions whatever, and that the annuitants shall be mere creditors of Mr and Mrs James.

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Now, besides the fact that Mr and Mrs James are resident beyond the jurisdiction of this Court, this is a proposal which the Lord Ordinary, by interlocutor now in dependence, has negatived. If Mr and Mrs James had acquiesced in the judgment of the Lord Ordinary, which finds that they are entitled to the fund, but that the interest of the annuitants must first be secured, there might have been more room for moving for consignation; for they might have said, that all that remained now to be done was only executorial. But the interlocutor is reclaimed against by Mr and Mrs James, who still maintain that the fund is properly their own, and that the annuitants are to look to them and not to the trustee for protection. While that interlocutor remains, I must hold that the Lord Ordinary has rightly settled that *hoc statu* the Court is not to interfere. We must also keep in mind that there are annuitants who have been called in the multiplepoinding, but who are in India, and it may be doubted whether we should give judgment in their absence. It may increase the difficulty if they are to be obliged to come here every quarter for payment of their annuities. But why should all this be done? The trustee has properly exercised his functions, and are we now summarily to oust him—for that is the proposal? This fund is in bank on deposit receipts, in such terms as save the estate from all peril. It is perfectly clear, therefore, that—unless the Court is prepared to decide in the abstract, that wherever there is a going trust, any one interested who chooses to bring a multiplepoinding may stop the trust, and supersede the trust management—there are no grounds for interfering in this case.

Lord Curriehill.—From the mode in which this case has been argued, it makes it one of considerable importance as a precedent. The trust-deeds vest that fund of L.10,000 in the trustees, of whom Kerr is the sole survivor. The duty imposed on the trustees is to pay this fund to Mr and Mrs James, when they have provided for certain annuities. The annuitants are, as I understand, liferent annuitants; so that the instalments of their annuities will be payable to them as long as they live, unless, by some arrangement into which they cannot be compelled to enter, they convert these annuities into a capital sum. But, as matters stand an obligation is imposed on Kerr to pay these annuities so long as the annuitants live. A different construction may afterwards be put on these deeds when we come to consider them; but, *hoc statu*, we are bound to assume that such is the condition of this trust. Such being the state of matters, this trust, technically speaking, is a continuing trust, and I do not think a process of multiplepoinding raised for the purpose of determining which of several parties are entitled to a fund places a trust of that kind under the administration of this Court. The trustee continues to manage the fund. He uplifts its annual revenue, and pays the annual burdens for which it is liable. The mere institution of a process of multiplepoinding does not *ipso facto* deprive the trustee of his powers, nor relieve him from his responsibilities. They both continue as before. It is quite true that when the Court has such an action before them, if it be satisfactorily made out that the fund is in jeopardy, they will listen to an application for the purpose of taking means for securing it. But they will not do so as a matter of course, and without a special case being made out for their interference; and therefore, unless we are now to depart from the practice of the Court in this respect, there is no ground for disturbing this interlocutor by interfering with the present management of the trust *in hoc statu*.

Lord Deas.—There is a fund here of from L.10,000 to L.12,000, in regard to which, so far as we see, the reclaimers Mr and Mrs James are the sole beneficiaries. There is nobody called in the action, and nobody has appeared who pretends right to compete with them as claimants to the whole trust-estate, subject to the annuities amounting in whole to L.250 a-year. There is thus an ample fund belonging to the reclaimers to meet all the expenses attending consignation, and the expense of any warrants for payment of the annuities, or otherwise, which may be requisite. In this state of matters, I see no interest either the trustee or the annuitants can have to object to consignation. The money will not be less secure than it now is; and as the expense will all fall on a fund belonging exclusively to the beneficiaries asking consignation, I do not see why they should not be indulged with it. At the sametime it is a mere question of discretion, and I see no present reason

apprehend risk from the one course being followed more than the other. The only thing I regret is, that there should have been expense and time bestowed on a question, the issue of which seems to me so immaterial to all or any of the parties, and which, according to the view I take of it, is quite special, as indeed almost every case of the kind must be. From the general principle that a going trust ought not to be interfered with on slight grounds, I do not differ.

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The Court pronounced the following interlocutor:—"Refuse the prayer of the said reclaiming note, and adhere to the interlocutor reclaimed against: Find the claimants, Mrs Mary Colville or James, and Mr Henry James, her husband, liable to the raiser Mr Christopher Kerr, and to the claimants Misses Colville, in the expenses incurred by them respectively in discussing the motion made by Mr and Mrs James for consignation, both before the Lord Ordinary and before the Inner-House," &c.

Maclachlan & Ivory, W.S.—Gibson-Craig, Dalziel, & Brodie, W.S.—James Bayne, S.S.C.—Agents.

The Shotts Iron Company, Advocators.—*Penney—Fraser.* No. 165.
John Paton, Respondent.—*D. F. Inglis—Mair*

Process—Landlord and tenant—Summary removing—1 & 2 *Vict. cap.* 119, *sect.* —*Held* (aff. judgment of Lord Mackenzie), that a summary complaint for removing is competent if it describe the nature of the tenancy with accuracy, although not in the precise terms of the schedule annexed to the statute.

The Shotts Iron Company presented an application to the Sheriff of Lanarkshire for warrant of removing against John Paton, a collier, formerly in their employment. The application was in the following terms:—"That the complainers let to the said defender a dwelling-house and pertinents, situated at No. 53 High Street, Shotts Iron Works aforesaid, in the county aforesaid, for a fortnight, for which period he was hired to work in the complainers' service as workman, and fortnightly during such time as the said defender should continue to work in the said complainers' service—his hiring being from fortnight to fortnight, and no longer, and terminable on a fortnight's notice by either party to the other; and the let of the said dwelling-house and pertinents, which was a mere accessory to the said hiring, being, in like manner, terminable at the end of each fortnight. That the rent of said dwelling-house and pertinents, for each fortnight, was at a less rate than L.30 sterling per annum; and the said defender having, on or about the 13th day of March 1856 years, on expiry of a fortnight's warning, ceased to be a workman in the complainer's service, the said let terminated on the same day in like manner; and the said defender was then bound to remove from the said dwelling-house and pertinents: That the said defender nevertheless refuses, or at least delays to do so, though the period of his lease has expired. Therefore, decreet ought to be granted," &c.

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The respondent lodged answers, in which he objected that the complaint was not in the form prescribed by the schedule annexed to the statute 1 & 2 Vict. cap. 119, under which it was presented, in respect the statute provides that the beginning and ending of the let shall be set forth thus, "for the period from to ," whereas the complaint nowhere set forth when the subjects were let, and consequently was informal and defective.

The Sheriff-substitute (Tennent) pronounced the following interlocutor: "Finds that the complaint is not framed in accordance with or to the effect of the form in schedule A of the Act 1st and 2d Victoria, cap. 119,

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and that it is incompetent as brought; and therefore dismisses the same: Finds the pursuers liable in expenses," &c.*

On appeal, the Sheriff-depute (Alison) adhered. The Shotts Iron Company advocated.

The Lord Ordinary pronounced the following interlocutor on 26th February 1857:—"Finds that the summary complaint for removing was competently brought before the Sheriff under the 8th section of the Act 1st and 2d Victoria, chapter 119, and is framed substantially to the effect of schedule A, annexed to that Act: Finds that written answers to the complaint were ordered by the Sheriff, and that, by the 13th section of the said Act, it is provided that 'in all cases where written answers shall be ordered, such cases shall thereafter be conducted as nearly as may be according to the forms in use in ordinary processess of removing, and the judgment of the Sheriff therein shall be subject to review in common form;' Therefore, remits to the Sheriff with instructions to recall the interlocutors complained of; to repel the objections to the competency of the complaint; to allow the parties a proof of their averments in point of fact; and thereafter to proceed as may be just, and decerns: Finds the advocators entitled to the expenses incurred by them in this Court," &c.†

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* "NOTE.—The Sheriff-substitute has felt a good deal of difficulty with regard to the point raised in this case, but has at last come to the opinion that the complaint does not comply with the statutory requisites in the schedule, and cannot be sustained. The statute renders it competent to pursue summary removings in the given form where the rent is under L.30 per annum, and the house is let for a shorter period than a year. The length of the let is therefore *inter essentialia* in determining the competency of a complaint in this form.

"Accordingly, the schedule referred to in the empowering section requires the period of the let to be stated, the words used being 'for the period from to ;' the complainer being empowered only to present a summary complaint in the form 'or to the effect' of the schedule.

"The present complaint is not in the form of the schedule, and bears little resemblance to it. The question is, is it to the same effect?

"The Sheriff-substitute thinks it is not—the period of the let is nowhere expressly stated in the complaint, and is only to be gathered from the statement that is given of the contract of hiring between the pursuer and the defender, to which it is said to be accessory. There could have been no difficulty in stating the period of the let as required by the schedule, and it would appear that the omission to do so deprives the pursuers of the benefit of the summary remedy of the statute."

† "NOTE.—This is a summary complaint for removing from houses or heritable subjects, said to be let for a shorter period than a year, at a rent of which the rate does not exceed L.30 per annum, under the 1st and 2d Victoria, chapter 119, section 8. It was objected to the competency, that the complaint was not framed in the form, or to the effect of schedule A, annexed to the Act, and that objection was sustained by the Sheriff.

"According to the form of complaint given in the schedule, it is stated that the subjects are let 'for the period from to ; that the said defender is bound to remove from the said subjects at the date last mentioned,' &c. Here the complaint bears—1st, That the subjects were let to the defender for a fortnight, the hiring of the premises, and of his services as a workman, being from fortnight to fortnight, and terminating at any time on a fortnight's warning. 2d, That the said let terminated on or about the 13th March 1856, on the expiry of a fortnight's warning, and that the defender was then bound to remove;—and, 3d, that the rent was at a less rate than L.30 per annum. These particulars are set forth with accuracy and precision; and the Lord Ordinary thinks the complaint, though not in the same words, is substantially to the same effect as the schedule A annexed to

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Paton reclaimed, and pleaded;—That this was not a case of tenancy but of service, in regard to which the complaint was vague and ambiguous. Besides, being presented under the statute 1 & 2 Vict., cap. 119, the complaint must comply in all respects with the statutory forms.[1]

Counsel for the advocators were not called on.

Lord President.—I hold that the statute applies to a case of this kind—as to which, indeed, we have no question at present, for there is no plea to that effect. Therefore, holding the statute to apply, the petition ought to contain the *res gestae* giving rise to the action; and this being a case in which a party occupies a house in his character of a servant—as an accessory to his hiring—at an estimated value, I do not see how there was any other way of stating that, except the way which has been adopted. The complaint states the nature of the tenancy,—which is no doubt peculiar,—and then it states that " the defender having on or about the 13th day of March 1856 years, on expiry of a fortnight's warning, ceased to be a workman in the complainers' service, the said let terminated on the same day in like manner, and the said defender was then bound to remove from the said dwelling-house and pertinents." The complainers sufficiently set forth all that the statute requires, and in a way that meets the peculiarity of the case.

The case of Hill v. Dymock has no bearing on the present case. That was a case of criminal procedure, the question being, whether a party was convicted properly under a particular statute? That procedure requires very exact conformity to the statutory form, and the decision there does not here apply. I have no serious difficulty in this case. The judgment of the Lord Ordinary is quite right.

Lord Ivory.—I am of the same opinion.

Lord Curriehill.—I am also of the same opinion. The statute is not to be construed in that strict manner contended for in argument, because it says that the petition is to be in terms, or to the effect of the schedule.

Lord Deas.—I am entirely of the same opinion. The words of sect. 8 of the statute are, that the complaint is to be "in the form, or to the effect of schedule A." Now, the effect of schedule A is, that the complaint shall state the nature and terms of the lease so far as necessary to shew that the removing is properly brought under the Act. That is done here, and done in the only way it well could be. The more strictly the enactment is construed, the more clear it is that it has been complied with to the letter.

The Court adhered, with additional expenses.

Archibald Melville, W.S.—David Manson, S.S.C.—Agents.

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the Act, and that there is no such variance in the form as can render the application incompetent.

" At the debate, the respondent attempted to raise a new plea, that the advocation was incompetent, under the 22d section of the Act 16 and 17 Victoria, chapter 80, on the ground that the cause did not exceed the value of L.25. No such plea is stated upon the record, which was closed after the parties had availed themselves of their privilege of lodging additional pleas in this Court. When the respondent asked leave to have the record opened up to have the new plea added, the Lord Ordinary intimated that this could only be allowed on payment of a certain sum of expenses, whereupon the respondent abandoned his motion, and consented to the debate proceeding on the record as it stood; and in the discussion which followed, he strenuously contended that, though the plea was not upon the record, it was *pars judicis* to give effect to it. Now, it is thought that course is not imperative in a case like the present, where the conclusions are not of a pecuniary nature. This is a removing where the right to possess the subjects is involved, and the matter in dispute on the face of the proceedings is uncertain. Whether advocation is excluded in this and similar cases under the recent Sheriff Court Act, may be a very important question; but as there is no plea on the record to raise it, the Lord Ordinary does not consider himself called upon to give any opinion on the point."

[1] Hill v. Dymock, 18th November 1856, supra, p. 47.

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Ure v. M'Cubbin.

JAMES URE, Petitioner.—*Penney*—*Fraser*.
DAVID M'CUBBIN AND OTHERS, Respondents.—*Macfarlane*—*Scott*.

Bankruptcy—Recall of Sequestration—19 *and* 20 *Vict.*, *cap.* 79, *sect.* 31—*Acquiescence.*—A creditor who lodged a claim in a sequestration became a candidate for the office of trustee, and urged certain objections to the vote of the concurring creditor in the application for sequestration who voted for the other candidate. His objections were not sustained, and he was not appointed trustee. He now on the same grounds presented a petition for recall of the sequestration;—*Held*, (aff judgment of Lord Mackenzie) that he was barred by acquiescence from insisting in his objections, as no radical defect in the sequestration, nor any injury to the general body of creditors was alleged.

2D DIVISION.
Ld. Mackenzie
I.

THIS was a petition presented by Ure under 19 & 20 Vict., cap. 79, sect. 31, for recall of the sequestration of Alexander Ramsay, which had issued originally with concurrence of Dugald Ramsay, and the grounds of recall stated in the petition were;—"The bankrupt, the said Alexander Ramsay, is the brother of the said Dugald Carmichael Ramsay, and is a conjunct and confident person with him, and the application for sequestration was made collusively, in order to defeat the legal rights of *bona fide* creditors.

"No proof was produced with the documents upon which sequestration was awarded, to establish that the debt was really due to his brother, and the affidavit contains no statement of the circumstances under which the said document was granted, and does not even state that the document was granted of the date it bears."[1]

Ure had lodged a claim in the sequestration, been a candidate for the office of trustee, and in an appeal to the Sheriff had urged these very grounds,—as well as that Dugald Ramsay's claim was "wholly fictitious,"—as objections to his vote, which had been given in favour of M'Cubbin, whom the Sheriff declared to have been duly elected.

At a meeting of creditors M'Cubbin was instructed to oppose the recall of the sequestration. Accordingly, he and Dugald Ramsay both gave in answers, and pleaded;—1. The petitioner having acquiesced in and homologated the deliverance awarding sequestration, he is barred from insisting in the present application. 2. The sequestration having been validly awarded on the application of the bankrupt, with a concurrence to the requisite amount, there is no ground for the application for recall.

The Lord Ordinary pronounced the following interlocutor:—"*16th March* 1857.—Finds no sufficient grounds stated or substantiated by the petitioner to warrant the recall of the sequestration: Therefore refuses the prayer of the petition for recall, and decerns: Finds the petitioner liable in expenses."

The particular circumstances connected with the claim of Dugald Ramsay will be found stated in the Lord Ordinary's note.*

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[1] Anderson v. Guild, 13th June 1852, ante, vol. xiv. p. 866.

* "NOTE.—The petitioner, who is an accountant in Glasgow, and a creditor of the bankrupt for a debt of L.26, 13s., lodged a claim in the sequestration, and attended the meeting held on the 17th December last for the election of trustee. He appeared both for himself and as mandatory for several other creditors, and no objection was then stated by him or any one else to the sequestration. On the contrary, the petitioner moved that he should be appointed trustee on the sequestrated estate; but a majority of the creditors present voted for the respondent, Mr M'Cubbin, and, after a discussion before the Sheriff, his election was confirmed and the petitioner was found liable in costs.

"After being defeated in the competition for the office of trustee in the sequestration, the petitioner has presented this application to have it recalled. The grounds of this application are not very distinctly stated, but the chief objection seems to be that the concurring creditor in the petition for sequestration was

A reclaiming note for Ure was resisted, on the ground that there was no informality alleged in the issuing of the sequestration; and the objections stated to Dugald Ramsay's claim were such as, if well founded, would be sustained in the sequestration itself. If the recall took place, the effect would be to set up a preference, which one creditor had all but secured before the sequestration was issued. This would be most injurious to the general body of creditors, who were therefore most anxious that the sequestration should be proceeded with; and it was farther contended, that the petitioner having continued a party to the sequestration so long as he had a chance of being made trustee, must now be held to have adopted and acquiesced in it, and was barred *personali exceptione* from applying for its recall: acquiescence might not operate as a bar when the objections were stated recently after coming to the knowledge of the objector, but the case was different where they had been known throughout the time when the acts were done, which were founded on as showing acquiescence.[1]

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For the reclaimer it was argued;—That whether or not acquiescence could be pleaded against him, depended altogether on the nature of the objection stated, and if it were one which struck at the claim of the concurring creditor in the application for sequestration, that, if made good, implied a radical defect, and the sequestration must fall. The affidavit on which the sequestration was issued was unexceptionable, therefore Mr Ure had thought all was right, but since then he had discovered, and now alleged, that the bills founded on by the concurring creditor were fictitious, in other words, that the concurring creditor was not a *bona fide* creditor to the statutory amount, and, at all events, that his claim was a contingent one, which disqualified him as a concurring creditor under section 14 of the recent Act.[2]

Dugald Carmichael Ramsay, the bankrupt's brother, and that the grounds of debt produced were not sufficient to support the application for sequestration.

"The sequestration was awarded by the Sheriff on 5th December 1856, and it is stated that it was resorted to for the express purpose of preventing a creditor from acquiring a preference under his diligence. The claim of Dugald C. Ramsay, the concurring creditor, is founded on two promissory-notes by the bankrupt for L.100 each, bearing to be for value received in cash, dated respectively the 8th and 11th August 1856. These promissory-notes were produced, along with an affidavit to the verity of the debt, with the petition for sequestration; and though the affidavit did not set forth specially the circumstances under which the notes were granted, this is now fully explained by the respondent Dugald C. Ramsay, in his answers. The import of his statement is, that he obtained a loan of L.200 from the English and Scottish Law Life Assurance Company in August 1856, and about the same time advanced various sums in cash to, or on account of his brother, to the full amount specified in the promissory-notes. In confirmation of this statement, the bankrupt's cash-book has been produced, containing entries from the 9th to the 20th August 1856, of various sums received from Dugald C. Ramsay, to the extent of L.192.

"The petitioner admits that the loan of L.200 was received by Dugald C. Ramsay from the Assurance Company, and nothing has been stated to show that the money was not *de facto* paid over and advanced to the bankrupt by his brother. It is not averred by the petitioner that the promissory-notes were granted without value, and, in so far as they were produced to support a petition for sequestration, there is no reason for presuming *mala fides*.

"On the whole, the Lord Ordinary thinks no sufficient grounds have been stated to warrant a recall of the sequestration."

[1] Campbell v. Myles, 27th May 1853, ante, vol. xv. p. 685; M'Nab v. Hunter, 9th December 1851, ante, vol. xiv. p. 182.

[2] Muir v. Stevenson, 24th January 1850, ante, vol. xii. p. 512; Arnold v. Hinton, 8th July 1852, ante, vol. xiv. p. 986.

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Lord Justice-Clerk.—I confess I attach the greatest importance to that first plea of personal bar against the petitioner. What is the application? It is a petition presented within forty days of the awarding of sequestration under section 31 of the last Bankrupt Act. It is not provided in that section—and, in fact, could not be—on what ground the Court are bound to recall a sequestration; the matter is left entirely to the discretion of the Court. Now, the petitioner has stated no ground of recall on the score of irregularity or informality in the granting of the sequestration, which he admits to have issued validly. That being so, it becomes very important to consider whether grounds are alleged for the advantage of the estate? What injury does the petitioner allege to the estate? We must recollect that the application is at the instance of one creditor alone, while the others instruct the trustee to proceed.

It is of great importance that individual creditors be not allowed to play fast and loose in these proceedings. Now, here we have a creditor going on for a certain time, and wanting to be elected trustee, but having failed in that, he tries to get the sequestration recalled. I think it would be an abuse, at his instance, to recall the sequestration on grounds which are all competent to be stated and discussed at a future stage in the sequestration itself. The principal objection is to the claim of Dugald Ramsay, the petitioning creditor, but if that be a good objection, we must presume effect will be given to it in the ranking. Then it is said the object of the sequestration was to cut down a preference which one creditor was securing, but that would be no ground of recall. No prejudice to the petitioner himself is stated as likely to follow from this sequestration, and the general body of creditors don't think it prejudicial to them, for they oppose its recall, and the recall is not pressed upon any ground of invalidity of the original awarding it, therefore I am not for granting it. But I can conceive many cases where sequestration is unnecessary, as where the estate is small, and one creditor has an overwhelming claim. That, however, does not seem to be the case here. What would be the result of granting this petition? A creditor can come forward and concur in a sequestration so long as he has hopes of being appointed trustee, and then turn round and obtain a recall. I see no ground, as the matter is left to our discretion, for complying with the prayer of this petition.

Lord Murray.— The power of recalling a sequestration is entirely a discretionary one, and as I see no injury likely to arise from the judgment of the Lord Ordinary, I do not think we should exercise it.

Lord Wood.—This is not a case where any statutory objection to the awarding sequestration is stated, or any radical defect on which the Court might be compelled to recall it. It is a case where the recalling, or not, is matter for the exercise of the discretion of the Court.

Now, in the circumstances, no injustice will be done to any party, and, in particular, no prejudice can be suffered by the petitioner by refusing his application for recall. All objections he may have to any claims upon the bankrupt estate, and, among others, to the claim of the concurring creditor, whose debt is objected to, will, it is to be presumed, be given due effect to in the course of the sequestration; and, on the other hand, it appears from the statement on the record, that the rights of the creditors generally might be injured by a recall, as thereby the preference—which it is said a person of the name of Drummond was in the course of attempting to carry out, and which the sequestration was applied for, in order to cut down—might be made good.

Accordingly, all the other creditors, except the petitioner, are desirous to maintain the sequestration, and instructed the respondent (the trustee) at the meeting of 27th January 1857, to appear and oppose its being recalled.

In these, and the other circumstances of the case, I am of opinion that the petitioner is to be held as having by his conduct precluded himself from insisting in his application for recall, he having thereby acquiesced in the sequestration being carried through, and having waived his right to challenge it.

It appears that, in the competition for the office of trustee, the petitioner was one of the candidates, the respondent being the other. The majority of votes was adverse to the pretensions of the petitioner, and the proceedings which thereafter took place before the Sheriff in the competition show that the petitioner was then perfectly aware of all the objections to the debt of the concurring creditor, in the

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application for sequestration, which are now relied on as the ground on which it is pleaded that the obligation for recall ought to be sustained. These objections will be found set forth under four heads at page 4 of the appendix, along with the objections the petitioner had to the votes of the rest of the creditors who had supported the election of the respondent. But this notwithstanding, the petitioner went on before the Sheriff in the discussion as to whether he or the respondent was the party duly elected to be trustee, on the footing of the validity of the sequestration, and of he himself adopting and acquiescing in it as open to no objection. His object was not to interfere with it, but to obtain the office of trustee under it, and secure the benefits that might be derived from that office. Accordingly, not a word was heard of any objection to the sequestration itself, till after proceedings before the Sheriff had issued in finding that the respondent had been duly elected trustee, and the consequent defeat of the petitioner's claim to the office. The interlocutor of the Sheriff is dated 2d January 1857, and it was not till the 14th of that month that the petition for recall was presented; and it appears to me to be abundantly manifest, that nothing of the kind would have taken place, had the competition for the trusteeship ended differently from what it did. But I apprehend that the petitioner cannot be permitted thus to play fast and loose with the sequestration—to acquiesce in it, while he supposed it might be for his interest to do so, and when he fails in making it the means of promoting his personal views, to object to it on such grounds as he has pleaded, and this in opposition to the concurrence in the sequestration by all the other creditors, who were entitled to rely that, at least, as respected the petitioner, it would not be attempted to be interfered with, but would be allowed to proceed, for the just and legal settlement of the interests of all parties in the bankrupt estate.

LORD COWAN.—I have no objections to our resting the judgment on the ground stated in the first plea in law for the respondent, viz., that the petitioner, having acquiesced in, and homologated, the deliverance awarding sequestration, is barred from insisting in this application.

I am not satisfied that there might not have been a good ground of recall, in respect of an *ex facie* omission of a statutory requisite, or of there being a radical defect in the sequestration,—a defect to which acquiescence on the part of the creditor applying for the recall would not necessarily have prevented our giving effect. But in a case like this, where a creditor has identified himself with the sequestration proceedings to the extent which the reclaimer here admittedly did, I think the plea of personal bar is invincible. Mr Penney, indeed, said, that a plea of personal bar will fail to meet a challenge of a sequestration on the ground of its being improperly granted. I cannot admit that doctrine, stated thus broadly. Suppose a party misleads creditors, and comes forward, appearing and taking part in the sequestration, and afterwards applies for a recall, the effect of granting which would be to set up a preference in favour of himself as a creditor, surely it is impossible that he should be entitled to take such a course to the detriment of the general body of creditors. Unless there were inherent nullity rendering the sequestration *funditus* void, he must be personally barred from seeking a recall of it.

The observations on this subject contained in the second volume of Bell's Commentaries, p. 332, sect. 1, apply to the course which the Court should adopt in such cases under the new Act. I think it would never do for us to recall this sequestration. This petitioner had a material interest in supporting the sequestration, so long as there was a possibility of his being appointed trustee, for he looked to getting the commission; and having supported it with that view, he cannot now, having failed to attain his object, be allowed to turn round, and say, that the sequestration had been improperly granted.

THE COURT adhered, and found additional expenses due.

DAVID CRAWFORD, S.S.C.—JAMES F. WILKIE, S.S.C.—Agents.

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May 28, 1857.
Halbert v. Bogie.

JOHN POTTS HALBERT, Advocator.—*D. F. Inglis—Young.*
MRS JANE DICKSON OR BOGIE AND HUSBAND, Respondents.—*Penney—Baillie.*

Succession—Heirs-portioners—Præcipuum—Brieve of Division.—The disponee of an eldest heir-portioner sued a brieve of division, and under it claimed as *præcipuum*, the only house on a farm which had once formed part of a larger estate. It had always been let as a farm-house by the ancestor of the heirs-portioners, although it was alleged that it had been used as a mansion-house by one proprietor of the larger estate before it was split up and sold;—*Held*, that such a house could not be claimed as *præcipuum*;—*Opinion*, that in a question between heirs-portioners no house could be claimed as the mansion-house which had not been treated as such by the person to whom the heirs-portioners succeeded.

Expenses—Interlocutor.—An interlocutor in an advocation of one branch of a case finding "the advocator liable in expenses," *held* to carry the expenses both in the Court of Session and in the inferior Court on that branch of the litigation.

2D DIVISION.
Sheriff of Dumfries-shire.
R.

THIS was an advocation of a judgment by the Sheriff of Dumfriesshire, pronounced under a brieve of division purchased from Chancery by John Potts Halbert, the widower and disponee of the eldest of two heirs-portioners of the lands of Rosehall, under which brieve he claimed one-half of the lands, and also "the mansion-house of Rosehall, with the offices, garden, orchard, and ornamental ground thereto belonging, as a *præcipuum*."

The history of the house in question seems to have been as follows:—It was built about the year 1771 by one George Mackenzie when joint tenant, along with a person of the name of M'Vitie, of a farm on the estate of Netherwood, which had long been the property of a family of the name of Johnston, and on which there was a mansion-house. This property was in 1777 purchased by Mackenzie, who, after the purchase, continued to reside at Rosehall, where he died in 1781. In 1782 the lands seem to have been acquired by a Mr Lowthian, who granted a lease to Mackenzie's widow of "all and haill the farm of Rosehall, with the mansion-house, offices, orchard, and pertinents," &c., from which time downwards the house seems to have been in the occupation of the tenant for the time of the farm.

In 1803 the estate of Netherwood was again sold by Lowthian's heirs, but this time it was sold in lots, of which the 14th, comprising the farm in question, was purchased by Tristram Lowther. He seems to have been engaged in business in Liverpool, and when in Scotland never resided at Rosehall, but on another property called Dornock, in the neighbourhood of Annan. There he died in 1835 without issue. He had in 1830 executed a *mortis causa* disposition in favour of a nephew, John Dickson, conveying to him the lands he had so purchased, now commonly called Rosehall. The nephew, Mr Dickson, who thereupon took the name of Lowther, lived at Dornock, which his uncle had also conveyed to him, and he let the property to a tenant, who under it occupied the house,—"All and whole the lands and farm of Rosehall." There was in fact no other house upon the lands.

Mr Dickson Lowther died in 1842; he left no settlement, and was succeeded by his two sisters, whereof the eldest (now deceased) had married Halbert, the pursuer—the younger, during the dependence of this process, married Dr Bogie.

Mrs Halbert, who died in 1844, had, under a mutual disposition and settlement, conveyed all her rights to her husband, in the event of her predecease, which took place; and at his request Mrs Bogie, then Miss Dickson, made up a title as her sister's heir, and then conveyed to him "all and whole the *pro indiviso* half that belonged to the said Mrs Elizabeth Johnston Dickson or Halbert, his spouse," of the said lands. On this conveyance he was infeft in 1846. He

and Mrs Bogie, in 1853, concurred in letting to an agricultural tenant "all and whole the farm of Rosehall, as lately possessed by Robert M'Harg (the tenant under the lease by Dickson Lowther), with the garden and orchard, and whole buildings, farm-offices, and pertinents thereof," &c.

In answer to the claim for the house at Rosehall as *præcipuum*, besides objecting "that there neither is nor has been a mansion-house on the lands in question, or any subjects to which a claim of *præcipuum* could competently attach," it was pleaded that the pursuer, as singular successor to his wife, was not entitled to any *præcipuum* or preference over Mrs Bogie, such claim being personal to the eldest heir-portioner.

This plea was repelled by the Sheriff, and although stated in the Court of Session, it was not persisted in. In the Sheriff-court a proof was allowed, on advising which the Sheriff-substitute (Trotter) sustained the pursuer's claim for the house at Rosehall as *præcipuum*, but on appeal the Sheriff-depute (M. Napier) pronounced the following interlocutor:—"*17th June* 1856.—Recalls the interlocutor appealed against: Finds that the dwelling-house in question upon the farm of Rosehall, which is the subject of the present brieve of division, never having been used or inhabited as the family mansion-house of an estate, but having been always set under lease as the accommodation for the agricultural tenant of the said farm of Rosehall, and there being no other dwelling on the said farm to serve the purposes of agricultural tenancy, the same is not to be considered as a *messuagium* or mansion-house of the said divisible lands, or to be allotted as such to the elder sister (or those in her right), as a *præcipuum* appertaining by right of primogeniture to her, without division or equivalent compensation.

"With this finding, the Sheriff remits the case to the Sheriff-substitute to proceed under the brieve of division as may seem just." *

* "NOTE.—. . . . The relevant consideration of the case is, when lot fourteen of the divided estate of Netherwood came to be sold in 1803 to Mr Lowther—the principal part of which was this same farm of Rosehall—did these lands and that small estate then acquire a *messuagium* or mansion-house indivisible; and is that *messuagium* the said house of Rosehall, now claimed as such? The Sheriff thinks not. He lays no stress upon the fact of the limited extent of the property. That is not relevant. But Mr Lowther, the disposition to whom expressly regards Rosehall as a farm, makes no mention of any mansion-house; and, what is more to the purpose, Mr Lowther let the farm, and the dwelling-house thereon in question, as an agricultural farm, with its corresponding farm accommodation. It is not alleged that there is any other accommodation for the agricultural tenant of the farm of Rosehall than this house of Rosehall; and the proof shews that there is not. Mr Lowther, again, dispones 'the farm of Rosehall' to his nephew, Mr Dickson Lowther; which last, in like manner, just continues the lands under lease, the agricultural tenant having the house of Rosehall for his agricultural accommodation, and there being none other on the lands for that purpose. Meanwhile, these successive proprietors of the small heritable property of Rosehall occupy as their mansion a house in another small property of their own.

"Under these circumstances, the Sheriff cannot regard the tenant's dwelling on the farm of Rosehall as other than the farm-house appertaining thereto; nor could attach the feudal notion of *messuagium* or mansion-house, or the important feudal consequences of such a dwelling, which cannot be traced in all its history, into any other position than as occupied by an agricultural tenant of the 'farm of Rosehall.' It was not a mansion-house as part of the large estate of Netherwood; and, what is more relevant, it has never been made so since the farm of Rosehall became a separate property.

"Now, the law of *præcipuum* as regards a house on the divisible estate, is not that the eldest co-heiress takes, without division or compensation, the best house on the estate. It is, that she takes as her *præcipuum* the family mansion-house on the lands, if any such there happen to be. It does not now require to be of the nature

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A note of advocation by Halbert was brought direct before the Second Division. The argument was mainly directed to the import of the proof, the advocator maintaining, that it showed that while Mackenzie was proprietor of Netherwood, the house at Rosehall acquired the character of a

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of a fortalice, to have that consequence attached to it; but, whatever its value or condition, whether inhabitable at the time of division of the lands or not, it will be the *præcipuum* of the eldest co-heiress, and the only *præcipuum* of that kind allowed her, if it can be shewn to have been once established as the mansion-house of those lands, in contradistinction to the agricultural accommodations and dwellings of the tenants.

"Lord Stair distinctly points to this. He says, (3, 5, 11,) 'Rights indivisible fall to the eldest alone, without anything in lieu thereof to the rest; as 1. The dignity of Lord, Earl, &c. 2. The principal mansion, being tower, fortalice, &c., which doth not extend to houses in burghs; nor to ordinary country-houses.' By this last, Lord Stair means to indicate the ordinary argricultural dwellings, or farm-houses, as we now term them, as distinguished from a family mansion set apart for the heritor. The term 'ordinary' country-house used by Lord Stair, does not refer to the style, the state of repair, or the extent of the accommodatio of the said country-house, but to the nature and purposes of its occupation. Th is an ordinary country-house, (as distinguished from the mansion-house of th estate), which has always been occupied for agricultural purposes by the tenant the farm on which it stands; more especially when there is no other accommodati than itself for that purpose upon the farm; and the commodious or ornate style the dwelling with its appliances, will not, under such circumstances, take it out that category.

"The leading case on the subject, being that which ruled most of the subseq cases, is Cowie v. Cowie, March 5, 1707, M. 2453. There it was decided that t right of such *præcipuum* did not depend upon the value of the estate, or t dwelling-house. The Sheriff-substitute is quite right in saying, 'In the cas quoted, no distinction seems to be taken either with reference to the size of t estate, or extent of the mansion; in all cases the right of the eldest heir-portio to the mansion-house seems to have been recognised.' But then it must be she to have once at least acquired, by the nature of its use and occupation, the qual or character of a mansion-house, or *messuagium*; and this principle, according was pointedly recognised and saved as regarded the small possession in the case Cowie. There 'the Lords found, this being the principal *messuage* on the grou and there being other houses for the tenants, therefore this ought to belong to t eldest daughter and heir-portioner.'

"In the subsequent case of Ireland v. Govan, Nov. 14, 1765, M. 5373, the ch stress was laid, by the party pleading against the *præcipuum*, upon the fact of t extreme poverty of the dwelling claimed as such, and which was alleged to be 'b walls without a roof.' But the answer was, that the poverty and ruinous conditi was owing to the antiquity, and that it had always been the 'ordinary residence of t family.' It appears (from the session papers in that case, which the Sheriff examined), that the fact of its having been the family mansion, such as it was, fully admitted by the party pleading against the *præcipuum*. Accordingly 'T Lords found the eldest sister entitled to the principal *messuage* as a *præcip* without any recompense.'

"But none of these cases are authorities in favour of the present claim; and Sheriff has been unable to find any case in which a dwelling that has never b used or occupied, except by the agricultural tenant for his agricultural purp upon the farm, having thereon no other dwelling for that purpose, has been re nised in law as a mansion-house or principal *messuage*, such as becomes the *pr puum* of the eldest of co-heiresses. . . . .

"What the Sheriff goes by, is not the length of time during which the dw in question has been used as a farm-house, but the fact that it cannot be shewn have ever, at any time, acquired, by the proprietor's use or occupation, the c acter of a mansion-house or *messuagium* at all."

mansion-house, and that it never lost it, having been a much larger house than that at Dornock. No. 167.

The respondents contended, that having been built under a lease, and Mackenzie having only for four years been proprietor of Netherwood, it could not be held to have ever possessed the character of a mansion-house; and if it did, having been sold as the house attached to a farm, and ever since let and tenanted as such, it had lost that character. May 28, 1857. Halbert v. Bogie.

Lord Justice-Clerk.—This case lies in a narrow compass. The law is clear, as Erskine says, iii. 8, 13, because the mansion-house is indivisible, the eldest gets it as a *præcipuum* for her residence. But then it is, he says, the principal mansion-house of the lands. The other heirs-portioners did originally receive, however, in lieu, a recompense to secure equality. But in later times no such recompense was given, and that fact is a consideration why we should not lightly admit any house to the character of *præcipuum*, which practically is a farm-house. It is obvious that this principle is quite inapplicable to the case of a farm on which the tenant must reside, if there is only one residence on that farm.

I do not enter into the question, whether, if George Mackenzie had died in possession of the whole estate of Netherwood, leaving heirs-portioners, the eldest would have been entitled to the newer house of Rosehall, instead of the old mansion-house of Netherwood. That is not the point before us. The question might, as a precedent, be of importance, but on that very account, as it forms no part of the question to be decided, I do not even speculate upon it. It would be requisite to know many more facts before it would be safe to hazard even a conjecture upon that point. The question here is simply, whether, after this property or farm of Rosehall was sold fifty years ago, and held ever since as a separate possession, the house thereon became the mansion-house of the family of the purchaser, so as to form, in the event of the succession of heirs-portioners, a *præcipuum* for the eldest.

The matter of fact excludes any such view. This is an agricultural farm. The house in question is the only one fit for the occupation of the tenant. It has been sold and occupied for fifty years and more, and so let for that purpose by this family of Lowther. I cannot now invest it with any higher character, or attach to it the importance which the advocator desires. It may be a little larger than, or rather, I should say, of a different form from, a farm-house now to be built on the lands. But farm-house it has been, farm-house it must be, and so as a farm-house it must be treated for every purpose. This is all I have to say on the subject.

The reasons of advocation should be repelled, with expenses, and the case remitted *simpliciter* to the Sheriff.

Lord Murray.—I concur. We have no evidence whatever that this ever was a mansion-house, or anything but a farm-house. That the word mansion-house occurs in a single case, is a circumstance to which I can attach no weight. There may have been a better garden than usual attached to the house, but it cannot be shewn to have ever been properly and peculiarly a mansion-house.

Lord Wood.—I am of the same opinion. In arguing the case for the pursuer, the Dean's position was, that while as yet the entire estate of Netherwood, including Rosehall, belonged to one proprietor, the house of Rosehall was erected and made the mansion-house of the estate, thereby displacing the old mansion-house at Netherwood. I should be inclined to hold that the house on Rosehall was built by George Mackenzie when he was joint tenant with Mr M'Vitie of the estate of Netherwood, and prior to his purchase of the estate in 1777. Certainly, till then it was not occupied by the proprietor of Netherwood as the mansion-house. But, no doubt, from that date Mackenzie, who had become the proprietor, did reside at it. But at that time the mansion-house of Netherwood was under a current lease, and the residence of Mackenzie, as proprietor, in the house on Rosehall, could only be for the short period from 1777 till his death in 1781. I lay no stress on its being, in the lease in 1782 to his widow, called a mansion-house. Netherwood was at the same period called a mansion-house. Certainly, from 1782 downwards, the

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house on Rosehall was substantially let with the farm, and occupied as the farm-house.

Now, had a question arisen upon the succession opening to heirs-portioners of the proprietor of the undivided estate of Netherwood, it would have required, in my opinion, more satisfactory evidence of the substitution of the house on Rosehall for that on Netherwood as the mansion-house of the estate, to have warranted its being held that it had obtained that character. But that is a point on which it is not necessary to give any opinion, for the question here does not arise in the succession to the proprietor of Netherwood, but in the succession to the successors of the purchase of the comparatively small part of it called Rosehall, acquired at the sale of the estate when broken down into various parcels in 1803.

Rosehall was then bought by Tristram Lowther, and, as far as appears, purchased by him as a mere investment. Neither by him nor his nephew, his successor, was Rosehall and the house upon it treated as anything but a farm and farm-house. It was the only house upon the property for the accommodation of a tenant, and the offices attached to it were the only ones to be applied to the necessary uses of the farm. Accordingly, the fact is (and here it is material, although in other cases mere non-residence might not be of weight in determining whether the house retained the character of a mansion-house or not), that the proprietors never resided at it, and that, whether the house and offices were better or worse than common at the period on a farm of the same extent, they were let with the farm as a part of it, just in the ordinary way, from 1803 downwards, to the death of John Dickson Lowther in 1842; and then, on the succession opening to his two sisters, the lands and houses still continued to be similarly occupied. Thus, from the date of Rosehall passing into the family of the Lowthers, the fact is, that the house was in the agricultural occupancy of the tenants of the farm. And that being the case, I have no idea, that in the succession of heirs-portioners in this new family, in the portion of the estate of Netherwood acquired by Tristram Lowther, the house on it can be looked upon as being a proper mansion-house of the estate, to which the eldest heir-portioner is entitled as a *præcipuum*. I think the whole conduct of the proprietors is opposed to such a result. It shows, that from the date of the acquisition in 1803, whatever the house may previously have been, it was never treated as, or considered to be, a family mansion, but was dedicated to the agricultural uses of Rosehall as a farm, and as being nothing more than a farm-house. And while I have no idea that the Lowthers ever imagined or intended that their succession falling to heirs-portioners was to be regulated on the footing of the house being the proper mansion-house of the estate, I am clear that, in point of law, there is no ground for maintaining that it ought to be so regulated.

Lord Cowan.—The eldest heir-portioner is entitled, as *præcipuum*, to the principal mansion-house, and the question is, what constitutes such a house in succession? Generally, indeed, in all the cases where there have been decisions on the point, the house has been the residence of the family, either of the immediate ancestor, or one a little more remote; but that cannot be said to be an indispensable condition. It would never do to say, that, where there was a proper mansion-house on an estate, there was to be no *præcipuum*, because it so happened that the proprietor had never occupied it personally. Still, to found a claim for *præcipuum*, the house must obviously have been intended to be used as a mansion-house, and must have been treated as such,—and not as a mere farm-house,—and that by the predecessor of the heirs-portioners. When it appears, that so far from having been so dealt with, it has been acquired and treated as a mere country-house, or as an ordinary farm-house for the lands on which it stands, there are no *termini habiles* for the claim of *præcipuum*.

On the question of fact as to this being a mansion-house, it is contended that it was the proper residence of the family who held the estate of Netherwood. But (1), It is by no means clear on the evidence that it ever was so, for there was a house on Netherwood, as well as the house at Rosehall, and, for twenty years at least prior to 1803, it had been let to the tenant of the lands; and, (2), even if it had been, we are not in a question between heirs-portioners succeeding to Mackenzie of Netherwood, but heirs-portioners succeeding to Lowther, who acquired a frag

ment of the Netherwood estate after it was split up, since which time it has continuously, down to the present day, been let as a farm-house. I hold it impossible to impress indelibly on a house the character of a mansion-house,—there is no rule of *semel et semper* applicable to it,—the purchase of it as a detached subject may of itself alter the condition of the question. Suppose the house sold without any land, as a mere villa, would the claim of *præcipuum* not entirely fail?—and so, if sold with a single farm, on which there was no other accommodation for agricultural purposes, I should hold the character of the building to be changed, if it ever was a mansion-house proper.

No. 167. — May 29, 1857. Stirling.

We have truly no occasion to look beyond the condition and character of this house, as it has existed since it came into the family of the Lowthers; and having been let continuously from 1803 downwards to farmers for agricultural purposes, I cannot hold the disponee of the eldest heir-portioner entitled to claim it as a *præcipuum* in a division of the estate.

THE COURT pronounced the following interlocutor:—"Refuse the prayer of the said note, and remit *simpliciter* to the Sheriff: Find the advocator liable in expenses, allow an account to be lodged, and remit to the Auditor, to tax the same, and to report."

Before the Auditor a difference of opinion arose as to the import of this interlocutor, which was thus stated in a note by him.

"The respondent maintains, on the authority of the case of Sinclair, 30th May 1855, 17 D. 784, that this finding carries the whole expenses incurred by him in the inferior Court, in so far at least as these relate to the questions which have been disposed of under the advocation; the advocator contending, on the other hand, that it merely disposes of the costs of the advocation itself, leaving it to the Sheriff to deal with the expenses *quoad ultra*, under the remit to him, as the case differs from an ordinary advocation of a final judgment, inasmuch as the decision of the Sheriff brought under review disposed of one branch only of the litigation raised under the brief of division."

THE COURT afterwards pronounced the following interlocutor, disposing of this question:—"The Lords having considered the note by the Auditor of Court on the account of expenses in this cause, and heard counsel for the parties, declare that the expenses for which the advocator was found liable by the interlocutor of the 28th day of May last are the expenses in the inferior Court, from 13th February 1855, and the expenses of the advocation in this Court: Allow an account of these expenses to be given in, and remit to the Auditor, to tax the same, and to report; and remit all other questions of expenses *simpliciter* to the Sheriff."

HUNTER, BLAIR, & COWAN, W.S.—DOUGLAS & MONILAWS, W.S.—Agents.

SIR SAMUEL STIRLING AND HIS TRUSTEES, Petitioners.—*Patton*. No. 168.

Entail—11 & 12 *Vict., cap.* 36, *sect.* 26—*Warrant to uplift consigned money.*—A sum having been consigned by road trustees, long prior to the passing of the Entail Amendment Acts, as the value of land taken from an entailed estate, and consisting, *inter alia*, of the estimated expense of fences to be erected by the proprietor along the high road;—warrant granted to uplift that sum, applicable to the fences, on proof of their erection and efficiency, although no vouchers were produced.

May 29, 1857. — 1st Division. Ld. Mackenzie C.

IN 1832 a sum of L.2228, 12s. 3d. was consigned by the Berwickshire Road Trustees, under a local Act, as the value of land taken from and permanent damage done to the estate of Sir Samuel Stirling. That sum included L.450, as the estimated cost of fences required in consequence of

No. 168. the operations of the road trustees. Part of the money was uplifted under proceedings prior to 1848. The present application was presented under the 11 & 12 Vict. cap. 36, and under it warrant was granted, on 15th July 1856, to uplift the whole balance of the consigned money, with the exception of the L.450 allowed for the erection of fences. The petition stated that the petitioners had long since, at their own expense, erected them.

May 29, 1857. Gibb.

A remit was made to a man of skill, who reported,—"On examining the fences erected on the estate, along the line of the post road, I find that they have been properly and sufficiently executed; that the hedges are in a thriving state, and the walls are in good order; that the fences erected extend to 1072 roods, or thereby; that no vouchers have been produced for outlay in erecting these fences; but it has been explained to me that these fences were erected several years ago, and that the vouchers for these payments have unfortunately gone amissing and cannot be found; but I am satisfied from the inspection I have made that these fences could not have been erected at a less expense than from 7s. 6d. to 8s. 6d. a rood, and assuming the lower rate, the amount expended would be L.402, and therefore that the claim for repayment of the L.450 stated to have been expended upon them is reasonable and just."

Mr Simon Campbell, S.S.C., to whom a remit had also been made, reported that although vouchers were not forthcoming, there had been produced solemn declarations emitted before a justice of the peace by three parties residing in the neighbourhood, in which they declare that they were well acquainted with the estate, and that the fences in question "were erected between the years 1827 and 1830, under the orders and at the expense of Sir Samuel Stirling, or his trustees, the proprietors."

The Lord Ordinary reported favourably for the petitioners.

The Court pronounced the following interlocutor:—"The Lords, on report of Lord Mackenzie, Ordinary, Find that the petitioner, Sir Samuel Stirling, and Donald Lindsay and George Auldjo Esson, his trustees, are entitled to receive the sum of L.450 sterling, being the balance of the consigned fund in bank, in repayment of the sums expended by them on the fences along the line of post road, with the interest due thereon, all as set forth in the minute No. 91 of process: Grant warrant," &c.

Pearson & Robertson, W.S.—Agents.

No. 169. James Shirra Gibb, Petitioner.—*Boyle*.

Entail—Disentail—Heirs-portioners—Intimation.—In an application for disentail, intimation was ordered to be made to daughters, to whom the estate would go, as heirs-portioners, under the title of "heirs whomsoever," on failure of two heirs of entail under the destination, although *Held*, that such heirs-portioners are not heirs of entail.

Judicial factor—Curator ad litem.—Where proceedings under the Entail Amendment Act were ordered to be intimated to minor heir-portioners who might possibly succeed to the estate, a curator *ad litem* was appointed to each.

May 29, 1857. 1st Division. L.

The petitioner, institute of entail in possession of the estate of Oldfield, presented this application for authority to disentail. The first substitute called to the succession after him was the petitioner's brother, George Gibb. Mr George Gibb had an only son, a pupil, and these two were the nearest and only heirs entitled to succeed to the estate under the destination in the entail; failing them, it went to "heirs whomsoever." Mr George Gibb had

also several daughters; but the petitioner stated, that "although called to the succession on the failure of his heirs-male under the title of his heirs whomsoever, as heirs-portioners are not excluded, they are not heirs of entail in any proper sense of the expression, and do not require to be called as parties to this petition." The petition accordingly only prayed for intimation to the petitioner's brother and nephew. When the case was called,—

No. 169. — May 29, 1857. M'Lean v. Robertson. — Scott v. M'Dowall.

Lord President.—I presume that the petitioner is afraid to give intimation to the heirs-portioners, lest it be held that he recognises them also as heirs of entail. I do not think it can have that effect.

Intimation was accordingly made; and it appearing that the heirs-portioners were minors, the Court appointed curators to each of them.

The Lord Ordinary now reported the case, and stated, that as the daughters only came to have an interest in the entail under the last branch of the destination to "heirs whomsoever," it appeared to him that, under the decisions in Gordon v. Mosse,[1] and Primrose v. Primrose,[2] their consents as heirs of entail were not necessary. The other consents required by the statute had been given.

Clark, for the curators;—In the case of Gordon the succession had opened to a person whose "heirs and assignees were called, which distinguished that case from the present, in which the daughters were called under the title of "heirs whomsoever."

Lord President.—The case of Primrose conclusively settled that point.

Authority granted.

Morton, Whitehead, & Greig, W.S.—Agents.

Alexander M'Laren, Pursuer.—*Millar*. No. 170.
Alexander Robertson, Defender.—*Fraser*.

Process—Reponing—Decree by default.

The prayer of a reclaiming note to be reponed against a decree by default was granted, but the Court inserted in their interlocutor the words, "in respect of the consent of the defender;" observing, that in such cases reponing did not, as when decree had gone in absence, take place as a matter of course.

May 29, 1857. — 1st Division. Lord Neaves. C.

A. J. Stewart, S.S.C.—J. Galletly, S.S.C.—Agents.

George Scott and Others, Advocators.—*Logan—Gifford.* No. 171.
Colonel Day Hort M'Dowall, Respondent.—*Penney—D. Mure.*
Colonel Gordon and Others (Porterfield's Trustees), Compearers.—*Scott.*

Servitude—Process—Interdict—Landlord and Tenant.—The proprietor of an estate, to which was attached a servitude of pasturage over a muir, the extent of which right had not been defined, and was not alleged, applied for interdict against the tenants of one of the *pro indiviso* proprietors of the muir grazing cattle on the muir. Their so doing was contrary to the terms of their leases, but they had long had verbal permission from their landlord so to do; and he, by a minute in the process of interdict, consented to their continuing to graze according to use and wont;—*Held* (*alt.* judgment of Lord Handyside, *diss.* Lord Deas), that the tenants were in the lawful enjoyment of the privilege when the action was instituted—that the minute by their landlord conferred upon them the right to continue in that privilege, and interdict refused. *Observed*, that if the object of the complainer had been to prevent excessive grazing by others, he had not selected the proper remedy. *Process—Minute of Compearance.*—An interlocutor of the Lord Ordinary re-

[1] Gordon v. Mosse, 19th Dec. 1851, ante, vol. xiv. p. 269.
[2] Primrose v. Primrose, 9th Feb. 1854, ante, vol. xvi. p. 498.

No. 171. claimed against;—*Held*, that the trustees of a deceased heir of entail who had compeared in the process, but had not reclaimed, and had died since the date of the Lord Ordinary's interlocutor, were not entitled to compear in the Inner-House.

May 29, 1857. Scott v. M'Dowall. 1st Division. Ld. Handyside L.

Colonel M'Dowall presented petitions in the Sheriff-court of Renfrewshire against five farmers; in each he alleged that he was "proprietor of the lands of Ladymuir, &c., and, as such, a *pro indiviso* proprietor of the muir called Duchall Muir, or at least has a right of servitude of pasturage therein, in so far as he has a right and privilege by himself and his tenants of grazing sheep, cattle, and horses, on the said muir. That the respondent had no right of grazing on the muir, but of late had put thereon to graze, without any authority from the complainer, or any other person, sheep and cattle, to the annoyance and injury of the complainer and his tenants; and has further disturbed the sheep and cattle of the complainer's tenants." And in each case he prayed the Sheriff "to ordain the respondent to remove all cattle, sheep, or other bestial belonging to him, and presently grazing on the said muir; and, in the meantime, to interdict, prohibit, and discharge him, and all others acting for him, from grazing cattle, sheep, horses, or other bestial, in the muir, or any way disturbing the sheep and cattle of the petitioner and his tenants grazing thereon; and thereafter, upon advising this petition with or without answers, to continue the said interdict permanently," &c.

The actions were conjoined, and Mr Porterfield, the landlord of the respondents—being himself a *pro indiviso* proprietor of the muir—was cited. He lodged a minute, sisting himself as a party, "and in so far as the tenant defenders claim a right of grazing upon the muir of Duchall, consents that they shall have such right during their existing leases, conform to use and wont, or until the commonty is divided."

A proof was then allowed, and taken at great length. One of the parties complained of, George Scott, produced a holograph letter from Mr Porterfield, of the same date with his lease, by which Mr Porterfield allowed him to graze ten queys and four score sheep on the muir so long as the same should be undivided.

The import of the proof was thus stated by the Sheriff-substitute in his interlocutor, dated 7th May 1852:—"1st, That the missives on which the defenders possess their respective farms on Duchall estate give them no right to pasture on the muir. 2d, That the defender George Scott alone founds on a holograph letter of his landlord allowing him to pasture ten queys and four score sheep on the muir. 3d, That it is proved that said defender has far exceeded these limits, and he has produced no title as assignee of the pasturage effeiring to the lands of Newton. 4th, That it is proved that upon the whole the Muir of Duchall is overstocked, but to what extent does not appear to be distinctly ascertained. In the circumstan[ces] finds that the defenders Robert Scott, John Laird, James Laird, and W[il]liam Laird, have instructed no title on which to found a possessory ju[dg]ment, and against them grants interdict as craved; and against Geo[rge] Scott, so far as exceeding the limits above-mentioned: Further finds pursuer entitled to expenses," &c.

The respondents advocated; and, on 22d May 1855, the Lord Ordi[nary] pronounced an interlocutor, in which, though he advocated the cause, substantially adhered. The findings by the Lord Ordinary, so far as t[hey] differed materially from those afterwards pronounced in the Inner-Ho[use] were as follows:—" . . . Finds that the Sheriff sustained the [re]spondent's title to insist in the process as in the right of certain l[ands] and also the right of Mr Porterfield to appear in support of his tena[nts'] possessions in the muir in question, and further allowed a proof to [the] respondent in support of his condescendence, and also a proof of how m[any] sheep and cattle in all the Muir of Duchall is capable of pasturing, an[d]

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the extent to which that servitude had been enjoyed by the tenants of the respondent's lands, and allowed the advocators a proof of the extent to which they had been accustomed in time past as tenants of Porterfield to use the muir in the pasture of sheep and cattle: Finds that the advocators acquiesced in that interlocutor which sustained the title of the respondent. . . . Finds, on a consideration of the proof led, that the respondent's accustomed use and enjoyment through the tenants of his lands of the servitude of pasturage over the muir has been interfered with and limited by the acts of the advocators in driving to and pasturing upon the muir cattle, sheep, and other bestial, whereby the muir has been overstocked, and the servitude of pasturage of the respondent rendered less valuable: Finds that the advocator George Scott has pastured sheep and cattle on the muir exceeding the limits allowed to him by Mr Porterfield in said holograph letter granted in reference to his lease: Finds that the other advocators have severally driven their sheep, cattle, or other bestial to the muir, and pastured them thereon to the disturbance of the stock of the respondent's tenants, and to the diminution of the use and enjoyment of the right of pasturage effeiring to the respondent's lands: And on these facts, Finds, as matter of law, that the advocators, other than George Scott, being excluded by their leases from any right or privilege of pasturage on the Muir of Duchall, had no title to plead possessory right to continue to pasture in the muir, in respect of their having *de facto* pastured sheep and cattle thereon according to alleged use and wont, and that such pasturage by them was usurped, and without any legal title: Finds that the averments and pleas of these advocators on the record as closed, affords no sufficient legal grounds to support their possession, and to resist the interdict sought to be obtained against them: Finds that the minute of compearance by Mr Porterfield, having regard to its terms, and that Mr Porterfield took no farther steps in the process, and is not a complainer in this Court by having presented any note of advocation, does not raise up or constitute a title in these advocators, as in a question with the respondent under the process brought, and in which the record was previously closed, to resist the interdict applied for: Finds, as regards the advocator George Scott, that he is not entitled to pasture on the Muir of Duchall, in respect of the lands of which he is tenant, more than ten queys and four score sheep, as limited by the holograph letter produced and founded on by him, but that to that extent he is entitled to possessory rights: therefore repels the additional pleas in law for the advocators; of new grants interdict as craved against the advocators, Robert Scott, John Laird, James Laird, and William Laird, and against George Scott, against pasturing on the Muir of Duchall more than ten queys and four score sheep, and decerns; of new finds the respondent entitled to expenses of process in the inferior court: Finds him also entitled to the expenses incurred by him in this Court," &c.*

"NOTE.—Though the proceedings in this case are voluminous, and an extensive proof was led by the parties, the matters for determination have appeared to the Lord Ordinary, after full consideration, to be brought, as he views the case, within narrow limits. The preceding interlocutor embraces so much explanatory of the nature and progress of the cause, as to dispense, it is thought, with any lengthened note. The really important questions for decision are: What is the character of Mr Porterfield's compearance, and what effect, if any, shall be given to it? The respondent resisted Mr Porterfield and Sir Michael Stewart being cited for their respective interests, but unsuccessfully. The act was that of the Sheriff *ex proprio motu* after the record was closed. The advocators had not sought to have Mr Porterfield made a party, nor had they objected that he was not called. They went to judgment contesting the respondent's title to bring the process, as well as his conclusions, against them, and though their leases had been

No. 171. The advocators reclaimed. When the case was called,—

May 29, 1857. *Gifford*, for the advocators, stated that Mr Porterfield, who was an heir of

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previously made productions in process, they pleaded notwithstanding a right to graze on the muir under a use and wont exercise of it as tenants of Mr Porterfield. The respondent accordingly pressed very strongly that if the advocators had no title when they were brought into Court, and went to issue under a closed record and productions which established that their landlord had withheld it, it became incompetent in a question of interdict to procure a new title and plead upon that which was previously non-existent. The respondent contended that the advocators in relying now on the minute of Mr Porterfield, as giving them a title, admitted that they had previously none under the closed record, and he maintained in point of law that a title made up *pendente processu*, and in contradiction to the true position of the party under his previous right, ought to be disregarded in a possessory question. Reference was made to the case of Ross v. Fisher, February 28, 1833. The Lord Ordinary thinks that the objection so taken by the respondent is one not merely of a formal kind applicable to the stage which the process had reached, but has also substantial grounds to support it. The process being one of interdict, raises the possessory question alone. The advocators resisted interdict on alleged possession entitling them to a possessory judgment. But to plead on possession in a matter of heritable right, a title is required which must not only be shown, but connected with the possession as the warrant upon which it has been enjoyed. Possession without any title whatever is mere usurpation. The respondent might well therefore contest the right of the advocators, who had not even averred on record that Mr Porterfield had withdrawn the prohibition in their leases, and given them by verbal grant any privilege of pasturage, to plead upon the waiver in his minute of compearance as becoming a title to support their possession. At the same time where interdict is sought against tenants, the interests of the landlord may be seriously affected in certain cases which may seem to involve the extent of his rights, so as to make it quite proper, even at a late stage of the process, that he should be cited for his interest. Such considerations probably suggested the order to cite the proprietors of the muir in this case. And this raises the question of how the minute of compearance by Mr Porterfield should be viewed as bearing on the claim of the respondent to obtain the interdict he prayed for. Now, it will be observed, that the terms of the minute of compearance are most qualified. He merely consents, in so far as the defenders claim a right of grazing, that they shall have it during their existing leases, conform to use and wont, or until the commonty is divided. He does not appear to protect them in their claim, and as their landlord to insist with them on their right. He makes himself no party to the allegations and pleas by adopting the record. He puts in no separate pleading for himself stating an interest and maintaining pleas to resist the respondent's petition for interdict. He does not say that he has discharged the prohibition in his tenants' leases and granted them an express right of pasturage, although only till the commonty is divided. All that he does appears to amount to this, that he opposes no obstacle to the advocators maintaining their claim in the process, but will not commit himself by any act of his to incur responsibility, whether as a party to the process or otherwise, either as regards his own tenants or the respondent. Now the Lord Ordinary thinks that this intervention of Mr Porterfield has not supplied the previous defect in the advocator's case. That gentleman by taking up the case and identifying his tenants with himself, might possibly have raised questions with the respondent which could not be solved in this process. But Mr Porterfield has adopted a different course, no doubt for sufficient reasons. He is the proprietor of the muir, but that is the servient tenement over which the respondent has the servitude of pasturage. The right of servitude belonging to the dominant tenement must be respected by the owner of the servient. The servitude is not to be so stretched, says Mr Erskine, as to exclude the owner of the servient tenement from pasturing his own cattle, if there be grass enough for both. The complaint of the respondent is, that the tenants of Mr Porterfield are interfering with the rightful exercise of the pasturage belonging to the dominant tenement. He complains against them and not against the owner of the servient tenement, because Mr Porterfield had given no right to pasture on the muir; on the contrary, he had

entail, had died since the date of the interlocutor reclaimed against. He No. 171.
therefore now tendered a minute of compearance for Colonel Gordon and —
others, Mr Porterfield's trustees, and moved to have them sisted. May 29, 1857. Scott v.

LORD DEAS.—Your proposition is, that the trustees are entitled to come here M'Dowall.
without reclaiming. I do not think that is competent.

LORD IVORY.—Mr Porterfield appeared, in his character of landlord, in order to strengthen the hands of his tenants. But he is now dead: and, if any one is now entitled to come forward as his representative, it must be the heir of entail.

The Court, on 20th May 1857, refused "to sustain the compearance of the said trustees."

The case was then argued on the merits.

The following findings in fact, contained in the interlocutor ultimately pronounced, embrace the whole circumstances of the case:—"Find, in point of fact,—1st, That the Muir of Duchall is a commonty of which the late James Corbett Porterfield, of Duchall, and Sir Michael Robert Shaw Stewart were the *pro indiviso* proprietors, subject to certain rights of servitude, and that the respondent, Colonel M'Dowall, was not a proprietor thereof, but had right, as owner of certain other lands, to a servitude of pasturage on the said muir; 2d, That the tenants of the estate of Duchall, which belonged to the said James Corbett Porterfield, and of which his *pro indiviso* share of the said muir formed a part, were in use to pasture on the said muir the sheep and cattle of the portions of the said estate held by them on lease from the said James Corbett Porterfield and his predecessors; 3d, That five farms of the estate of Duchall (named Barnshake, Montreal or Highburnbrae, Greenside, Midgibblestone, and South Gibblestone) were let by the proprietor of the said estate to the advocators by leases, in which it was stipulated that these tenants should have right to cut peats on the said muir, without any other privilege thereon; but the proprietor did not enforce that restriction, and, with his consent, the advocators, for a number of years prior to the year 1847, enjoyed the privilege of pasturing on the said muir the sheep and cattle of their farms, and they were in the full enjoyment of this privilege when, in that year, the summary actions now under advocation were instituted against them by the respondent, Colonel M'Dowall; 4th, That in these actions, which were conjoined, the said respondent prayed that the advocators should be ordained to remove all their cattle, sheep, and other bestial from the said muir, and that they should be interdicted permanently from pasturing their said stock thereon; and, in support of these demands, the said respondent alleged that he was a *pro indiviso* proprietor of the muir, or, at least, had a servitude of pasturage thereon, and that the advocators had put a great quantity of sheep and cattle thereon, to the annoyance and injury of him and his tenants; 5th, That the Sheriff having appointed the said James Corbett Porterfield to be called as a party to the actions, he appeared therein, and lodged a minute, stating that, in so far as the tenant defenders claimed a right of grazing on the said muir, he consented that they should have such right during their existing leases, con-

ided it. Had he given such a right, and the tenants had rested their title on a grant from him, the respondent Colonel M'Dowall must have contested the matter with the owner of the servient tenement as well as his tenants. But as the case stood when the petition for interdict was presented, and as it now stands, according to the Lord Ordinary's apprehension, notwithstanding Mr Porterfield's minute, it is conceived the respondent has got the proper parties with whom he has to deal, and that against them he is entitled to prevail.

The proof, as already noticed, was allowed before answer. It is unnecessary for the Lord Ordinary to enter into any examination of it. The greater part of it is of course superseded if the view the Lord Ordinary has taken on the points just adverted to is sound. So far as the findings in the interlocutors rest upon considerations of the proof, he has merely to say that he thinks it supports them."

No. 171. form to use and wont, or until the commonty should be divided; 6th, That when the said respondent instituted these actions the extent of the foresaid servitude of pasturage on the said muir, to which he had right, had never been ascertained, and remained indefinite and uncertain; that, although an action of division of the said commonty had long been and still was in dependence, and the said respondent's authors had entered appearance therein, no decree of division had then been or has yet been pronounced therein; and, also, that under the proof which was taken in the said conjoined actions the respondent has failed to prove the extent of his said servitude of pasturage, and the same still remains indefinite and uncertain, and no facts have been proved which afford data for ascertaining the extent of the said servitude; and, 7th, That the said respondent has failed to prove that his said right of servitude has been infringed or encroached upon by the advocators, or any of them."

May 29, 1857. Scott v. M'Dowall.

The advocators pleaded;—That, the respondent's servitude being a limited right of pasturage, he had mistaken his remedy in applying for absolute interdict against the tenants of a proprietor who had right to pasture on the muir, and with whose consent his tenants had been in use to do so; a practice acquiesced in by the respondent up to the date of his complaint. Its prayer was absolute for interdict against the advocators as intruders on the muir, but the respondent had himself not averred the extent of his possession, nor stated any limits to his right. He was not entitled to exclude Mr Porterfield's cattle until he could shew that the number of cattle he was himself entitled to pasture were sufficient to eat up all the pasture. This he had failed to do. Therefore, due regard being had to Mr Porterfield's compearance, the Sheriff ought not to have interdicted the advocators as not having authority to graze. Farther, the advocators were not bound to instruct a title in order to found a possessory judgment, the application for interdict being simply founded on the assumption of the non-existence of authority.

At advising,—

Lord President.—To my mind this has been a very unsatisfactory case, both in regard to the statement, and more especially in regard to the proceedings in which it originated. The complaint is made by Colonel M'Dowall, who asserts, apparently with reason, that he has a servitude of pasturage over this muir of Duchall. In the Inferior Court, he puts his statements alternatively, that he has either a right of property or a right of servitude: he does not appear to be clear which, nor does he say to what extent he claims right of pasturage. He complains that the advocators, having no right to graze on the muir, nevertheless do so to a great extent, that the muir is thereby over-stocked, and that his cattle and sheep are in consequence made to suffer. The view which is taken by the Sheriff, and also by the Lord Ordinary, is that these parties who are complained of have not only no title to graze animals on the muir, but that their grazing is in the face of their title as tenants of an admitted proprietor of the muir—that they are in effect usurpers, and so that the complainer is entitled to absolute interdict against them. Both parties refer to a process, the precise position of which is not clear, but which was instituted for ascertaining the rights of parties about fifty years ago, and is still in dependence.

The advocators contend that they have been in use to graze, and that they were entitled to a possessory judgment in their favour, of right to graze, according to use and wont. That view has been rejected, on the ground that the mere act of possession without a title is not enough; that the respondents had shewn no title, and therefore were not in a position to demand such a judgment, and, therefore that they ought to be interdicted altogether from grazing any bestial on this muir.

Now the view taken by the Sheriff is not satisfactory to me. The condition of things for a period farther back than the possessory period of seven years, seems to have been that of every party grazing as many cattle upon the muir as he could put upon it. All of these parties complained of had cattle to a large extent upon

it, and the pursuer of this action had cattle there also. But I do not see anything No. 171.
to satisfy me in the first place as to what was the precise extent of the right of —
Colonel M'Dowall himself. We have no elements for deciding that. Then, again, May 29, 1857.
it appears that one of Mr Porterfield's tenants had permission from him to graze to Scott v. M'Dowall.
a certain extent—not by his lease, but by a separate writing, and his right has been *sustained to* the extent so given. The other tenants complained of have no title by lease or otherwise.

I am not prepared to hold that, in this process of interdict, the tenants of one of the proprietors of the muir are to be precluded from grazing, because they have not a written title from their landlord so to do. That is a proposition which I am not prepared to support. I think that verbal permission from the landlord to graze — supposing the landlord has himself the right — would be sufficient if instructed,—that possession, following upon such permission, would entitle the tenant to a possessory judgment, and a process of interdict would not be the proper mode of determining the rights of parties in such a state of matters. Now I see in the proof before us evidence of the landlord having given such a verbal consent, so far back as twelve years before the date of this process. Then, again, there is here a compearance by the landlord, who consents to the tenants having such right during their existing leases, conform to use and wont, or until the commonty is divided.

I consider that to be, from the date of that document, in one construction, a consent to grazing on the muir. If it be so, I do not understand how it can be maintained that interdict against grazing hereafter is to be granted—which is what the Sheriff has done. This is a process of interdict. It is a prospective interdict which is craved, for interpelling parties from doing in future what it is alleged they have no permission from their landlord to do. Before that interdict was laid on, the landlord gave his permission.

It might be, if there had been nothing else in the case at that stage of it, that the pursuer might still have insisted for expenses. But the Sheriff would not have been warranted in granting interdict. Suppose the landlord had given all of his tenants a written consent as at that date, could the Sheriff then have granted interdict against their future grazing? I think not. These documents would have given them right as from that date. But I farther think that the tenants had a parole permission before that date: and that was quite enough from their own landlord. It may be that, under that permission, they were not entitled to graze to excess. That I can perfectly understand. But the interdict is not against the tenants grazing to excess. It is against their grazing at all. It is not at all clear that the complainer was entitled to that at any stage of the proceedings.

Parties have gone wrong here altogether. It is the overstocking of the muir that is the real grievance, and the attempt is made to correct that grievance by this arbitrary proceeding, on the ground that the tenants are mere intruders. The proof removes from them that character, and therefore I think the remedy of interdict is not applicable. The landlord who gave the consent was an heir of entail. He is dead, and the next heir of entail may not be bound to recognise what he did. The next heir is not here, and has not renewed the consent, and there is no evidence that he does consent; and it is argued, if that consent was good during the lifetime of the heir who granted it, it is good no longer, and now that it is off, the respondent is entitled to interdict. I do not think that argument is sound.

That is a change of matters, which the parties complained of would be allowed to remedy. They would be allowed an opportunity of shewing whether they had the consent of the present landlord or not. But it is not worth while raising a question of that sort, seeing that the trustees came forward to say that they wanted to give such consent, but they were not allowed to do so. The judgment pronounced was a wrong judgment. It ought to be recalled, and the application for interdict dismissed. As to the matter of expenses, this is not the remedy the complainer ought to have had recourse to, and, therefore, I think the advocators are entitled to their expenses.

LORD CURRIEHILL.—The position of the respondent, Colonel M'Dowall, is that of being not the sole nor even a *pro indiviso* proprietor of the Muir of Duchall, but merely the owner of certain other lands having a servitude of pasturage over this muir. The muir belonged in property, when these proceedings commenced, to Mr

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Corbett Porterfield of Duchall, and Sir M. S. Stewart, and the respondent's right is merely that of an incumbrancer, as is found by the interlocutor under review, which, as to that matter, is now final. The extent of this right of servitude has never been fixed or ascertained, and was quite indefinite and uncertain when these proceedings commenced, as the title which the respondent produced and founded upon is silent as to that matter; and the proper procedure which the law of Scotland provides for ascertaining the extent of such indefinite rights of servitude in commonties had never been made available. This might have been done either by an action of souming and rouming, or by an action of division under the statute 1695, c. 38. But the former of these remedies had not been resorted to; and although a statutory process of division had long been in dependence, and the respondent's authors had been made parties thereto, it had not been brought to a conclusion. Nor has the extent of this right of servitude been fixed or ascertained by the proof in the five conjoined summary actions which the respondent instituted in the Sheriff-court, and which are now under advocation. It appears from that proof not only that the extent to which that servitude has been exercised was very fluctuating; but that even that fluctuating possession, instead of having been limited to the stock of the alleged dominant tenement, included the stock of other farms, and even stock taken in by the tenants to pasture for hire, so that still the extent of the servitude remains quite indefinite and uncertain.

On the other hand, the position of the advocators was this: They were tenants on the estate of Duchall, which belonged to Mr Porterfield, and of which his *pro indiviso* right in this common muir was a pertinent, and consequently a right of pasturing the stock of these farms on this muir would have belonged to them *ipso jure* as a pertinent of their farms, if it had not been expressly withheld from them by their landlord. And although the leases which he granted to them contained a declaration that they should have no other privilege in the muir besides that of casting peats, yet the party in whose favour that restriction on their right was thus stipulated by the landlord, was not the respondent Colonel M'Dowall, nor any third party, but only their landlord himself; and it was entirely optional to him to enforce that restriction or not, as he might think proper. And he did not enforce it. Instead of sending his own bestial to pasture on the share of the common which belonged to himself—and the use of which, beyond the right of casting peats, he reserved to himself—he allowed his tenants possessing his lands under these leases to enjoy the benefit of that pasture. No doubt he could at any time have insisted on their removal; but so long as he acquiesced in the continuance of that possession, it was lawful possession, and no third party could deprive them of it.

But the respondent Colonel M'Dowall, by the five actions under advocation, is insisting upon excluding them entirely and permanently from continuing that possession. What he prays for is, that they should be ordained to remove all their cattle, sheep, or other bestial grazing on the muir, and that they should be interdicted permanently from grazing bestial thereon. The landlord did not concur in these applications. On the contrary, when he was called as a party under an order by the Sheriff to that effect, he appeared, and expressly consented that the tenants should have such a right of grazing as they claimed upon the muir during their existing leases, conform to use and wont, or until the commonty is divided. These are the circumstances in which the respondent persists in his summary actions of removal and for interdict. I am of opinion that he is not entitled to succeed in these applications.

As he is not an owner of the muir, and has merely a right of servitude entitling him to pasture thereon the stock of the dominant tenement belonging to him, he may have a title to adopt the appropriate remedy against any acts by which the proper exercise of that privilege may be detrimentally affected, if he can shew that such has been the case. He might even be entitled to exclude the proprietor himself, or those acting under his authority, from participating in the pasturage of the common, if he could shew that the whole of that pasturage was necessary for the use of the stock of the dominant tenement, and to give due effect to the right of servitude. But he has not proved any such thing—the evidence shewing that the stock pastured by his tenants have always used but a small proportion of the pasturage of the common. He has not even made any allegation to this effect. And this being the case, he, as a mere servitude man, has no title or right to insist upon

removing entirely and permanently from the common the stock of the owner's tenants, whose bestial are, with their landlord's permission, pasturing thereon. No. 171.

The proof and pleadings in this case appear to have been intended to shew that the stock which the advocators had been pasturing upon the common, even supposing their right to pasture was unchallengeable, had been excessive. But, in the first place, even supposing the proof had established this to be the case, such evidence would not have supported the conclusions of the present actions for a total and permanent exclusion from the common of the stocks of the advocators; and as these actions contain no conclusions for regulating the possession of the muir among the different parties interested, as if there were an action of souming and rouming, no such proceeding is competent in this case. And, in the next place, as the respondent is not entitled to complain of what is done by any of the other parties interested, unless he can shew that his own servitude of pasturage is thereby detrimentally affected; and as he has failed to prove this, inasmuch as his proof leaves the extent of his servitude altogether indefinite and uncertain, as has already been stated, he could not have obtained even a partial interdict in the present case, even if the actions had been adapted for obtaining such a remedy. May 29, 1857. Scott v. M'Dowall.

Lord Deas.—I concur in the result arrived at by the Sheriff-substitute, the Sheriff, and the Lord Ordinary.

The respondent Colonel M'Dowall, as proprietor of the lands of Ladymuir, Bridgeflat, and Netherton, has a right of servitude of pasturage over the Muir of Duchall, the *pro indiviso* property of Mr Corbet Porterfield and Sir Michael Shaw Stewart. The respondent's right of servitude was expressly admitted at the bar, and is sufficiently proved by the titles, taken in connection with the proof, although the precise extent of his right of pasturage is not defined, and may, very possibly, have reference to the valued rent of the lands, or the quantity of bestial the dominant subjects can maintain in winter. The complaint of Colonel M'Dowall is, that the advocators, Robert Scott, John Laird, James Laird, and William Laird, who are tenants of certain other subjects belonging to Mr Porterfield, are pasturing large numbers of bestial on the muir, not only without authority, but in the face of an express prohibition in their leases, and that the other advocator, George Scott, is pasturing on the muir a much larger number of bestial than he is authorised to do by his lease, which restricts him to ten queys and four score of sheep; by all which, it is further said, the respondent Colonel M'Dowall's stock are disturbed, and his means of pasturage injured and limited. Against these intruders, therefore, he asks interdict, which has been granted in the Sheriff Court, and by the Lord Ordinary, against George Scott, *quoad* the excess over ten queys and four score of sheep, and against the other advocators *in toto*.

Now, I lay aside, in the first instance, the minute of consent by Mr Corbett Porterfield; and, doing so, I take it to be clear that, as against those of the advocators who not only have no title but are possessing in the face of their title, the respondent is entitled to interdict. He is lawfully in possession of the pasturage of the muir; and these parties are in no better, if indeed they be not in a worse, position than intruders from a distance who hold no lease from the servient proprietor at all. The very facts that the extent of the respondent's right is not defined,—that it requires ascertainment, which must involve delay, investigation, litigation, and expense, before it can be known whether the whole or what part of the pasturage is required by and belongs to the dominant tenement; and that, in order to maintain their own possession, the advocators find it necessary to impugn, and do impugn, the respondent's rights, and the extent of his occupancy, are conclusive, to my mind, against the supposition that, in order to obtain interdict, the respondent must try these questions with these intruders, against whom a judgment would avail him nothing, either against new sets of intruders coming forward *ad infinitum*, or against the servient proprietor Mr Porterfield.

This leaves only the consideration,—as in a question with these four advocators, —whether, and to what extent, their position is made better by the minute of compearance lodged, after the record had been closed, for Mr Corbett Porterfield, by which he sisted himself as a party for his interest, "and, in so far as the tenant defenders claim a right of grazing upon the Muir of Duchall, consents that they shall have such right during their existing leases, conform to use and wont, or until the commonty is divided."

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Now, I cannot look upon this minute as bettering the position of the advocators at all. I think the question must be decided upon the state of matters as they stood at the date of the application for interdict, and that the minute can be of no avail, except in so far as it may be said to prove some averment in the closed record. But it proves no averment whatever in the record. The record does not aver, and the minute does not bear (whatever the proof may do), that Mr Porterfield had ever at any time authorised these four advocators to pasture. The record merely avers that he acquiesced in their pasturing, but the minute does not affirm even this averment—far less does it adopt what these advocators have done, and the views they now contend for, so as to enable the questions at issue to be tried as between Colonel M'Dowall and Mr Porterfield. It merely consents, *de futuro*, that the advocators shall have the right which they claim,—a consent which, whether it may or may not avail them in some future proceeding, notwithstanding the death of the heir of entail who granted it, cannot affect the result of this case, in which the interdict, like all other interdicts which proceed on want of title, will not prejudice the advocators in any action raised, either by them or against them, after they are in a position to produce a title. No doubt, if the title conferred by the minute were clear and conclusive, we might take another course, and, in respect of the title now produced, recall the interdict,—dealing with the matter of expenses as in a case of innovation of title *pendente processu*. But the title is not clear and conclusive;—for, even if it enabled the respondent to try the question with proper parties, which I think it does not, it would require a new record to be made up, embracing the extent of the relative rights of Mr Porterfield and the respondent, and a new proof to ascertain these rights,—in place of which, I think, the proper course is to dispose of the present case upon the record as it stands, and leave the parties to found upon any new title, and to vindicate their rights under that title otherwise as they best may. Mr Porterfield's representatives may be made parties to any new proceedings, if thought necessary, but they are no parties here,—your Lordships having refused to allow them to be sisted, as Mr Porterfield himself, who has since died, had not reclaimed against the Lord Ordinary's interlocutor, and his representatives are now, therefore, out of the field. The next heir of entail who has succeeded to the estates has never been in the field at all, and does not propose to come into it. If the question is proposed to be tried with these four advocators, in their own right, apart from Mr Porterfield's minute, the answer is, that they have no right at all, and stand debarred from claiming any right. If, again, the question is proposed to be tried with them, as in right of Mr Porterfield under the minute, the answer is, that he neither authorises this, by adopting what they have done, nor have they a record calculated to try such a question as the minute (if its terms had been different) might have authorised to be tried.

I have taken the case, hitherto, as in a question with the four advocators, exclusive of George Scott. But I have now to add that I do not think there is, in his case, any sufficient specialty to make a difference *quoad* him, in the result. He does not allege, so far as I have seen or heard, that Colonel M'Dowall has done anything which prevents him having sufficient pasturage for his ten queys and four score sheep. He cannot, and does not complain that he is allowed to continue pasturing these ten queys and four score sheep. And as regards the excess, his lease seems to me to place him in the same position with the other advocators,—the restriction, to the effect that he was to have no right of pasturage on the muir, being removed only to the extent mentioned in the relative letter.

If it were necessary to authorise interdict, either against him or the other advocators, that there should be *prima facie* proof that their pasturage on the muir disturbs and interferes with the respondent's right of pasturage, I think we have such *prima facie* proof here. It has not been shewn, or even attempted to be shewn, that Colonel M'Dowall has been pasturing more bestial than the dominant tenement will maintain in winter, or than the state of possession betwixt him and the proprietor of the dominant tenement will sanction, and I cannot presume that such has been the character of his possession upon a lawful title, in a question with parties who have no title whatever. The presumption, I think, is quite the other way,—that, if there be overstocking, it is occasioned by the intruders, and not by the lawful possessor. But, even if this matter be debateable, we have no parties

here with whom the respondent can be called upon to debate and try the question. I am, therefore, in every view, of opinion that the Lord Ordinary's interlocutor ought to be adhered to. No. 171. — May 29, 1857. The Crown v. Lamont.

LORD IVORY was absent, but having heard the debate, he communicated his concurrence with the views of the majority.

THE COURT pronounced the following interlocutor:—" Recall the interlocutor reclaimed against: Advocate the five conjoined causes: Recall the interlocutor of the Sheriff complained of; and—(here followed the findings in fact quoted supra, p. 773.)—Find, in point of law, that in these circumstances the advocators were in the lawful enjoyment of the privilege of pasturing sheep and cattle in the said muir at the time when the foresaid actions were instituted, and that after these actions came into Court, the right to continue in the enjoyment of that privilege was in terms of the foresaid minute conferred upon them by the said James Corbett Porterfield: That the respondent had no title or right to deprive them thereof as prayed for in the said actions: Therefore, dismiss the said actions, and decern: Find the advocators entitled to expenses, both in this Court and the Inferior Court, and remit," &c.

J. & H. G. GIBSON, W.S.—TODS & ROMANES, W.S.—Agents.

No. 172.

H. M. ADVOCATE, Pursuer.—*Sol.-Gen. Maitland—Fraser.*
ALEXANDER LAMONT AND OTHERS, Respondents.—*D. F. Inglis—Cook.*

Domicile—Legacy duty.—A Scotchman born of Scotch parents domiciled in Scotland, went to Trinidad in 1802, and remained there without interruption till 1838. He acquired estates, had establishments, carried on business, and ultimately died there. Between the years 1838 and 1850, he made very frequent visits to Scotland. He rented premises in Glasgow, where he carried on business through an agent, and he purchased an estate in Argyleshire, on which he built a mansion-house. This investment he spoke of as made to give employment to a nephew whom he made his heir. He had expressed an intention of "dying in harness," and none of returning permanently to Scotland, and died at Trinidad in 1850;—*Held* (aff. judgment of Lord Ardmillan) that he had acquired a domicile in Trinidad, and had never reacquired a Scotch one, therefore that his domicile as regarded all questions of legacy duty was in Trinidad.

THE Crown brought this action against the accepting trustees and executors of the late Mr Lamont, who died at Trinidad in 1850, for payment of legacy duty to the amount of about L.9000 upon Mr Lamont's estate. The defence, admitted to be good if well-founded in fact, was that Mr Lamont's domicile was in the Island of Trinidad at the time of his decease. May 29, 1857. — 1ST DIVISION. Ld. Ardmillan C. Exchequer Cause.

The facts of Lamont's life bearing upon this question, as to which there was no difference of opinion on the bench, will be found fully stated in the opinion of the Lord President on advising a reclaiming note presented for the Lord Advocate against the following interlocutor, pronounced by the Lord Ordinary:—" Having heard the counsel for the parties and made avizandum, and considered the debate, with the closed record and productions, and the joint minute for the parties renouncing further probation on the question of domicile: Finds that the deceased John Lamont was, at the date of his death, domiciled in Trinidad, and not domiciled in Scotland, within the meaning of the statutes libelled on: Therefore assoilzies the defenders from the conclusions of the action and decerns: Finds the defenders entitled to expenses, allows an account thereof to be given in, and, when lodged, remits the same to the Auditor to tax and report."*

* "NOTE.—The late Mr John Lamont died in the Island of Trinidad, in No-

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The following statutes were founded on by the Crown:—55 Geo. III. cap. 184; 8 & 9 Vict. cap. 76, sect. 4; 36 Geo. III. cap. 52, sect. 6; 45 Geo. III. cap. 28, sect. 5.

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vember 1850, in his 69th year, and unmarried. His death took place in his own house, on one of his own estates, in that island. He left personal property in Scotland to a large amount, besides the landed property of Benmore, in Argyleshire, and several estates in Trinidad.

"The present action has been brought by the Lord Advocate, on the part of the Crown, for recovery of legacy or residue duty from the executors of Mr Lamont, on the footing of his having been, at the date of his death, a domiciled Scotsman; and the point for present decision is, whether his domicile at that date was in Scotland or in Trinidad. Without too curiously considering the question of *onus probandi*, which may shift more than once in the course of such an enquiry, the first and leading fact is, that Mr Lamont died in Trinidad, in his own residence, and this fact, according to the *dictum* of Lord Thurlow, 'affords *prima facie* evidence of his domicile at that place, and it lies on those who say otherwise to rebut that evidence.' The origin, previous history, and ascertained feelings and intentions of the deceased, are explained in an adjusted record, and are referred to on both sides as affording the materials on which the question must be disposed of. Parties have renounced farther probation, and the facts must be taken as appearing on this record.

"Mr Lamont was born, in 1782, in Scotland, and although in his case, as an illegitimate son, the domicile of origin was not marked by those family ties and associations which tend to give it so much weight and importance in the case of legitimate children, still his original domicil was Scottish. He did not, however, retain his Scottish domicile. He left Scotland in 1801 or 1802, and for twenty-six years he voluntarily remained in Trinidad, without once returning to this country, —he purchased several estates in Trinidad,—he had more than one residence there,—he had a comfortable establishment; he was actively engaged in the cultivation of his estates; and he held an important public office in the island, said to be similar to that of a Lord-Lieutenant of a Scottish county. The Lord Ordinary is of opinion that, in 1828, when he for the first time visited his friends in this country, he was no longer possessed of his original Scottish domicile, but was domiciled in Trinidad. There is no authority to support the proposition that his original Scottish domicile was retained by him during his long absence from Scotland, and residence in Trinidad, under such circumstances. The fact of a person leaving Scotland in youth, and residing many years in India, engaged in commercial business, though intending some day to return home, but dying in India, is put by the Lord Chancellor, in the case of Bruce, as working a change of domicile; and his Lordship treats it as clear that the domicile of such a person would be Indian. The same *species facti* is put in the opinion of all the Judges in the case of Munro—not only of the majority, but of Lord Moncreiff and the other Judges in the minority, and with whom the House of Lords concurred, and is referred to as illustrating a change from the original domicil, notwithstanding a hope or intention of one day returning to Scotland. The Lord Justice-Clerk (Boyle) and the majority of this Court, say, 'Men settling themselves of their own accord, or in the Company's service in India, are held, beyond all doubt, to lose their native, and to acquire an Indian, domicile, and the cases are innumerable in which their intestate succession has been distributed upon this assumption accordingly. Yet there probably is not one of those persons, especially of Scottish origin, who has not meditated an ultimate return to his native land, and, in the great majority of instances, made great preparations and outlays with a view to it. All this, however, only indicates a purpose to change their actual Indian for a future Scottish domicile, and till this purpose is consummated by their actual return to Scotland, *animo remanendi*, it is quite settled that their only domicile is in India, and that it is by the law of that country that their rights and condition must be exclusively regulated.' Lord Moncreiff, and the Judges in the minority, say, 'The case of persons entering into the service of the East India Company, or any similar employment, is essentially different, and let it not be thought that we have lost sight of the settled

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Lord President.—In this case the counsel for both parties were of opinion that the facts were so fully stated in the record with all the evidence, that it was

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rule in such a case, though the person who engages in such a course of life may have in his mind a constant contemplation of returning at some distant and undefined period to his native country, by adopting such a trade or profession which indispensably requires a continued residence in another, and actually pursuing it for a length of time, he forms and evinces that *animus remanendi* which is of the essence of a constituted domicile; just as effectually as a man who settles as a merchant in London or Hamburgh does, though he may have a lingering anticipation that at some time or other, when fortune has crowned his labour, he may spend the evening of his days on his native soil.' The same illustration is put by Lord Fullerton in the case of the Commissioners of Inland Revenue v. Gordon's Executors, 4th February 1850, who states that he 'never understood it to be doubted.' Accordingly the Lord Ordinary holds it to be quite clear that Mr Lamont had, in 1828, abandoned his original domicile, and acquired a domicile in Trinidad. As he died in Trinidad in 1850, that was his domicile, unless he had changed it in the interval between 1828 and the date of his death.

" But the second question, viz.—Did he regain his Scottish domicile after 1828? is attended with more difficulty. The original domicile is easily revived. Recurrence to the original domicile may be established more easily than the adoption of a new domicile of choice—(per Lord Stowell, in the case of the Harmony, 2 Rob. Adm. Rep. 322). With the view, therefore, of ascertaining whether such recurrence can be fairly gathered from the circumstances and the correspondence in this case, the Lord Ordinary has given to these his anxious attention. The result is, that he has arrived at the conclusion, that recurrence to the original domicile has not been established, and that Mr Lamont died domiciled in Trinidad.

" If, as must be assumed in disposing of this second question, the original domicile of Mr Lamont had been lost, and his domicile in 1828 was in Trinidad, then the abandonment of that acquired domicile in Trinidad, and the recurrence to his original Scottish domicile after 1828, must be proved by the pursuer. He must instruct the change in order to establish this alleged change of domicile: (for it is a change, though being a recurrence, it is a change more easily instructed) the pursuer must prove that Mr Lamont did, *facto et animo*, abandon his domicile in Trinidad, and recur to his domicile in Scotland.

" On the one hand, it is true that his constant and large remittances, his accumulating funds in Scotland, his mercantile business in Glasgow, his purchase of the estate of Benmore, and the building of a new house there, and the terms of the settlements made and left by him in Scotland, are all important facts favourable to the Scottish domicile; but then, on the other hand, it is to be observed, that there was no dissolution of the ties which had for so many years bound him to Trinidad —the Trinidad business was not wound up, not even contracted, nor was his personal management of it relaxed—the Trinidad establishments were not diminished —the Trinidad residences were not displenished—the public office in Trinidad was held by him to the last day of his life, and at no period of his history, not even on any one occasion, does Mr Lamont appear to have written or spoken of dissolving his connection with Trinidad, or of returning to Scotland permanently, or otherwise than on a visit. Where an original domicile has once been lost, a man's floating purpose of returning, at some indefinite period, to lay his bones in his native land, is of very little weight as affecting the question of recurrence to that original domicile. It is not an intention to go there to die, but an intention to live there, and to live permanently there, that is required for the establishment of a domicile. So long as Mr Lamont lived, he never actually abandoned, and never even expressed his intention to abandon, his home and residence and social position in Trinidad—he never quitted that island, except on the footing of paying a visit and of returning. How can it, therefore, be said that, *facto et animo*, he changed his domicile and regained his original domicile in Scotland?

" In a letter to his brother, Alexander, dated 'Trinidad, 28th June 1841,' he says, 'I think of making a short visit home and returning early, to endeavour to stem the downward tendency of things here. I find my long absence very prejudicial, and that I am looked on as an absentee by all parties, from the Governor to

No. 172. unnecessary to address us, especially as the note of the Lord Ordinary brought out the whole case. The record does contain a great deal of evidence. It sets forth

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the humblest labourer who works for us. This won't do, and I must act again as an every-day practical planter.' Again, on 4th July 1843, he writes to Alexander —'If I can make satisfactory arrangements, I may venture across for a short time, but only for a very short time, as affairs here require vigilant attention.' On 19th June 1844, he writes—'I am likely to be with you by the next packet;' adding, 'my sojourn is likely to be shorter than usual.' On 4th November 1845, he writes—'The commander will, I trust, take her' (a little steamer) 'off my hands soon, and let me have my money back again, and allow me to give my undivided attention to my cane farms.' On 19th June 1847, he writes—'In a month or so, I must be on the move, if I go at all, as go I suppose I ought; yet I am loath to leave, so much requires to be done here.' On 19th February 1850, he writes—'I mentioned to you that the crop here would be short this season. Even on my fine fertile soil at C. Grove, I will fall short, from careless cultivation during my absence.' It is scarcely possible to reconcile such language as this with that settled intention to abandon Trinidad and return permanently to Scotland, which the pursuer must prove; but is quite consistent with an intention of making frequent visits to Scotland, and returning to his plantations, and his residence, and his official duties or position, in Trinidad. But visits afford no indication of a purpose to change the domicile. On the contrary, it is the place which a man leaves when he goes to pay a visit, rather than the place at which he pays the visit, which has the proper character of a domicile. The recognised definition of domicile precisely applies to the residence of Mr Lamont in Trinidad, which he quitted when he set out on his journey to visit Scotland, and to which he returned when his visit to Scotland was at an end, and he had ceased to wander.

"The purchase of Benmore in 1848, completed in January 1849, and the building of a new house on that estate, are facts undoubtedly of great importance, and have been naturally and properly urged, with much earnestness, by the pursuer. But the motive and objects of Mr Lamont in this purchase must be attended to. It was not a step taken with a view to permanent settlement, nor in order to substitute a residence at Benmore for a residence in Trinidad. He does not appear to have even intended to do that, and, after the purchase, he continued to speak of Trinidad as the place where he must personally live, to attend to his business. Verbal expressions are certainly of less weight than written statements; but it cannot be altogether overlooked, that, after the purchase of Benmore, and with reference to the suggestion of retiring and residing there, Mr Lamont said, 'he would not come home and lead an idle life;' and that 'he would rather work out than rust out.' The purchase of Benmore is frequently stated by Mr Lamont himself in his letters to his brother and to Mr Newton, to have been to give his nephew, James, agricultural experience and rural enjoyment, and ultimate succession; and accordingly, by his settlement, executed in 1849, the year when the purchase was completed, he left to James Lamont the estate of Benmore. It is true that, while he lived, Mr Lamont was the proprietor of Benmore—that he so designed himself in his holograph settlement and other documents—that he took much interest in it, and looked forward with pleasure to seeing his friends there, when he might be in this country. He had previously dwelt in hotels and clubhouses. He had more than one residence in Trinidad when he returned from visiting Scotland, but he wished to have a residence of his own, during his visits to Scotland, and at the same time to secure for his nephew present employment and improvement, and a valuable succession. In all this, he did not mean to abandon Trinidad, and he did not abandon Trinidad—neither *facto* nor *animo*, did he change his domicile.

"A case like the present depends chiefly on its own facts and circumstances. The Lord Ordinary has carefully consulted all the leading authorities, and it is unnecessary to refer to them. The rules of law have been settled, and the real difficulty is in their application to the circumstances of the case. The facts that Mr Lamont, leaving Scotland with no family ties and no property, was for twenty-six years a constant resident, and for above forty years an active planter, residing in Trinidad, that he had estates, houses, establishments, and official position there,

in the various articles of the condescendence the whole evidence in the case, instead of the facts to be supported by the evidence. It is a very irregular record. But it brings before us the whole evidence upon which the parties rely.

The facts of the case appear to be that Mr Lamond was born in Argyleshire in 1782, where both his father and mother had their domicile. In 1801 or 1802 he went to Trinidad, and settled there as a planter. He purchased estates there, which he managed personally. He had a residence and establishment in Trinidad. He was an active member of the community, and became a person of some consequence. He held a public office in the colony, and died there in his own residence in November 1850, in his 69th year.

If that were the whole case, there could be no question that, at the time of his death, Mr Lamont was domiciled in Trinidad. But it is necessary to trace his history more minutely, and ascertain whether it discloses any circumstances which shall obviate the conclusion which would otherwise arise from the general character of the case as I have now stated it.

From the time Mr Lamont went to Trinidad in 1801-2, till 1828, a period of twenty-six or twenty-seven years, he appears to have been constantly resident in Trinidad, and during all that time he does not appear to have revisited or expressed any intention of revisiting his native country. I find nothing in the record that leads to any other conclusion than that he considered himself as resident in Trinidad. He had all his interests in that place, and an establishment there, and I see nothing to lead me to doubt that, in 1828, his proper domicile was in Trinidad. His domicile of origin had been lost, and another had been acquired. If he had died in 1828, there could have been no doubt or question as to his domicile.

But the circumstances founded on by the pursuer are subsequent to that date. Therefore it is to the period of his history between 1828, and his death in 1850, that we must look for the elements on which our decision is to be rested.

The point before us is, whether after 1828 he again changed his domicile, through re-acquiring a Scotch domicile? The affirmative of that proposition must be established by the pursuer. The *onus* of proving that is on him. Now, it is a received principle that the re-acquisition of a domicile may be inferred from circumstances which would not be sufficient to infer the loss of the original domicile, and the question is, are the circumstances of this case sufficient to sustain the inference that Mr Lamont had lost the domicile which he had acquired in Trinidad? I think they are not. The main facts on that side of the question are, first, that he made repeated visits to Scotland; second, that he rented premises in Glasgow where he carried on mercantile business through the instrumentality of an agent; third, that he purchased a property in Argyleshire on which he caused a mansion house to be erected. These are substantially the facts on which the case for the Crown is rested.

Now, as to the first of these, Mr Lamont's first visit to Scotland was made in 1828. He remained but a short time—for two months. He then returned to Trinidad, where he remained for six years. His second visit was in 1835, on which occasion he appears to have been in Scotland for the purpose both of transacting his mercantile business and of visiting his friends. Two years elapsed before he made another visit. After 1838 these visits became more frequent; indeed, after 1840 they became almost annual. His visits to Europe were not for the purpose of spending his time entirely in Scotland; they were devoted partly to residence in England, and partly to residence on the Continent of Europe. But it does not appear that Mr Lamont ever expressed any intention of remaining permanently in

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all which he retained till the close of his life, that, in advanced years and unmarried, he died in his own house in Trinidad, and that he never abandoned or expressed an intention to abandon his business, residences and position there, and never returned to Scotland *animo remanendi*, or expressed an intention to return to Scotland *animo remanendi*, or otherwise than for a season, and with the view of returning to Trinidad, are, in the opinion of Lord Ordinary, sufficient to preponderate over the facts favourable to the Scottish domicile; and they have accordingly led him to the conclusion that Mr Lamont died domiciled in Trinidad."

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Scotland. He himself describes his visits as *visits*,—which implies that he was going from home to some other place; therefore, I do not think that upon these visits much can be rested, as inferring that Mr Lamont had changed the domicile he had acquired in Trinidad.

The second circumstance is, that Mr Lamont rented premises in Glasgow where he carried on business by the assistance of an agent. The fact that a party domiciled in one country, has an agent in another country, and pays the rent of premises in which his agent conducts his business, does not alter his domicile. These premises rented by Mr Lamont were for the purposes of his business. They were not for residence; and upon the occasion of his last visit before leaving Scotland Mr Lamont instructed his attorneys whom to employ as his agent in the event of the party then acting giving up his agency.

But the third and prominent circumstance in Mr Lamont's history is, that he purchased a property in Argyleshire on which he caused a mansion-house to be erected. That was in 1848 or 1849. The purchase was not a very large one, looking to the extent of his means. He paid L.13,000 for the estate, but after having made the purchase he found that the mansion-house was not in good order. He intended to have it repaired, but ultimately thought it wiser to have it rebuilt. But, though Mr Lamont made that investment, it does not appear that he had any intention of coming at any early period, or at all, to reside permanently on his estate. When in Scotland in 1849 and 1850 he visited it, but these were very transient visits. He lived more in hotels in Glasgow, and never made the estate a residence. The strong fact connected with this investment is, that the object Mr Lamont had in view in making it is completely disclosed through his whole correspondence,—it was to give employment and occupation to his nephew, whom he intended to be, and whom he did make his heir. That intention is expressed again and again. Now, an investment for that purpose is no indication of a change of domicile. There is no expression of intention by Mr Lamont at any after period to come to reside in this country. On the contrary, the statements in the record for the Crown are, that he expressed repeatedly, and up to a late period, his intention of managing his affairs at Trinidad. "He would die in harness." He "would not come home and lead an idle life." Therefore, there is nothing in this investment to prove that his domicile was other than in Trinidad.

The only point before us is the question of domicile. I therefore think that the interlocutor of the Lord Ordinary should be adhered to.

Lord Ivory.—I am of the same opinion.

Lord Curriehill.—I am also of the same opinion; and I may mention that I had the benefit, in another Court, of hearing this case fully argued; and, although on that occasion I gave no judgment, I formed a clear opinion upon the case,—the same as your Lordship has expressed.

Lord Deas.—I am entirely of the same opinion with your Lordships and the Lord Ordinary. It is true the deceased was born in Scotland; and, although he was an illegitimate son, his domicile of origin might have been easily enough revived had he wished to revive it,—especially as his conduct and character appear to have been such as to have placed him in a position, relative to his father's family, which it is pleasing to contemplate, and which might naturally enough have resulted in an equal desire to settle among them as if he had been born in lawful wedlock. But I cannot discover that, to the end of his life, he ever manifested any such desire or intention. He left Scotland for Trinidad when he was about twenty years of age. He became a successful planter and purchased extensive estates in Trinidad, and, for twenty-six years, he never once visited Britain. For twenty-two years more he continued actively engaged in the same pursuits as formerly; and, although, during the latter period, he frequently visited this country, more for the purposes of business connected with his Glasgow agency, than of seeing his friends, he never once expressed even a wish, far less an intention, either permanently to remain, or ultimately to return for the purpose of remaining. On the contrary, he expressed his resolution to continue his occupation in Trinidad to the end, and, as he expressed it, "to die in harness." He did die in harness in that island in 1850, being upwards of forty-eight years after he had first left Scotland. The single circumstance which, at first sight, might suggest a doubt is that, some years before his death, he pur-

chased the estate of Benmore, in Argyleshire, and built a house on it. But this circumstance is completely explained by his letters, which shew that the avowed object of that purchase, which was small compared to his means, was to give employment to his nephew James Lamont, and that the real object, although not, perhaps, at first disclosed to the nephew himself, was to make him proprietor of that estate, into the possession of which he had thus been installed. Indeed it is so clear that he never meant or desired to take this estate or mansion-house into his own hands that all the circumstances connected with them become only, when properly attended to, additional circumstances to prove that he had no intention whatever of ultimately quitting Trinidad and settling in Scotland. No. 172. — May 29, 1857. Holt v. Ritchie. — Young v. Mann.

THE COURT pronounced the following interlocutor:—"Refuse the prayer of the reclaiming note, and adhere to the interlocutor reclaimed against: Find the defender entitled to additional expenses."

ANGUS FLETCHER, Solicitor of Inland Revenue.—ROBERT AINSLIE, W.S.—Agents.

No. 173.

JOHN HOLT, Pursuer.—*C. Scott.*
JOHN RITCHIE, Defender.—*Logan.*

Process—Reclaiming note in a process of cessio—6 & 7 *Will. IV. cap.* 56, *sect.* 8—*A. of S., 24th December* 1838, *sect.* 13.

THE competency of a reclaiming note against a judgment of the Sheriff-depute of Midlothian refusing the benefit of cessio was objected to on two grounds,—1st, because it was not lodged till the eleventh day after the judgment was pronounced, the tenth day having been a Sunday[1]; 2d, because the delivery of a copy of it to the respondent or his agent was not attested by the execution of a macer, messenger-at-arms, or Sheriff-officer, and one witness, as required by the 13th section of the Act of Sederunt. May 29, 1857. — 2D DIVISION. Sheriff of Midlothian.

On the latter ground, the Court held the reclaiming note to be incompetent.

MACQUEEN & BRIDGEFORD, S.S.C.—MILLAR & CRAWFORD, S.S.C—Agents.

No. 174.

RODERICK YOUNG, Pursuer.—*Millar.*
HUGH MANN, Defender.—*D. F. Inglis—Macfarlane.*

Process—Jury trial—Issues—Freight.—An action for payment of freight was resisted on the ground of damage to the cargo in consequence of the leaky and unseaworthy condition of the vessel, and of delay and fault on the part of the pursuer. Form of issues to try the question.

THIS action was raised for payment of L.140 sterling, under deduction of L.20 paid to account, as the freight of the pursuer's vessel chartered by the defender in October 1853 to carry a cargo of potatoes from Nairn to Cardiff in Wales. June 4, 1857. — 1ST DIVISION. Ld Handyside.

The defence was, *inter alia*, that the pursuer's vessel was in a leaky and unseaworthy state when she was loading, and when she sailed went aground. That afterwards during the voyage she struck on a rock and was damaged, and detained through the negligence or unskilfulness of the pursuer, or those acting for him: that the cargo had been damaged in consequence of such unseaworthiness, and of the delay thereby occasioned, and that the pursuer was not entitled to claim the balance of his freight, he having taken no means whatever to save the interest of those concerned in the cargo.

The Lord Ordinary reported the case, on the issues, to the Inner House. The only difficulty was as to a counter issue proposed by the defender in

[1] Macdonald Hume v. M'Lellan, 21st February 1857, ante, vol. xvii. p. 477; Lothian v. Tod, 3d March 1829, Sh. vol. viii. p. 525.

No. 174. order to bring out his defence. It was in these terms :—"Whether, in consequence of the insufficiency of the said vessel, or through the fault or negligence of the pursuer, or others for whom he is responsible, the cargo of the said vessel was not delivered in the like good order and condition in which it was shipped, whereby loss was sustained on the said cargo, to the amount of the stipulated freight, or part thereof."

June 5, 1857. Gilchrist or Norris v. Gilchrist or Laing.

Millar, for the pursuer, now objected to the word "insufficiency." There was no precedent for such a phrase. The proper word to adopt was "unseaworthiness."

D. F. Inglis, for the defender, contended that he was not bound to take an issue of unseaworthiness,—this was a mere contract of carriage, and the insufficiency of the means of carriage was the true ground to assign. The vessel might be good and seaworthy, and yet unfit for carriage.

The Court suggested the phrase "leaky condition," which was agreed to.

The pursuer's issue was in the ordinary form, whether the defender had chartered the vessel, and was resting owing the balance of the freight.

The counter issues, as adjusted, were :—"1. Whether, in consequence of the said vessel having been in a leaky condition when she sailed, and having continued in that condition during the voyage, and through the fault of the pursuer in the conduct of the voyage, the cargo of the said vessel was damaged, and loss was sustained on the said cargo to the amount of the stipulated freight, or part thereof?

"2. Whether, in consequence of the said vessel having been in a leaky condition when she sailed, and having continued in that condition during the voyage, the cargo of the said vessel was damaged, and loss was sustained on the said cargo to the amount of the stipulated freight, or part thereof?

"3. Whether, in consequence of the fault of the pursuer in the conduct of the voyage, the cargo of the said vessel was damaged, and loss was sustained on the said cargo to the amount of the stipulated freight, or part thereof?"

James Bell, S.S.C.—Hagart & Stein, W.S.—Agents.

No. 175. Mrs Ann Crichton Gilchrist or Norris and Husband, Pursuers.
Margaret Gilchrist or Laing and Others, Defenders.—*Fraser*.

Process—Decree by default—13 & 14 *Vict. c.* 36, *sec.* 2.—A pursuer having taken an order to revise his condescendence, did not do so ;—*Held* that the defender was not entitled to take decree by default, but that the clerk was bound to transmit the process to the Lord Ordinary with a view to adjustment.

June 5, 1857. — 1st Division. Ld. Benholme.

In an action of mails and duties before Lord Benholme, the pursuer, in February 1857, took an order for revisal of his condescendence. The process was then borrowed up by his agent. The order was not obtempered, and the process was not returned, but was ultimately recovered by caption, and before it had been transmitted to the Lord Ordinary the defender moved for decree by default.

The pursuer did not appear to resist this motion, and the Lord Ordinary reported the case upon the point, whether he was bound to give decree as craved, or whether the process should not be first transmitted to him in ordinary course, and sent to the debate roll.

Fraser, for the defender ;—The pursuer has arrested the rents, and hence the importance of obtaining decree of absolvitor, and getting this action dismissed immediately. The procedure under the Act of 1850 in regard to the transmission of the record to the Lord Ordinary, was intended with a view to the adjustment and closing of the record between parties actively litigant, and was not imperative in such a case as the present, where one

of the parties had ceased to make appearance, and the effect of following it would merely be to create delay. No. 175.

June 5, 1857. Watt v. Watt.

LORD CURRIEHILL.—I had no doubt about this when in the Outer-House. If the parties are willing to close on summons and defences, the pursuer's consent must be endorsed on the defences. But if a revisal is moved for and allowed, and not complied with, the provision in section 2 of the Act of 1850 is quite explicit. The pursuer is not bound to appear, and although he does not, "the clerk to the process," without any motion to that effect, "shall transmit the same to the Lord Ordinary, with a view to the adjustment and closing of the record." The clerk here, the moment he got the process, ought to have so transmitted it. The subsequent course of proceeding pointed out by the Act must then take place. There is no difficulty in regard to it, and no option; and at this moment this process is irregularly here. It ought to have been on the table of the Lord Ordinary, and the defender should have had no opportunity of making such a motion as that reported to us.

LORD IVORY.—I concur in the reading of the Act of Parliament adopted by Lord Curriehill. The defender has only to take one or two steps more, and he will then get the action dismissed. To proceed now would be using great violence with the words of the statute. It is right that there should be a record closed in circumstances which shall bind even an absent party.

LORD DEAS.—When in the Outer-House I had this repeatedly before me, and I dealt with it in the way stated by Lord Curriehill. I do not think there is any irregularity here as yet. But the course pointed out by the Act of Parliament is, that the process shall be transmitted to the Lord Ordinary, and it is only after it has been so that it can be ascertained whether revisal was necessary or not. If parties fail to attend in chambers, or to satisfy the Lord Ordinary, he may put the case to the roll, and make an order, and then default may occur; but the defender must wait till the time arrives for ascertaining whether there is default or not.

LORD PRESIDENT.—That is the sound view of the Act. After the process is transmitted to the Lord Ordinary, if he conceives the record is not in a safe state to close, he may order an amendment, and if that order is not obtempered, a question may then arise. But the proper form of proceeding here is to transmit the process to the Lord Ordinary.

WILLIAM WALLACE, W.S.—JAMES FRASER GORDON, W.S.—Agents.

ARCHIBALD WATT AND MANDATORY, Pursuers.—*Macfarlane*—*W. Ivory*. No. 176.
JAMES WATT, Junior, AND THOMAS WATT, Defenders.—*D. F. Inglis*—*Moir.*

Process—Jury Trial—Proof by Commission—Statute 13 & 14 *Vict. cap.* 36, *sect.* 49.—In a reduction on the ground of facility, fraud, and circumvention, the Court was moved to grant proof by commission, the pursuer being resident in New York, and it being stated that much documentary evidence must be taken by commission in America at any rate. The defender demanded a jury trial, and said that he intended to insist on examining before the jury the pursuer, who was the party said to have been imposed upon;—*Motion refused.*

June 5, 1857. 1ST DIVISION. Ld Handyside. L.

THIS was an action at the instance of Archibald Watt, residing in New York, and Christopher Kerr, town-clerk of Dundee, his mandatory, against James Watt, junior, merchant in Dundee, his brother. It was now defended by Thomas Watt, his *curator bonis*. The action concluded for reduction of a decree of the Court of Session, obtained in absence against the pursuer on the 25th day of February 1840; and also of an account dated March 1838, and docquet attached to it, on which alone the decree was founded. With regard to the docquet, it was alleged "that the pursuer was prevailed upon and induced to subscribe said docquet or memorandum by fraudulent misrepresentation, and concealment and circumvention, on the part of the defender as to the state of matters betwixt them, at a time when the pursuer was weak and facile, and suffering under severe illness, and unable to attend to business." The summons also contained conclusions for ascertainment

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of the true balance between the parties, and for payment of the same, and for damages arising from the defenders' wrongous and illegal proceedings.

Tentative issues were lodged applicable to each conclusion.

The Lord Ordinary, on 25th February 1857, pronounced an interlocutor sustaining the relevancy of the pursuer's averments, and finding "that the pursuer is entitled to a proof to establish his averments regarding said docqueted account as being false and erroneous, and having been procured from him through facility and weakness on his part, and by falsehood, fraud, and circumvention on the part of the defender: And in respect that the pursuer has moved the Lord Ordinary, that, having regard to the particular circumstances of this case, the proof shall be appointed to be taken by commission, and to which the defender refuses to consent, Ordains the pursuer to box the record already printed, and any other parts of the process deemed necessary, to the Lords of the First Division, in order to the Lord Ordinary reporting the pursuer's motion to the Inner-House, in terms of the statute 13 & 14 Vict. cap. 36, sect. 49, and grants warrant for enrolment in the Inner-House rolls." *

The pursuer now supported his motion for a proof being allowed to be taken by commission, under sect. 49 of the 13th & 14th Vict. cap. 36, on the ground that a great part of the evidence was in New York; so that even if issues were sent to a jury, much of the evidence must at any rate be taken on commission. In these circumstances it would be most satisfactory that the whole should be taken in the same way. Although the summons did contain conclusions for damages, it was not, in substance, an action of damages, but one of reduction; therefore to grant the motion was quite within the discretion of the Court.

The defenders admitted that the matter was one for the discretion of the Court, if the pursuer limited his demand of proof to the reduction on the ground of facility. But he contended, that even that being one of the cases enumerated in 6 Geo. IV. c. 120, sect. 38, it was incumbent on the pursuer to show a higher degree of expediency to entitle him to a proof by commission than in an ordinary case. The pursuer, however, had not limited his demand for proof; and if he meant it to be applicable to all of the conclusions of the summons, even that for damages, as one of his tentative issues was, the Court had no power to grant it, for such questions were specially excluded by the 49th section of the recent Act. The fact that some of the witnesses were in America, and that it might be necessary that their evidence be ultimately placed in writing before the jury or the Court, did not affect the defenders' right to demand a jury trial. Farther, as much of the evidence would be of a documentary character, to that part, the difficulty on which the pursuer based his motion had no application; and, with regard to the oral evidence, the most important witness

* "NOTE.—The defender did not contest that the pursuer had not set forth relevant grounds to entitle him to an issue, as regarded the reductive conclusions of the action to set aside the docqueted account, and the decree of this Court resting upon it. The first plea in law for the defender has been accordingly repelled.

"The pursuer had lodged draft issues upon the whole cause, but under a protest that it was not a case to be sent to a jury. No discussion took place upon the terms of the issues, which were merely to be considered as indicating the pursuer's views upon the points on which he is ready to go to proof.

"The finding of the Lord Ordinary in his interlocutor is confined to the reductive conclusions of the summons, and it is so framed as to open the question for report to the Inner-House to take its direction, on the motion of the pursuer to be allowed a proof by commission.

"With regard to the other conclusions of the summons, they hang upon the pursuer's success in reducing the docqueted account. The Lord Ordinary thinks they ought to stand over to abide the issue of the reduction of the docquet."

in New York was the pursuer himself, the person said to have been imposed on, and the defender contended he was entitled to have him in the witness-box, to satisfy the jury out of his own mouth of his state of mind. It was not a matter of choice whether he should be here or not. The defenders would demand as a right that he, the most important of all witnesses, should be present. The only other very material witness—besides the defenders—the party through whom the fraud was said to have been committed, was dead. In these circumstances, the reason urged by the pursuer failed to make out a case for the Court departing from the ordinary rule of procedure.

No. 176. — June 6, 1857. Gourlay's Trustees v. Kerr.

Lord President.—It is, of course, for the pursuer, who asks that this case shall not go to trial before a jury, to shew good cause for our granting his motion. Such a case may perhaps be made out, and it is a material circumstance for consideration in the ordinary case, in determining whether we are to grant proof on commission, or send the case to a jury, that most or almost all of the witnesses are resident at a distance, or that all the witnesses on one side are so. But, on the other hand, an element that might guide us in an ordinary case, not enumerated as one appropriated for jury trial, would not necessarily guide us in a case that is one of those enumerated. Farther, this being a case founded on alleged fraud, the defender, who insists on the case proceeding in ordinary course of jury trial, has a strong ground indeed for maintaining that position; and the circumstance that many of the witnesses are at a distance is not of itself a sufficient reason for depriving him of that privilege. A great deal may also be said for the demand that the pursuer shall be examined personally. There may in many cases be an answer to that demand; but it is a consideration of importance that it has been made. Upon the whole, I think there are not grounds made out for departing in this case from the ordinary course.

Lords Ivory and Curriehill concurred.

Lord Deas.—I am of the same opinion. When a case involves questions more fit for the Court than a jury, it may be an additional reason for the case proceeding before the Court that the proof requires mostly to be taken by commission. But where the case is not of that nature, the answer to the proposal is that the same disadvantage of not seeing the witnesses attaches to the Court as to the jury; and if the question itself be, as here, a question of weakness and facility on the one side, and fraud and circumvention on the other, it is not the less appropriate for a jury, in preference to the Court, that the evidence consists mainly of written depositions. Here there is the additional element that the defender asserts his right to have the pursuer in the witness-box, not merely to explain the facts, but to enable the jury to judge whether he is a person weak and facile, and likely to have been imposed upon in the manner he alleges himself to have been. On the whole, I have no doubt that the case ought to follow the usual course.

The Court pronounced the following interlocutor:—"The Lords, on report of Lord Handyside, and having heard counsel for the parties, Find that the cause should be tried by a jury, and remit to the Lord Ordinary to proceed in this cause."

Morton, Whitehead, & Greig, W.S.—Ranken, Walker, & Johnston, W.S.—Agents.

Alexander Balfour and Others (Gourlay's Trustees), Pursuers.—*D. F. Inglis—Penney.* No. 177.

Christopher Kerr and John Kerr, Defenders.—*Macfarlane—Young—A. R. Clark.*

Process—Interpretation and application of verdict.—To an issue whether agents employed to sell railway shares did, in violation of their duty, purchase 217 of the shares, "or any part thereof?" A jury returned a verdict "for the pursuers, so far as regards 100 of the shares," . . "inasmuch as"—here followed an explanation of how they had arrived at that result; and "for the defenders as regards the remaining 117 shares." Each party claimed the verdict—the defenders, on the ground that the explanation was inconsistent with the first finding, and intended

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as a qualification of it, and that the facts contained in it should have led in law to an opposite result;—*Held*, that the explanation was perfectly consistent with the finding, and *motion* to have the defenders assoilzied in respect of the verdict, *refused*.

Question, whether the defenders' motion was competent, as the point was not raised on a bill of exceptions, and as the Court was not asked for a new trial.

Opinion, that an agent who, being employed to sell shares, purchases them for himself without communicating with his principal, acts in violation of his duty.

See ante, vol. xviii. p. 619.

This case went to trial in May 1857 upon the following issue:—"Whether, in September 1845, the said Christopher Kerr and John Kerr were employed by the Dundee Foundry Company, or those interested therein, and by William Gourlay's trustees, as their agents, to sell certain shares of the Dundee and Newtyle Railway Company, belonging to them respectively? and whether, in violation of their duty as such agents, the said Christopher Kerr and John Kerr did, as a company, or did jointly as individuals, in the said month of September or of October immediately following, become the purchasers of 217 of the said shares, or of any, and what part thereof?"

The jury returned the following verdict:—"Find for the pursuers, in so far as regards 100 of the shares referred to in the issue, and which belonged to the Foundry Company, inasmuch as these shares having been purchased by Messrs Christopher and John Kerr, for Mr Gabriel Hamilton Lang, and that transaction having fallen through, Messrs Christopher and John Kerr, as a company, in the month of October 1845, appropriated the said shares to themselves without communicating with the Foundry Company, by whom they had been employed to sell them; and find for the defenders in so far as regards the remaining 117 of the shares mentioned in the said issue."

The case now came before the Court on a motion by the pursuers to apply the verdict, and find them entitled to expenses; and on a counter motion by the defenders "to apply the verdict, and in respect thereof to assoilzie the defenders, to find them entitled to expenses," &c.

The pursuers founded their motion on the first part of the verdict, and they pleaded, that the defenders, in opposing that motion, must hold it to be—(1), unintelligible; or (2), so inconsistent in itself, that no effect could be given to it; or (3), to be a good verdict for themselves; unless (4), they admitted it to be quite satisfactory, and a verdict in favour of the pursuers.

But for the reason therein assigned, this last was the most reasonable view. Any difficulty arose out of the addition "inasmuch as," &c. These words could not be intended to express the extent of the verdict. That had been done already. They were therefore the reason for the verdict, and it was not said that they made it ambiguous, which, on the authority of Morgan v. Morris, would have grounded a motion for the verdict being corrected,—but it was said the reason assigned by the jury was a bad one, and one inconsistent with their finding. It was incompetent to state such an objection at the present stage of the case. The only way of getting the better of an inconsistent or unintelligible verdict was by applying for a new trial, not by entering up the verdict actually returned, contrary to the intention of the jury. There was truly no difficulty as to this first branch of the verdict.[1] It would have made no difference if the jury had introduced their verdict with the explanation, "the Kerrs purchased these shares for Lang, and therefore find for the pursuers." The words "inasmuch as" were here equivalent to "because." Where the jury intend to leave anything to the Court to determine, they usually find certain facts, and then stop short of finding for either party. Here they had not done so; they had drawn their own conclusions from certain facts which pressed upon their minds, and the Court were precluded from considering whether the facts proceeded on by the jury pro-

[1] Cleland v. Weir, 24th April 1849, 6 Bell's App. p. 402.

perly led to the result they had arrived at. That result, however, the pursuers argued, was a sound one. The transaction alluded to, it was said, "fell through." That was an ordinary phrase, the meaning of which was apparent. If the transaction fell through, Lang never became the purchaser. It went for nothing—and what follows? Kerr and Company "appropriated the shares without communicating with the Foundry Company, by whom they had been employed to sell them." Did they not thereby become the purchasers? and if the defenders now objected to that legal inference, and maintained that the reason thus assigned should have led to a verdict in their favour on the first branch as well as the second, the objection was too late; they ought to have asked a direction of the judge to that effect, and to make the objection competent it ought to have formed the subject of a bill of exceptions. The facts found were sufficient to justify a verdict for the pursuers. But even if they were not, there was no precedent for entering up a verdict in favour of a pursuer as a verdict in favour of the defender.

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The defenders, in support of their motion, argued;—A verdict "for the pursuer" was technically understood to be an affirmation of the whole issue, just as, on the other hand, a verdict for the defenders was negative of the whole issue. In the verdict under consideration there was no such general answer to the issue. The jury must be held to have said, that "inasmuch as what follows may be a finding for the pursuers, we find for the pursuers," or, "we find for them in so far as these facts go." But if these facts, to the extent of which alone the jury "find for the pursuers," do not answer the abstract question which was put to them, the Court could not enter up that verdict as affirming that abstract question. The jury had declined to say that the defenders were purchasers of these shares; but they say that the shares were purchased for an individual therein named, and that the defenders thereafter "appropriated them without communicating with" their clients. Was that a sale? The jury had not said that it was. They called it appropriation. But how did the defenders appropriate the shares? Was it a breach of trust? Was it criminal appropriation? Were the defenders purchasers from themselves as acting for their clients? There was no allegation of two sales, and the jury had found that the only purchase was a purchase for Lang. The fair inference was, that the shares were sold to Lang. He did not come forward to take them up. But he might come forward now and take them up. There was nothing in this action to prejudice his claim. What was the meaning of a sale "falling through," as applied to this concluded contract? An inchoate transaction might fall through, but the phrase could not apply to a completed sale, whereby the relation of buyer and seller was definitely constituted. That expression was simply unintelligible. Again, while the jury affirm the purchase of the shares for Lang, they do not say that the defenders purchased the shares, but that they appropriated them. It was a fraudulent purchase that the pursuers had alleged on record. The pursuers of the action undertook to establish certain things to the satisfaction of a jury with a view to getting judgment, and having failed to do so, the defenders were entitled to have the verdict so entered up as to lead to absolvitor. The finding was inconsistent with the plea of the defenders being the purchasers. As to the competency of their (the defender's) motion, there was no imperative rule that a verdict, "find for the pursuers," must necessarily be entered for the pursuer.[1]

At any rate, the verdict was ambiguous, and so could not warrant judgment for the pursuers, which must follow if the pursuers' motion were granted.[2]

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[1] Marianski v. Cairns, House of Lords, 1st July 1852, ante, vol. xv. p. 24.
[2] Adam on Jury Trial, p. 230.

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Lord President.—It appears to me that, in so far as regards 100 of the shares referred to in the issue, this is a verdict for the pursuers.

In dealing with the question put to them the jury have thought that there was ground for distinguishing between 100 shares and the remaining 117 shares. What the ground for that distinction was we need not enquire. The jury, considering that a distinction did exist, deal absolutely with 117 shares and differently with regard to the others.

The jury, in the first place, "find for the pursuers in so far as regards 100 of the shares." There can be no doubt at all that, if the verdict had stopped there, it would have been absolutely for the pursuers,—affirming everything in the issue in regard to the 100 shares. It could not be for the pursuers without affirming that the defenders "were employed to sell" the shares, and that, "in violation of their duty" as agents, they "did become purchasers of the shares, or part of them." Therefore it would have been a verdict finding all these things. But the jury go on to say, "inasmuch as," &c. To my mind the meaning of that addition is plain, viz. that Christopher and John Kerr made a transaction for behoof of Lang, which transaction "fell through." There can be no doubt about the meaning of these words "fell through." The transaction failed to take effect. These were the words of the jury, and I do not know that, by any other phraseology, they could have made their meaning clearer. They call it a "transaction," and they say it failed to take effect. What was the position of matters? The verdict does not say that this transaction was made directly between the pursuers and Lang. It says the reverse. What then? It failed to take effect. There was no sale to Lang. Christopher and John Kerr are the sellers of shares belonging to the Foundry Company; and, being so employed to sell the shares, they "appropriated the shares to themselves. I cannot understand how the jury could have intended to say anything else than that the defenders appropriated the shares as purchasers. The jury did not mean to say that the defenders feloniously or theftuously took the shares. They are, by their verdict, explaining how the defenders came to be purchasers. They became purchasers in this way: — the sale to Lang became abortive: the defenders then appropriated the shares to themselves; and it is in that way that the jury find for the pursuers. It might have been a question in law whether that way of acquiring the shares was a failure of duty on the part of the defenders. But the jury have no doubt about that, for they "find for the pursuers." At the trial, I was not asked to direct the jury that,—supposing the transaction to have been that the defenders had made the purchase honestly for Lang, that the purchase fell through, and became abortive, and that then the defenders themselves purchased the shares,—that would not be a purchase by the defenders in violation of their duty. I would have refused to give that direction; and, if that would have been a purchase in violation of their duty, what is described here is just the mode in which that purchase was attained. It would have been a different thing had the jury found that the defenders set about this at first, not for the purpose of securing the shares to Lang, but to themselves; and I was glad that the jury took that view of it, for, had they not done so, it would have led to a very different result in regard to the position of the defenders. But still the transaction described in the verdict was, to a certain extent, a violation of the defenders' duty as agents,—the thing pointed at in this issue. On these grounds, this does not appear to me to be an inconsistent verdict. It may be explained by reference to the issue before the jury.

Lord Ivory declined.

Lord Curriehill.—This case is attended with a good deal of nicety; but, on giving it my best consideration, I come to the same result as your Lordship, although, perhaps, not precisely on the same grounds. The verdict begins by finding for the pursuers. There can be no doubt whatever that these words mean that the defenders were the purchasers of the 100 shares to which it applies.

If the words which follow had merely expressed the reason why the jury find for the pursuers, no question could have arisen. Whether the reason was sufficient or not, a new trial not being asked for, we would have been bound to sustain the finding as a verdict for the pursuers. But, as I read the verdict, that is not the meaning of it. These words, "inasmuch as," do not express the reason of the finding, but are a qualification of it, and are equivalent to saying, "we find for

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the pursuers, by which we mean so and so." But, when I enquire what is the meaning of that qualification, I keep in view that the jury have found in favour of the pursuers; and, therefore, I enquire whether the special facts which they thus find are inconsistent with that finding. First of all, the defenders did make the purchase. It is found that they were the purchasers, not for themselves originally, but for another person; but, in making the purchase, although they were the mandatories of the sellers, they were also the mandatories of the purchasers; so that we have a finding of the jury that they are in a position of purchasers in the capacity of mandatories for Lang. Next, the jury find that that transaction proved abortive. I cannot read that finding in the sense in which it has been read for the defenders, that there was a completed sale in favour of the defenders as mandatories for Lang; because, if there had been such a completed sale, it could not have fallen through. That phrase may be ambiguous, but it cannot mean, at same time, an effectual and ineffectual transaction. The purchase made by the defenders in the character of mandatories of Lang proved abortive. Then the jury farther find that the defenders retained the shares in their own hands;—"they appropriated them." If they had thought proper they might have thrown them up; and I hold that appropriation to mean that they took the shares to themselves, making a purchase in their own favour; so that, although I read these words as a qualification or explanation of the general finding, it is not inconsistent with it. I therefore agree in thinking this verdict must be entered up in favour of the pursuers.

Lord Deas.—I agree in the opinion delivered by your Lordship in the chair, and the grounds of it. An objection is taken to the application of the verdict, so far as favourable for the pursuers, to which two answers are made,—the one, that the objection is incompetent, there having been no motion, *debito tempore*, for a new trial (which is not asked even now); and the other, that the objection is not in itself well founded. Now, I do not wish to give any opinion upon incompetency in a case in which, assuming the competency, I find sufficient grounds for judgment in favour of the party pleading incompetency, which is the position in which I find myself here. I think it clear that the objection taken is not well founded. The most stringent way in which the defenders can ask us to read the verdict, as to the 100 shares, is, I think, to read it as finding that Messrs Kerr (acting of course upon their authority to sell) having sold to Lang by a transaction which fell through, afterwards sold to themselves without communicating with their employers the Foundry Company now represented by the pursuers. Now, if Messrs Kerr had sold to themselves at once, the finding for the pursuer, as to these 100 shares, would, admittedly, have been unobjectionable; and what difference it can make that they first made a sale to another party which became abortive, I am unable to perceive. A sale which proved abortive was the same as no sale. If Messrs Kerr had required to go back to their employers for new authority to sell, this might have been different,—although, in that case, the sale would have been unauthorised. But the finding for the pursuers comprehends an affirmance of the authority to sell involved in the first branch of the issue. This authority was admittedly general,—to sell to anybody; and the only limitation of it was the limitation which the law implies—not to sell to themselves. The jury affirm the breach of legal duty; and to the direction they received in point of law no exception has been taken. The words "inasmuch as," which follow this finding for the pursuers, introduce an explanation which might possibly have destroyed the finding had the explanation been in its own nature calculated to do so. But I think the explanation is quite harmless,—importing as it does, nothing more than that, before selling to themselves, they had made an abortive attempt to carry through a sale to somebody else.

The Court pronounced the following interlocutor:—"The Lords having heard the counsel for the parties on the motions for them respectively contained in the notices Nos. 1427 and 1435 of process, they, in respect of the verdict returned by the jury on the issue in this cause, Find that, in September 1845, Christopher Kerr and John Kerr, mentioned in process, were employed by the Dundee Foundry Company, or those interested therein, and by William Gourlay's trustees, as their agents, to sell certain shares of the Dundee and Newtyle Railway Company, belonging to them respectively: Find

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that, in violation of their duty as such agents, the said Christopher Kerr and John Kerr did, as a company, in the month of October 1845, become the purchasers of 100 of the shares referred to in the issue, and which belonged to the said Foundry Company: And find, in so far as regards the remaining 117 of the shares mentioned in the said issue, that the said Christopher Kerr and John Kerr did not, as a company, or jointly as individuals, become the purchasers thereof, in violation of their duty as agents foresaid: Refuse the motion of the defenders to assoilzie them from the conclusions of the libel, in so far as these conclusions have reference to the before-mentioned 100 shares, which belonged to the said Foundry Company: *Quoad ultra*, and before further answer as to either of the said motions and the whole remaining points of the cause, appoint parties to be heard, and the cause to be put to the summar roll."

JOHN MACANDREW, JUN., S.S.C.—MORTON, WHITEHEAD, & GREIG, W.S.—Agents.

No. 178.

ROBERT FERGUSON, Pursuer.—*Penney—J. M. Bell.*
DAVID METHVEN, Defender.—*D. F. Inglis—Patton.*

Process—Jury trial—Issues—Wrongful use of subjects let—Construction of lease by usage.—In 1714 the clay on an estate was let for the purpose of a brick and tile manufactory. In an action against the tenant raised to stop the application of the clay to purposes alleged not to be authorised by the lease;—*Held*, that the action was in vindication not of the lease, but of reserved rights, and therefore that the pursuer was not bound to take an issue whether the defender's acts complained of were "in violation of the contract;" but whether the defender "wrongfully took and used the clay;" (2) that in order to let in a proof (with a view to construing the lease) that the use of the clay complained of was fortified by usage and by acquiescence, counter issues were not necessary.

Form of issues adjusted to try the question.

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1ST DIVISION.
Lord Neaves.
C.

ROBERT FERGUSON of Raith, proprietor of the barony of Abbotshall, in the county of Fife, brought an action in January 1855, against David Methven, brick and tile manufacturer, to have it declared that he, the pursuer, was the owner of the clay within the barony, and that his right of property was subject only to the rights and privileges conferred upon the lessee by a lease dated 8th May 1714, between Mr Andrew Ramsay, then of Abbotshall, and William Robertson and William Adam, their heirs and assignees. The action contained declaratory conclusions to the effect that the defender, as in right of the said lease, had no power or privilege of taking away clay "excepting for the tile and brick manufactory in Linktown, as referred to in the said lease, and during the standing of the said manufactory, and subject to the conditions specified in the lease," and particularly, that he had no right of taking clay "for the uses or purposes of any pottery work, or of any persons employing the said clay in carrying on such pottery work, or for being used in the making of pottery ware of any description;" and therefore the action concluded for interdict against the defender so using the clay. There was a farther conclusion against the defender selling the clay to third parties, but it gave rise to no discussion, as it was not resisted.

The lease referred to bore to be granted by the then proprietor of Abbotshall "during the standing of the manufactory after mentioned, to the said William Robertson and William Adam, and their co-partners in the said manufactory, and their heirs and assignees," and it let and granted "the liberty and privilege of digging, winning, and away-taking clay in any place within the barony of Abbotshall they shall think fit for a tile and brick manufactory, to be erected by them in Linktown, excepting always from the said privilege the houses, yard, and parks belonging to the said

Mr Andrew Ramsay, with the feuar's properties in Linktown; and also any part or portion of the said barony that may anyways damage or prejudice the said Mr Andrew Ramsay his mills or coal-works," &c.

The pursuer averred, in articles 7 & 8 of his condescendence, that the defender "is now, and has been for some time past, in the wrongous and illegal practice of away-taking clay from the said barony of Abbotshall, and using it for other purposes than those which alone are warranted by the said lease. *Inter alia*, he has so taken away and used quantities of the foresaid clay, for the purposes of a pottery work, which is situated in the vicinity, of which the defender has become the proprietor or occupant, or in which at least he has a large interest. It is believed that the defender uses imported clay and various other articles at said pottery; but he also uses quantities of the foresaid Abbotshall clay for pottery purposes. Pottery ware is an article wholly different from bricks and tiles. It is made on different premises from those in which the defender carries on his foresaid manufacture of bricks and tiles. Different implements, materials, processes, and workmen, &c., are employed in making it, and it constitutes a separate manufacture. It was not in the contemplation of the parties to the foresaid contract of lease of 1714, and is not included within said lease. Moreover, the defender has been, and now is, in the wrongous and illegal practice of selling quantities of the said Abbotshall clay to third parties, without either asking the leave of the pursuer to do so, or accounting to him for the price of the clay thus wrongfully sold."

The defender's statements in articles 3, 4, and 5 of his condescendence, were as follows:—"3. From the earliest period, at least for more than eighty years past, the granters and their successors, under the deed of 1714, in virtue of the grant, used the clay for purposes to which it was adapted, and, in particular, for the manufacture of what is called brown ware. It is the universal custom at all brick and tile manufactories to apply the clay where it is capable of making these articles, and when these articles are in demand to apply it to this manufacture. In point of fact, in all the older brick and tile works the ware is manufactured, and is held and considered as a proper manufacture of the work. The application of clay to brown ware, complained of, is an application which, according to the universal usage and understanding of the trade, is held to be a proper application in a brick and tile manufactory. 4. The brown ware was, for upwards of fifty years, made from clay taken from the barony lands, and in buildings on property in Linktown, belonging to the defender and his ancestors. On the same property the brick and tile manufactory stands—is connected therewith—forms a part thereof—and the whole are situated in the village of Linktown, and are within the barony of Abbotshall. There is also carried on in buildings upon said property a manufactory of pottery ware. This ware is made from clay and other materials imported from other quarters, the clay within the barony contained in the grant not being adapted for the purpose of manufacturing these articles. 5. The pursuer and his ancestors, the proprietors of the barony, were perfectly aware of the use made of the clay from the barony of Abbotshall, in the manufacture of brown ware, and they have received and discharged the rents due under the contract, in the knowledge of such use, and without protest or objection of any kind. The defender and his authors have been recognised by the pursuer and his predecessors as having right under the lease, and they have demanded and received the annual payments on that footing. In receiving and acknowledging receipt of these annual payments, they received and discharged the rents or annual payments as for clay known by them to have been applied in the manufacture of brown ware; and this has continued for greatly more than the prescriptive period."

In October 1855 the pursuer raised a second action, which was after-

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wards conjoined with the first, concluding to have it found that the defender had no power under his lease to make "pipes and collars, or pipes or collars, for the purpose of drainage or otherwise."

The pursuer pleaded;—That the defender's right being founded on the lease of 1714, which conferred no power or privilege to do any of the things complained of, there were no *termini habiles* to support any plea of prescription or of homologation.

The defender pleaded;—That according to the just construction of the grant of 1714, he was entitled to use the clay within the barony of Abbotshall, for such purposes as were usual in brick and tile manufactories. And it being according to universal usage to make brown ware at such manufactories, there were no good grounds on which the demand in the summons could be supported. The usage for greatly more than the prescriptive period, under the pursuer and his ancestors, was conclusive as to the construction of the grant, even if it were otherwise open to doubt. The application having been continued for greatly more than the prescriptive period, could not now be challenged. The pursuer and his ancestors having homologated the acts of the defender and his predecessors in right of the grant in the use of the clay, were barred from any such challenge as was now attempted.

The following issues were proposed by the pursuer:—

"It being admitted that the pursuer is proprietor of the barony of Abbotshall, in the parish of Abbotshall, and county of Fife, and that the defender is in right of a contract of lease, dated 8th May 1714, of which No. of process is an extract:

"1. Whether the defender has taken clay from the said barony of Abbotshall, for the purpose of using the same in the manufacture of pottery ware, being a purpose not authorised by the said contract of lease?

"2. Whether the defender has taken clay from the said barony of Abbotshall, for the purpose of using the same in the manufacture of pipes or collars, to be employed in drainage or otherwise, being a purpose not authorised by the said contract of lease?"

The following issues and counter issues were proposed by the defender:—

"1. Whether the defender has, in violation of the said contract, taken and used clay from the said barony, for the manufacture of pottery ware?

"2. Whether the defender has, in violation of the said contract, taken and used clay from the said barony, for the manufacture of pipes or collars, to be employed in drainage? Or,

"1. Whether, for forty years before the 17th October 1855, the defender and his predecessors, in right of the said contract, took and used clay from the said barony, under and in virtue of the said contract, in the manufacture of brown ware?

"2. Whether the pursuer and his predecessors, the proprietors of the said barony, or any of them, acquiesced in and homologated the taking and using of clay from the said barony, for the manufacture of brown ware, by the defender and his predecessors, in right of the said contract?

"3. Whether the pursuer or his predecessors, the proprietors of the said barony, acquiesced in and homologated the taking and using of clay from the said barony, for the manufacture of pipes, or pipes and collars, for drainage, by the defender, or his predecessors, in said lease?"

On 27th February 1857, the Lord Ordinary reported the cause on the adjustment of the issues.*

* "NOTE.—In the course of adjusting the issues in this case, certain points of law have been discussed, particularly in connection with the pleas in defence, which it may ultimately be necessary to dispose of, but on which the Lord Ordinary has not found that he could advantageously give a decision at present. He will, however, endeavour to explain their nature, and to state his own views regarding

The pursuer now pleaded;—That the question was, whether the tenant's operations were "authorised by the lease?" The issues proposed by the No. 178.

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them, for the assistance of the Court, in case it should be found that they properly arise in the final adjustment of issues. Ferguson v. Methven.

"The clay in the pursuer's lands was let to the defender's authors 'for the tile and brick manufactory' to be erected by them, and the lease is granted in somewhat singular terms, 'during the standing' of the manufactory.

"It seems clear that the clay was thus let for a special purpose, and the only questions between the parties regard the limits of the defender's rights. These conjoined actions have been raised for determining those questions.

"It is not disputed by the pursuer that the defender can take clay for the manufacture of bricks and tiles; but it is alleged, in the first of these actions, that he is also taking it for a pottery work; and the pursuer says that pottery is an article wholly different from bricks and tiles; and he seeks, accordingly, to interdict this use of the clay, as beyond the limits of the lease. The defender admits that he uses the clay for the manufacture not of pottery but of 'brown ware,' and he makes averments as to that article which require attention.

"It may be doubted whether on the record, in the action as to pottery, the parties have come to issue on the matter with all the precision that could have been wished. The pursuer does not mention 'brown ware' in his condescendence at all, and when he speaks of it in answer to the defender's statements, he does not say that it is pottery, though it is presumed he means to take that view at the trial, and to maintain that the manufacture of 'brown ware' would entitle him to verdict upon an issue as to the improper manufacture of pottery. The first issue which the pursuer proposes relates to this matter, but makes mention only of pottery ware in general terms.

"In so far as regards the making of pottery other than 'brown ware' the only dispute between the parties is one of pure fact. The defender denies that he has used the clay for pottery in that sense, and does not attempt to justify it by usage, in any other way.

"Again: In so far as the defender is to maintain that 'brown ware' is not pottery' he seems to require no counter issue. If he is right in that view of the fact, then the pursuer will not be entitled to a verdict on his issue as to pottery, by proving that the defender has used the clay for brown ware, even if brown ware were in itself an improper use of the clay.

"The difficulty in the shape of the case seems only to arise in so far as regards the supposition that 'brown ware,' which the defender admits he has made, is pottery in the sense of the pursuer's issue. In that view the pursuer would be entitled to a verdict, if pottery, including brown ware, was not within the lease, and if there is no special defence to justify the making of 'brown ware.'

"The defence here may arise either on the construction of the lease, or apart from its construction. If the words of the lease letting the clay, do in their popular technical acceptation imply the making of 'brown ware,' or if that manufacture a known or universal accessory of a tile and brick manufactory, as seems to be alleged in the defender's statement, Art. 3, he may be entitled to a verdict; but will need no counter-issue to cover that case. Perhaps also, he would need no counter-issue, in so far as he is to plead that possession under the lease will regulate affect its construction, though this point may require consideration in adjusting the issues.

"But the defender seems to point at another and broader defence, and to maintain that the long usage of making brown ware may, of itself, be effectual to give a use of the clay for that purpose, even although it could not be held that the words the lease admit of a construction to that effect. The Lord Ordinary thinks that such a plea is not well founded. If the lease is incapable of a construction that will include the disputed manufacture, he does not see how a new lease, or a collateral lease of clay for other purposes could be created out of any usage, however long continued. Such a usage might import for the past a permission to take clay, *de anno in annum*, for the purpose referred to, and might thus bar a claim for damages, or any other claim of a retrospective kind. But out of such a usage to grant a lease not contained within the terms of the existing contract of parties,

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defender for the pursuer, speaking of "violation of the lease," did not raise the question fairly; for there was no express injunction in the lease against so taking clay. It was quite enough that it was not authorised.[1] In Gillespie v. Russell, the essential question put was, whether the tenant was doing what the lease did not authorise, and that was what it was now proposed to put in issue—this not being like a case of miscropping, where rotation was prescribed, and where, therefore, the acts complained of were in direct violation of the lease.

Farther, usage could be founded on by the defender only to the effect of construing any flexible terms in the lease, but for that purpose he required no counter issue. He could adduce every proof of usage without it. His object, therefore, in asking this counter issue, was to push the plea of usage beyond the construction of the lease, and for the purpose of rearing up a right to a heritable estate, or interest by mere usage and possession, even without a title.

The same objection applied to the second counter issue. Whatever rights the lease carried, it carried fully without homologation, therefore that plea must be proposed to be used to carry something outside the lease. Its object seemed to be to establish that because for a number of years the defender had taken clay for a purpose not provided for by the lease, therefore he was entitled to continue to do so. But the fact of the landlord taking the rent due for the legal uses of the clay could not be pleaded as homologation of the illegal use of it in all time coming. He was only taking payment of a just debt, which could not be turned to his disadvantage. As to the allegation that the landlord was aware of the various purposes to which the clay was applied, if proved, it only amounted to a case of tolerance, which might bar a claim of damages or accounting, but could not rear up a privilege *de futuro*. A counter issue for the purpose of construing the right was unnecessary. But it would be most dangerous to allow such an issue, if its object was to create a right on the ground of acquiescence. The only question between the parties was one of construction.

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and this, too, for a prospective period of almost indefinite duration, seems inconsistent with the rules of law. A lease for a term of years can only be constituted *scripto*, and usage can confer no right for the future without a title, so that, if the terms of this lease are unambiguous and inconstruable, and must be held to be exclusive of the manufacture of pottery, or of brown ware, there seems no foundation on which any other kind of lease can be rested.

"The same view substantially may be taken of the defender's plea of homologation or acquiescence. If the terms of the lease can by no possible construction include the making of brown ware, there is nothing to homologate, and acquiescence seems only capable of supporting what is past without giving a warrant for any new and future operations.

"It thus appears to the Lord Ordinary that the only relevant pleas of the defender are those which either go to the simple matter of fact, or are such as may affect the construction to be given to the terms of the lease. But it may be doubted whether any of the defender's pleas are so stated on the record, as to admit of being safely repelled at present, or whether the questions raised do not affect the adjustment of the issues which the Court only can settle.

"The remarks above made apply only in part to the second action and second issue for the pursuer. The defender here does not seem to plead any usage except such as can affect the construction of the lease, but the plea of homologation is stated here also, and the element of usage mixed up with it.

"Upon the whole, it will be for the Court to consider whether there are any questions of law that can be determined with advantage before trial, or what course in this respect it would be best to follow."

[1] Gillespie v. Russell, 14th Nov. 1854, ante, vol. xvii. p. 1.

Pleaded for the defender;—What the lease contemplated was a manufactory, carrying on all the business of a tile and brick manufactory, known at its date; and if brown ware, as he alleged, was part of such a business at that time, then the lease clearly contemplated that clay should be taken for that purpose, and his so taking it was not a contravention; and unless it could be shewn that the privilege was limited to the taking of clay for the uses of a brick and tile manufactory, according to the pursuer's notions of what that was, or that there was an express or implied prohibition against so using the clay, the pursuer had no case. The contention between the parties was, whether this was within the lease or not, and therefore that question should be put to the jury, in the terms suggested by the defender. The issue proposed by the pursuer did not put the main question to the jury as such, but merely as a member of a dependent part of the sentence.

As to the counter issues, the defender's statement was that the right to use clay in a certain way was fortified by use for forty years, and even although wrong in construing the lease as originally contemplating the manufacture of brown ware as part of the ordinary business of a brick and tile manufactory, still, if there has been such continued use for forty years, the defender would be entitled to a verdict under this issue. He was not trying to establish a right which was contradictory of the contract. With regard to the second issue, this was exactly the class of cases to which acquiescence applied. At the same time, if this was only a question of construction, and it was understood that that part of the defence was not excluded, counter issues might not be necessary.

After consultation,

Lord President.—We think that in this case there is no necessity for counter issues. The matter resolves into a question of construction, and the defender says that, if so, he does not press for a counter issue. We are also of opinion that the issue proposed by the pursuer is not rightly framed, and that the issue proposed by the defender to be taken by the pursuer is more suitable. But perhaps some other better expression may be found than "violation of the contract," and, therefore, we think that amended issues should be put in.

Lord Deas.—While I quite agree, I do not wish it to be understood that, in my opinion, this is a case in which there ought not to be counter issues if the defender had pressed the point, but, as he does not, we need not go into that question.

On 3d June the case was again called. The pursuer now proposed to take the following issues, prefixing the same admission as before:—

"1. Whether the defender has taken clay from the said barony of Abbotshall, for the purpose of using the same in the manufacture of pottery ware, without power to that effect under the said contract?

"2. Whether the defender has taken clay from the said barony of Abbotshall, for the purpose of using the same in the manufacture of pipes, or pipes and collars, to be employed in drainage or otherwise, without power to that effect under the said contract?"

The defender then contended that the pursuer's issue must put the question whether the defender had *used* the clay, not merely whether he had taken it for the purpose of using. Farther, that unless he, the defender, had committed a legal wrong, and had done injury to the pursuer, there was no ground of action, and the pursuer had no title to complain, therefore it was indispensable that these two qualities should be added to the issue. What was complained of was not the taking clay, but the using it in a particular manufacture, so that the mere absence of power to that effect in the lease was not sufficient. The act must be unlawful, either at common law, or in respect of the contract. If it was an invasion of the pursuer's right as owner of the estate, it must be a legal wrong, and so injurious to him. If not

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an invasion of the pursuer's right, it was not a legal wrong, and not injurious, and therefore not a thing that he could complain of.

Penney, for the pursuer. — There can be no difficulty in adopting the word "using" instead of "for the purpose of using," but the defender objects that the whole conception of the issue is erroneous, because the issue does not raise the question of wrong and injury. This was not, in the correct sense, a case of wrong, but substantially the case of Torbanehill. It was much the same thing as if the landlord had let coal and the tenant had worked ironstone. It was not now the practice to take an issue of "wrong" in such a case as the present. In the case of failure to implement a contract of sale, or failure to deliver, "wrong" was never inserted. And so here, if a party having a lease takes the subject of it for a purpose not intended by the lease, his so acting is in one sense a wrong, but not in the sense in which that word is usually applied. A proprietor was entitled to challenge the actings of his tenant if he proved that the tenant was doing something which by his lease he had no right to do.

Lord Deas.—But all this is on the assumption that usage is not an element in this case,—that the averment of contravention of the lease is sufficient. Usage appears to me to be the principal element in this case.

Penney.— Usage is only of importance as construing the contract. If usage is made out to construe the contract in favour of the tenant, he establishes his right to do this thing.

Lord Deas.—If the defender prove usage, I cannot understand how the pursuer's case can be proved unless the issue of "wrongfully" be taken.

D. F. Inglis.—The cases in which the use of the word wrongful has been discouraged have been cases in which the issue necessarily put to the jury the wrong which was complained of,—*e. g.* failure to implement a contract of sale,—the issue there being whether the defender sold and failed to deliver. That was a statement in so many words of a legal wrong. But there was no legal wrong on the face of the proposed issue at all. What was complained of here was not breach of contract. It was something out of this contract altogether. There was no relevant complaint unless it were stated that there was an invasion of the pursuer's right of property. The term "injury" was appropriate for expressing the liability of one person to another in reference to a subject which entitled a person to apply for a legal remedy.[1] This was not a case of "damage;" therefore there must be introduced into the issue both the elements of invasion of the pursuer's right and injury to him for which the defender was responsible, otherwise the question put to the jury was simply a fact without any quality at all, viz., the taking of clay, which might be most innocent in itself.

Penney.—The pursuer's case is on the contract, and on that alone. If the pursuer made out that the defender had no right under the lease to do this act, then the pursuer made out his case. The word "wrong" ought not to be in the issue. There was no objection to the words "violation or contravention of the contract." But it was not a question of wrong that was to be tried.

Lord President.—Is it quite clear that the pursuer's case rests on the contract? The defence rests on it; but the pursuer says that, without any right at all, the defender has taken the clay. The defender says "no: the contract allows me;" and, consequently, in articles 7 and 8 of the condescendence, the allegation is, that the defender had "wrongously taken away." Is it not "wrongous" if the defender takes clay without authority? I think the issue should be, whether, during cur-

[1] Findlater v. Duncan, M'L. and Rob., p. 926, Lord Cottenham's Opinion, and p. 934.

tain years, "the defender wrongfully took and used, for the manufacturing of brown ware, clay from the barony of Abbotshall." No. 178.

LORD DEAS.—I think that the proper and usual way of putting this issue is, whether, "in violation of the contract," &c. June 9, 1857. Fraser.

D. F. Inglis.—I do not and never did object to that.

LORD IVORY.—This action is not on the lease, but on the reserved right. I think the question is well put in the issue suggested by the Lord President.

LORD CURRIEHILL.—I also think that the action raises a question, not on the contract, but on the invasion of right.

LORD DEAS.—When the case was formerly before us I was disposed to think there ought to be a counter issue. But this was not insisted in, and, looking to the practical difficulties, it was thought the better way was to try the whole question on issues for the pursuer. Before we can know what these ought to be, we must make up our minds upon the question whether this is a lease which admits of construction. Now I understood all your Lordships to be of opinion at the former advising that the lease was one which might be construed by what had followed on it. If this were not so, the question would simply be, whether the defenders did the thing complained of? For instance, if the lease was of coal, whether they had wrought ironstone. But here some expression should be used to raise the question of construction. Perhaps the word "wrongfully" is the least calculated to mislead; and the only difficulty is, whether, without some farther expressions, you have the question sufficiently connected with the contract?

The following issues were now adjusted:—

"It being admitted that the pursuer is proprietor of the barony of Abbotshall, in the parish of Abbotshall and county of Fife, and that the defender is in right of a contract of lease, dated 8th May 1714, of which No. 8 of process is an extract:

"1. Whether during the years 1852, 1853, and 1854, or any of them, the defender wrongfully took and used, in the manufacturing of pottery ware, clay from the said barony of Abbotshall?

"2. Whether during the said years 1852, 1853, and 1854, or any of them, the defender wrongfully took and used, in the manufacturing of pipes, or pipes and collars, to be employed in drainage or otherwise, clay from the said barony of Abbotshall?"

DUNDAS & WILSON, C.S.—HILL & ROBERTSON, W.S.—Agents.

EVAN BAILLIE FRASER, Petitioner.—*Crichton.* No. 179.

Minor—Tutor-at-law—Pupils Protection Act—Special powers.—Held, 1st, that it is competent, under the Pupils Protection Act, to grant special leasing powers to tutors-at-law. 2d, (*diss.* Lord Cowan), that they should only be granted where a case of necessity is made out.

Circumstances in which the Court refused to grant special powers to a tutor-at-law of two minors to enter into leases which should endure beyond the period of the last pupil attaining minority.

HUNTLY GEORGE GORDON DUFF, Esq. of Muirtown, died in 1856, leaving a widow and two daughters, one born in June 1848, the other in August 1856. In November 1856, Evan Baillie Fraser, Esq. was appointed their tutor-at-law. He reported to the Accountant of Court that the deceased had a considerable moveable property, which, however, he understood would not be sufficient to meet his debts. The rental of the estate, including the mansion-house, if let, amounted to L.930, out of which the widow was secured a jointure of L.400 a-year. June 9, 1857. 2D DIVISION. L.

It was necessary to grant leases, in the ordinary administration of the estate, for subjects of which the former aggregate rent had been L.375 a year. The tutor-at-law had advertised these, and got offers, but nearly

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June 9, 1857. Fraser.

The subjects were (1), a mill, of which the lease had expired; the rent had been L.125 a-year, and the outgoing tenant was entitled to meliorations to the extent of upwards of L.400, and the buildings were in a very dilapidated condition. The highest of several offers now obtained was L.120 of rent, on condition of L.200 being spent upon the buildings, and a lease being granted for eighteen and a half years from Martinmas 1856, with a break at the end of five and a half years in favour both of landlord and tenant. On the other hand, the tenant was to pay L.400 for the machinery and buildings as they stood.

(2.) A farm, formerly estimated at L.100 a-year, but for which L.140 of rent was offered, on condition of a lease of eleven years being granted.

These two subjects were provisionally let by the tutor-at-law, subject to the sanction of the Court being obtained.

(3.) Smaller holdings, for which the tutor-at-law was of opinion that an increase of rent could be obtained, if he had authority to grant leases of eleven years.

The Accountant of Court reported that in his opinion the tutor-at-law ought to have authority granted as he desired.

Mr Fraser then presented a note to the junior Lord Ordinary craving authority. His Lordship remitted to Mr Niel Maclean, land surveyor, to report. He said, the proposed arrangement regarding the mill "appears to me to be not only fair, but advantageous to the estate." (2.) "I consider the rent of L.140, at which this farm has been provisionally let, fully as much as it is worth." (3.) Of one of the other subjects he reported, "I think there cannot be a question as to the propriety of the offer being accepted;" and of the other two, "I should think that by granting leases, say of eleven years endurance, there can hardly be a doubt of their fetching better rents than they now pay."

The Lord Ordinary reported the case to the Second Division, and stated that he thought it clearly for the advantage of the pupils that the powers craved should be granted.

Crichton, for the petitioner, referred to the cases of Kincaid, 5th July 1856, ante, vol. xviii. p. 1208; and Waddell, 19th February 1851, ante vol. xiii. p. 739.

Lord Justice-Clerk.—The Pupils Protection Act brings tutors-at-law within its operation, so far as procedure goes, but it says nothing directly as to their powers. Our difficulty as to these cases has not been apprehended in the other Division. It is not as to the competency but as to the propriety of granting special powers to tutors-dative. I think if we granted such powers as are here sought, we should immediately be made administrators for every such estate in the country. We must consider, before entering upon a course of practice which is certain to lead to such a result.

On a subsequent day,—

Lord Justice-Clerk.—I have no special observations to make upon this case, but I think it right to say that in the case of Kincaid, the First Division seem to have mistaken what we did in the previous case of Waddell. They thought we considered it doubtful whether it was competent for the Court to entertain a petition for special powers from a tutor-at-law as coming under the Pupils Protection Act; but the only question on our minds was, whether or not the Court should, by granting special powers, undertake the administration of the affairs of pupils who have regularly appointed tutors-at-law. The criterion which should guide us seemed to be, has a case of necessity been made out? for there may be cases of necessity where the Court ought to interfere, whether for the protection of the property or the actual sustenance of the pupil.

In the case before us we have a mere question of expediency to deal with,

peculiarity of the case being that one of the pupils is within three years of being a minor, while the other is but a few months old. This is the great difficulty of the case. But this gentleman, Mr Fraser, has taken the office, and he must just bring his best discretion to the exercise of it,—it is not for the Court to interfere without necessity. It is needless to go into his difficulties in detail; but, on the whole, I am of opinion that a case has not been made out for our granting the powers craved.

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Lord Murray concurred.

Lord Wood.—I do not think there can be any doubt as to the competency of the Court to deal with this matter. But the question is, whether any necessity for our interference has been made out? I think none has, and that the tutor-at-law must exercise a sound discretion. The difficulty here is, how is this tutor to manage this estate? One of the pupils will be a minor in three years. Now to grant a lease beyond the three years would be to exceed his powers; for, as tutor, he cannot interfere in a manner which shall affect his pupil after ceasing to be in pupilage. I admit the difficulty; but, as no case of necessity has been made out, I do not think we should interfere.

Lord Cowan.—I cannot doubt the competency of the Court entertaining an application of this sort from a tutor-at-law, any more than from a judicial factor. It seems to me that the Pupils Protection Act puts the two upon the same footing so far as applications for special powers to this Court are concerned. I consider that, in disposing of and judging of such applications, we should act on the same principles, whether the application be by a judicial factor or by a tutor-at-law. This seems to me to have been the view of the other Division when they had the recent case of Kincaid before them.

As to this particular case, I am of opinion that the powers asked ought to be granted, in regard at least to some of the matters mentioned in the report of the Accountant of Court, and of which he approves. The pupils are two heirs-portioners—one born in 1848, the other in 1856; so that the tutor's powers as regards each expires respectively in sixty and sixty-eight, and the leading object of this application is to get power to grant leases to endure till this latter period, when both the pupils will have reached minority. Looking to the great expediency of granting the leases, and the special condition of the subjects, especially of the mills, when the tutor-at-law comes forward and says, "I have power to give a lease as to one of the pupils for eleven years, but no power as to the other beyond three, and it is essential for the interests of the estate that I should be able to grant leases for eleven years, and therefore I come and ask for authority to do so," I think we ought to grant the powers asked, there being an unexceptionable application as regards competency, and full power in the Court to grant it if deemed expedient.

Petition refused.

Messrs Tait & Crichton, W.S.—Agents.

John Christie Foulds, Pursuer and Respondent.—*D. F. Inglis—A. R. Clark.* No. 180.

John Thomson and Peter Burn, Defenders and Advocators.—*Macfarlane—Young.*

Agent and Principal—Broker's account—Gaming and wagering—8 & 9 *Vict. c.* 109, sect. 18—*Pactum illicitum.*—Where a party employs a broker to buy and sell stocks which he neither possesses nor intends to take up, speculating on rises and falls in the market, and hoping to settle by payment of differences;—*Held* (1), that such is not gaming and wagering in the sense of 8 & 9 Vict. c. 109, sect. 18, and the broker entitled to recover from his employer both advances made in the course of the transactions, and his ordinary commission and business charges; (2), that to constitute gaming and wagering in the sense of the statute, there must be two parties to the contract opposed to each other, each intending the transactions shall be illusory, and neither of them bound to deliver or accept the shares.

Quaere, Whether a broker employed to carry on gaming transactions would be entitled to [illegible] payment of his account against his principal.

Quaere, Whether the Act 8 & 9 Viot. c. 109, applies to Scotland.

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Sheriff of Lanarkshire.
I.

John Christie Foulds, accountant and sharebroker in Glasgow, raised the present action against Thomson and Burn for payment of "the sum of L.1017, 17s. 10d., being the balance of the price of certain railway stock and shares purchased by the pursuer in name and for the joint behoof of the said defenders, per account, commencing 11th October 1853, and ending 30th November 1854." He alleged that the defenders had been in the practice of dealing in railway and other stock on joint account, and had employed him as their agent in buying and selling their shares and stock; and that he, acting upon the joint and several authority and instructions of the defenders, entered upon the transactions, and made the sales and purchases detailed in the account. That down to the 16th of January 1854, at the close of each transaction, or series of transactions, he furnished each of the defenders with a specific statement of it, and that neither of them ever expressed any dissatisfaction; but they, in January 1854, suggested to him, that in future he should keep a pass-book for them, open to their inspection, in which he should enter their future transactions. This plan he thereafter acted upon. The defenders, he alleged, had frequently inspected the book, and they had never objected to any of the entries. The balance arising on the whole transactions was the sum sued for.

With regard to the defender Thomson, it was alleged, though not admitted, that he "a short time ago called a meeting of his creditors, submitted to them a state of his affairs, and entered the pursuer in said state as one of his creditors to the amount of L.1500—a sum which includes the amount now sued for;" and in his deposition as a witness in this action, Thomson admitted that he had offered 10s. per pound upon his share of the debt, by way of compromise, in order to avoid litigation.

In defence, it was stated that there was a well known class of speculators who, possessing no stock, went through the form of buying and selling, paying or receiving the differences between the selling price of the stock on the dates of sale and settlement. Such transactions were operations for the chance of differences in the rise or fall of the stock market; being time bargains, no purchase or sale actually took place, or was intended to take place, the transactions being merely fictitious entries in brokers' books, and the aim being merely the payment or receipt of the differences on the settling day. This, they said, had been the system followed in the account founded on, which consisted, from beginning to end, of nominal sales and purchases. No stock had been in existence so far as they (the defenders) were concerned, and the entries of stock put to their debit or credit were not only so made without their knowledge, but were entirely fictitious. The whole transactions were not only unauthorised, but illegal and incompetent. They were gambling transactions, and known to be such by the pursuer; and they were, besides, in violation of the provisions of the Acts, 7 Geo. II. cap. 28; 10 Geo. III. cap. 8; and 8 & 9 Vict. cap. 109.*

* The following are the terms of sect. 18, and the preamble of sect. 19, of 8 & 9 Vict. c. 109:—

Sect. 18.—"And be it enacted, That all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person, to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or toward any plate, prize, or sum of money, to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

Sect. 19.—"And whereas many important questions are now tried in the form of feigned issues, by stating that a wager was laid between two parties interested

The defenders farther admitted that they had in certain small transactions employed the pursuer; but they undertook to show that the account founded on was grossly inaccurate, and inconsistent with other statements rendered by the pursuer to them; and, moreover, that even if not void from being gambling transactions, they were in violation of the rules of the Glasgow Stock Exchange. No. 180. — June 10, 1857. Foulds v. Thomson.

They pleaded, in defence;—" 1. The transactions libelled being merely for differences or time bargains, and of the nature of wagers, are not actionable in law. 2. The *vitium reale* arising from the objectionable nature of the alleged contracts or transactions, render not merely the bargains assumed between the principals null and void in law, but also all subordinate or relative transactions between the alleged principals and brokers. 3. Upon the showing of the accounts themselves, the transactions therein referred to are struck at by the Act 7 Geo. II. cap. 8, passed to prevent the infamous practice of stock-jobbing. 4. By the common law of Scotland, recently made part of the law of England, by the statute 8 & 9 Vict. cap. 109, sect. 18, 'All contracts or agreements, whether by parole or in writing, by way of wagering or gaming, are null and void.' 5. The various entries in the accounts being fallacious, and assuming stock which was never vested in the parties referred to, transferences which never existed, and payment of prices which was never made, are unfounded in fact, and cannot be recognised in law."

A proof *pro ut de jure* of their respective averments was granted to and ed by both parties; and, after considering it, the Sheriff-substitute (Bell) pronounced an interlocutor repelling the defences, and finding the defenders liable in expenses.*

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n respectively maintaining the affirmative and the negative of certain propositions; ut such questions may be as satisfactorily tried without such form: Be it therefore enacted," &c.

* "Finds, first, in point of fact, that the defenders employed the pursuer as their agent or broker, to make purchases and sales for them of railway stock, during the period embraced in the account annexed to the summons, viz., from October 1853 till November 1854; and that the balance sued for as due to the pursuer, has risen since 30th March 1854, at which date the balance was in favour of the defenders: Finds, that although the said account contains about 180 transactions, it is proved that the defenders very rarely took up and paid for the stock they professed to buy, or gave delivery of the stock they professed to sell; and that they were frequently not possessed of stock at the time they entered into the contract of sale: Finds that the nature of the transactions is such as plainly to indicate that the defenders came into the share market as speculators for a rise or fall,—that is, in the hope that they would be able to sell at higher prices than they bought, and buy at lower prices than they sold, and thus benefit by the differences: Finds that the pursuer could hardly fail to be aware that this was the defenders' object; but finds it not proved that the pursuer knew that the defenders would have been unable to meet their obligations if they had been called on to take up or deliver stock, instead of getting it carried over from time to time: Finds, that in as far as the pursuer is concerned, and, for aught that appears, in as far as the third parties with whom the pursuer dealt were concerned, each transaction of sale or purchase was complete in itself, and was a real and *bona fide* transaction: Finds that what is meant by carrying over is, that when the constituent does not put the purchasing broker in funds to pay for the stock that has been bought, and wishes a delay of the day of settlement, the broker sells the stock which he had bought to a new purchaser, to whom the original seller agrees to transfer, the broker of the first paying the difference, if the market has fallen, and charging his constituent with it, and at the same time buying again a like quantity of stock, in the hope that by a rise of the market before it requires to be settled for, the loss sustained on the first transaction may be repaired; and the same course is followed *mutatis mutandis* when stock is sold by the broker for his constituent, and he is not prepared to deliver on the settling day: Finds that the parties who thus agree, by the common practice

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The defender Burn entered into a compromise of the case, so far as he was concerned.

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of the stock exchange, to liberate the original buyer or seller, and take other obligants in his stead, are not bound to do so; and should they refuse, the broker is in every instance personally liable: Finds that the defenders in the present case employed the pursuer to enter into the successive transactions condescended on in the account, for the purpose of getting rid of the prior ones by payment of differences; and specific statements of each transaction, or particular series of transactions, were regularly furnished to the defenders fortnightly, and were entered in a pass-book kept by the parties: Finds that the defenders did not deny the accuracy of said statements, or of the account sued for; but, on the contrary, promised to settle with the pursuer, and it was not until their affairs became embarrassed, and they could not arrange a compromise with said pursuer, that they fell back on the defence they have maintained in this action: Finds it proved that the pursuer did the work, and made the advances for the defenders, stated in said account: Finds, second, in point of law, that the Act 7 George II., cap. 8, as renewed and made perpetual by the Act 10 George II., cap. 8, is applicable exclusively to public stocks and securities, and does not extend to Scotland, so that it has no relation to the present case; but finds that a colourable contract for the sale and purchase of railway shares, when neither party intends to deliver or accept the shares, but merely to pay 'differences,' according to the rise or fall of the market, is gaming or wagering, within the 8 & 9 Vict., cap. 109, sect. 18, and also at common law, and is therefore null and void, and no suit can be maintained for recovering any sum of money claimed in respect of such contract—Grizewood, April 19, 1852, Scott's C.B.R. vol. xi. p. 538; but finds that the parties to the present case are not two parties who contracted for the pretended sale and purchase of railway shares, intending only to deal with each other for the differences, but are, on the one hand, as regards the defenders, speculators, who went into the share market in the hope of finding the differences in their favour: and, on the other hand, as regards the pursuer, the broker who was employed by the said speculators to buy or sell for them, who gave them his time, labour, and skill, besides making advances on their account, had no personal interest in the differences, however favourable they might have been to the defenders: Finds further, that as there is no evidence that the parties with whom the pursuer contracted on behalf of the defenders in the sale and purchase of stock, knew at the time that there was no intention to deliver or accept the shares sold or bought, neither the pursuer nor the defenders would have had an available defence, either under the statute or at common law, against these third parties, had actions been brought by them for implement of the transactions, the more especially considering that it is settled law, that a contract for the sale of goods to be delivered at a future day, is not invalidated by the circumstance, that at the time of the contract the vendor neither has the goods in his possession, nor has entered into any arrangement to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivering them, otherwise than by purchasing them after making the contract.—Hibblewhite, 1839. Meeson and Welsby's Report, vol. v., p. 462: Finds, still further, that even although it had been proved, as it has not, that the pursuer had knowingly made, for behoof of the defenders, wagering contracts with third parties for differences which, as between the principals would have been void, the defenders would still have been liable to the pursuer, as their broker, for labour expended and money paid at their request in fulfilment of such contracts, unless it could be shewn that the contracts were not only null under the statute or at common law, as wagers and *sponsiones ludicrae*, but were also illegal.—Knight, Jan. 23, 1855; Eng. Jur. N. S., vol. i., p. 525: Finds that neither the said act of Her present Majesty, nor the common law of Scotland, makes such wagering contracts illegal, but only null and void; and action therefore lies against the principals for labour given and money advanced by their agents or brokers.—Wells, April 29, 1836; Bingham's Reports, vol. ii. p. 722; and Oakley, May 4, 1836; *Id.*, p. 732: Therefore, and in respect, 1st, that it is not proved, but, on the contrary, disproved, that there was any mutual understanding between the pursuer and defenders, and the third parties with whom they transacted in shares, that the

An appeal was taken to the Sheriff-depute (Alison), who, although not No. 180.

transactions were to be merely for differences; and in respect, 2d, that even although this had been the case, the pursuer not being a principal, but only a party employed by a principal to aid in carrying on transactions which, though not enforcible in a court of law, are not illegal, is entitled to recover: Repels the defences, and decerns against the defenders, in terms of the conclusions of the summons: Finds the defenders liable in expenses," &c. June 10, 1857 Foulds v. Thomson.

"NOTE.—To prevail in their defence, it is necessary for the defenders to make out that the whole transactions out of which the pursuer's account arises were illegal. Now, in the first place, whatever the defenders' own intentions may have been, they have entirely failed to prove that those other parties with whom they dealt, through the agency of the pursuer, entered into contracts with them only for differences. On the contrary, it is established by the evidence of all the brokers examined on both sides, that in every instance the pursuer, as acting for the defenders, might have been compelled to deliver the stock he sold, and to take up and pay for the stock he bought. Instead of doing so, he very often, with consent of the other party, only gave a new party's obligation to deliver or take up; but to obtain these obligations he had to effect new sales and new purchases, and paid or received differences according as the market rose or fell. There was, however, no understanding beforehand that this was to be the course of dealing; and it might have been put a stop to at any time, by any of the other brokers refusing to allow the transaction to be carried over beyond the first settling day. Now, in all this there was not only nothing illegal, but nothing of a character which made it incompetent to bring the matter into a court of law. That the defenders would not have been able to pay for the shares they bought except by selling them over again, or that they sold shares which they had no means of delivering except by purchasing before the day for delivery came, may shew that they were somewhat reckless speculators, but at the sametime shews that they did no more in regard to shares, than what is done every day in the mercantile world in regard to other commodities. In the case of Hibblewhite, quoted above, Baron Parke said,—'I cannot see what principle of law is at all affected by a man's being allowed to contract for the sale of goods, of which he has not possession at the time of the bargain, and has no reasonable expectation of receiving. Such a contract does not amount to a wager, inasmuch as both the contracting parties are not cognisant of the fact that the goods are not in the vendor's possession; and even if it were a wager it is not illegal, because it has no necessary tendency to injure third parties.' If, then, there was no wager, there is an end of the defenders' case. But even suppose it had been shewn that all parties interested had known that the pretence of buying and selling shares was fictitious, and that it was merely the differences that were to pass between them, this might have made such contracts null and void, but it would not have tainted them with illegality, because the law attaches no penalty to them. The distinction is important as regards the broker employed by the parties speculating; for whilst it has been held that if a factor or broker engage, as such, in an illegal transaction, he cannot recover from his employer either his commission, or the advances or payments he may have made in order to carry his instructions into effect—(Russell on Factors and Brokers, and cases cited, p. 177)—the direct reverse has been held when the transactions are only null and void as wagers or *sponsiones ludicræ*, and not absolutely illegal.—*Ib.*, p. 181, and case of Knight, quoted above. The Sheriff-substitute can find nothing in the law of Scotland to induce him to regard a colourable contract for differences in any other character than that of a wager, which, though it cannot be founded on in a court of law as the ground of a claim, is not, in the proper sense of the word, illegal. In the case of Gordon, Nov. 16, 1804, F. C., a contract of an analogous description, by which a party bound himself to pay another L.100 if the three per cents rose above L.70 in ten years, and the latter to pay to the former L.100 if they did not rise to that price, was held to be a wager, and not actionable, and the case was therefore dismissed, but it was not attempted to be pleaded that the contract was illegal. The distinction may be somewhat nice, but is sufficiently broad and tangible to have been frequently given effect to both in this country and in England. Be this as it may, however, the conclusive point for the pursuer is, that though

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adopting the findings in fact or law of the Sheriff-substitute, nevertheless arrived at the same conclusion.*

A note of advocation was presented for the defender Thomson, and reported at once to the Second Division, in terms of 13 & 14 Vict. cap. 36.

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there was much speculation on the part of the defenders, there was no wagering, because it requires two parties to enter into a wager, and it has not been shewn that either the pursuer or defenders arranged with any second party to go into such wagering."

* The first part of the interlocutor was disposing of a motion to admit a condescendence of *res noviter*, which was refused. It then proceeded:—" Finds that the action is raised for a balance of L.1017, said to have arisen on brokerage transactions for the purchase and sale of different kinds of stock: Finds it not proved that there has been in any instance any stock really either delivered to, or paid for by, the pursuer and defender, or either of them, but only a fictitious series of transactions in stocks of various kinds asserted to be sold and bought, the balance of which, one way or other, constituted the only real debt intended to be enforced between the parties, and not the stock itself delivered or taken: Finds it admitted by the pursuer, that neither of the defenders ever received or gave any stock on the occasions set forth in the account libelled on, but the difference between the price of stock at the commencement and expiry of each fortnight alone was carried to the debit or credit on either side, and the stock never changed hands from the beginning to the end of the account; but the intermediate transactions are settled by payment of the difference, and the stock, for the first time, is transferred, one way or other, at the close of the account: Finds that the pursuer was not the party alleged to be the proprietor of these shares, but the broker or mandatory who managed the transactions: Finds it proved that the pursuer was aware of the fictitious nature of these transactions, which were, in technical language, called 'Bearing and Bulling the market,' and in Glasgow were termed 'Continuations:' Finds, in point of law, in these circumstances, that, as between the principal parties, the contract was a gaming transaction, under the Act 8 & 9 Victoria, cap. 109, sect. 18, and also under the common law of Scotland.—Girzewood v. Blane, Scott's New Reports, p. 526, 20th November 1851, Erskine iii. 1, 10; Bell ii. 300, and cases there referred to: Finds, in the present case, which is an action at the instance of the broker, and not of the principal, that the broker here sues for the surplus of his expenditure over his receipts in the case above set forth, and that it is pleaded that the broker cannot receive the balance of his account in such a case, in respect, as between the principals, the contract was illegal.—Russell on Factors, and Brokers, 177; Smith's Law of Contracts, 203: Finds that it is pleaded by the pursuer, that the transactions, so far as he was concerned, were entirely *bona fide*, that the whole account sued for, embracing 180 transactions, was twice interrupted and closed by payment of cash; and that the transactions, which originally were *bona fide* for the sale of stock, became continuations, by the inability of the defenders to raise money to meet their engagements in connection with these transactions, which compelled him to go into the market and continue the account, to postpone the period of a final settlement: Finds it proved, in point of fact, that the stock first said to be sold was impledged to the City Bank for its full market value, or as much as could be raised on it, and that the manager of the bank refused to make any further advances on said stock at the commencement of the account libelled on, in consequence of which the pursuer was unable to deliver stock on the defenders' account, as they were bound to do, and he was obliged to get into these colourable transactions in order to evade the consequences of this failure on their part: Finds that the defender Thomson had, before this action began, bought Caledonian stock to the amount of L.10,000, and held various stocks of other kinds, part of which had been forfeited, and that at this time Thomson's orders to the pursuer were at first real *bona fide* orders for the purchase or delivery of stock, and not for a mere continuation or fictitious account: Finds, in these circumstances, that the pursuer's employment began on the footing of real transactions, and was subsequently transmuted into fictitious ones, by the defenders' failure to implement their engage-

The import of the proof is contained in the findings in point of fact, contained in the interlocutor pronounced in the Inner-House. They were as follows:—"Find it proved, in point of fact, that the defender, along with a person of the name of Burn, employed the pursuer, as their agent or broker, to make purchases and sales for them of railway stock during the period embraced in the account annexed to the summons, viz. from October 1853 till November 1854, and that the balance sued for as due to the pursuer has arisen since 30th March 1854, at which date the balance was in favour of the defender: Find that the nature of the transactions is such as plainly to indicate that the defenders came into the share-market as speculators for a rise or a fall; that is, in the hope that they would be able to sell at higher prices than they bought, and to buy at lower prices than they sold, and thus benefit by the differences: Find, that in so far as the pursuer (respondent) is concerned, and so far as the third parties with whom he dealt were concerned, each transaction of sale or purchase was complete in itself, and was a real and *bona fide* transaction: Find that the defenders employed the pursuer to enter into the successive transactions condescended on in the account, for the purpose of getting rid of the prior ones, by payment of differences; and specific statements of each transaction, or particular series of transactions, were regularly furnished to the defenders fornightly, and were entered in a pass-book kept by the parties: Find that the defender did not deny the accuracy of said statements, nor of the account sued for, but, on the contrary, promised to settle with the pursuer; and it was not until their affairs became embarrassed, and they could not manage a compromise with the pursuer, that they fell back on the defence they have maintained in this action: Find it proved that the pursuer did the work, and made the advances for the defenders stated in said account."

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In the advocator's view the evidence did not establish these facts; in particular, he contended that the pursuer having examined both the defenders as his witnesses, was not entitled to repudiate their statements on oath as to the nature of the transactions.* From their oaths it was clear that Foulds

ments, which obliged the pursuer, on their behalf, to enter into continuation transactions, from which the pursuer derived no benefit,—just like entering into a series of bill transactions, to postpone taking up an original bill: Finds, in these circumstances, in point of law, that the pursuer's claim is not tainted by its being founded on transactions struck at by the statute 8 & 9 Vict. cap. 109, sect. 18: Therefore adheres to the interlocutor appealed from, and dismisses the appeals, and decerns."

"NOTE.—The main ground on which the Sheriff adheres to the interlocutor under review in point of law, is the distinction founded on in the Sheriff-substitute's interlocutor, and which appears to be amply established in law between a broker's or factor's claim for remuneration for trouble or reimbursement for outlay in a case such as the present, which relates to transactions not in themselves immoral, or illegal at common law, but merely declared null, or incapable of founding action by special statute, and those which are *mala in se* prohibited by the common law of all nations, and, consequently, incapable of affording action to any one concerned with them, and aware of their real nature. This distinction appears to the Sheriff to be well-founded, both in law and reason, and it appears to be in a peculiar manner applicable to this case, where the pursuer's employment as broker began for the conducting of real *bona fide* transactions, which was only turned into the conduct of fictitious ones by the inability of the defenders to make good at the requisite times the engagements consequent on real transactions."

* Peter Burn deponed, "The instructions I gave to the pursuer were, to 'bear,' in order to make up the loss incurred in the purchase of some Caledonian Railway stock in June 1853. The pursuer knew, when I gave him these instructions, that I had no stock to sell, though I told him to sell for me. At this date the City Bank held for Thomson and me an hundred shares, being L.10,000 worth of Caledonian stock, on which the bank had made a large advance. The whole

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never got authority to enter into a single *bona fide* transaction. His employment was to enter into fictitious transactions, and if he entered into real ones, his actings were not in conformity with his employment, which was, 1st, to gamble, and, 2d, to do so by bulling and bearing. The advocator denied the distinction between *mala prohibita* and *mala in se*, which, if it were sound, would lead to this result, that if brokers were interjected between two parties, whose dealings were admittedly gambling in the sense of the statute, the remedy would be complete and the statute defeated, because each broker would have action against his principal, though "the principals had not action against each other." Smugglers, also, could carry on their illegal traffic under the cover of such a doctrine. The objection, that they were not entitled to plead the illegality of their own transactions, did not apply, if they were right in their view of the proof that the pursuer all along knew their true nature, and accepted employment to wager and gamble.

For the broker it was argued:—There were two classes of items in the account. Money advanced, and remuneration for business done. It was not disputed that the business was done, and the disbursements made. Therefore the only question was whether 8 & 9 Vict., c. 109, sect. 18, makes these Acts illegal. He alleged that each transaction was a real one, and led to a transfer, more or less directly, in the books of the different companies whose stock formed its subject. The case was one, not of wager, but merely of a series of speculations on the part of the advocators. Many of them were time speculations, which were of every day occurrence, and of undoubted legality in merchandise, and were equally lawful as to shares of stock. But even assuming the advocator's statement that he and Burn went to the pursuer and said they wanted to speculate on rises and falls in the market, engaging to take and give delivery at distant dates, without any intention of ever really acquiring or selling stock, it would not amount to gambling unless they made out that the other parties with whom the broker dealt had precisely the same speculative view. This was not even alleged. Nay, it would not even be gambling if the other parties behind their broker had the same object as the defenders here alleged that they themselves had. To make out a contract by way of wager, the parties must come together for the purpose, and it must be entered into, both being in the full knowledge that a wager was intended. The elements of such a case did not exist here. For aught that was alleged, every transaction in the account might, as regards the other parties, have been a real *bona fide* transaction.*

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transactions in the account sued for consist, without exception, of 'bearing' and 'bulling,' by which I mean selling stock that I had not to deliver, and buying stock that I did not mean to take up. I never, in the course of the transactions, either received or granted a transfer of stock. The whole transactions consist of time bargains, or contracts for differences. The pursuer was quite aware of the nature of the transactions, and he advised us in the matter. He knew that we had no stock to deliver."

John Thomson deponed, "Burn and I, before the commencement of the account, had bought on joint account, and deposited in the City of Glasgow Bank L.10,000 worth of Caledonian stock. The pursuer was the broker in the purchase of that stock. I cannot say whether the said stock remained in the bank at the commencement of the account sued for. I depone, in reference to the account now in question, that it was incurred in consequence of Burn and I determining to 'bull' and 'bear.' We did not give the pursuer specific instructions as to the various transactions enumerated in the account. I was never asked to execute a transfer, or to pay the price of any stock during the course of the account. The pursuer was aware throughout that we merely intended to 'bull' and 'bear,' and that the transactions were not intended to be real or *bona fide*."

* In the course of the discussion, the following authorities were cited, in addition

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Lord Justice-Clerk.—This is an action by a stockbroker in Glasgow, against two parties, his employers, for the payment of an account incurred by them to him, in the purchase and sale of stock during the period embraced in the account. The account contains sums advanced on behoof of the defenders, and the broker's commission, and other charges. The employment is not disputed, in the proper sense of the term; nor is the accuracy of the account disputed, if the advocator is liable. I notice this particularly, because, on the record, the denials went far beyond the ground taken in this Court; but the defence to the action is this:—The transactions in which the pursuers were employed were gaming contracts under the 8 and 9 Vict., as well as by the common law of Scotland; and the pursuer, who was cognizant of, and aiding in, these transactions, is not entitled to bring action, either to recover advances or to claim commission upon the same. As for the rather comical alternative defence, viz., that if the transactions were not gaming contracts, and if the pursuer did really buy and sell for the defenders, no authority was given for any such obligations, as the employment was entirely to embark the parties in illegal gaming contracts, and hence that he cannot sue on any real contracts, for the purchase or sale of stock, as not employed for such transactions, it will be unnecessary to notice it, as it is not deserving of any attention, more especially as, after the facts are ascertained, it will be seen that the authority was direct to enter into the transactions in question, whatever was their character, and that the defender knew of all these, and homologated them.

The reply to this defence was twofold:—1. That the stockbroking transactions were not contracts by way of gaming or wagering; and, 2. That, even if the transactions were of this character, the broker was entitled to demand to be relieved of all his advances, and to claim his commission. The Sheriff-depute (as I understand his interlocutor and note) holds, in regard to the first reply, that the transactions were gaming transactions, but, on the second, that the broker carrying them through is entitled to claim relief from advances, and ordinary remuneration for services as a broker. As I am very clearly of opinion that the transactions were not contracts or agreements by way of gaming or wagering, I intend to limit myself entirely to that part of the reply to the defence, and not to express the slightest indication of an opinion on the other point, which, in my view of the matter, does not arise at all in this case, and on which it would be highly inexpedient to state any opinion, as the point may arise in other cases which may be brought to that issue.

The first question is—What is the character of the enactment in the 8 and 9 Vict., c. 109, sect. 18, relied on by the defender; and what are the substantial requisites of the contracts or agreements therein declared to be null and void? The defender assumes that the enactment in this section of the statute, and the common law of Scotland on this subject, are identical, and that may be assumed without detriment to the pleas of either party. Now, on looking at the statute, it will be observed, that all its provisions are directed against gaming in the proper sense of the term, against common gaming-houses, of the character of which it shall be sufficient evidence, if the chances of any game played therein are not alike favourable to all the players.

Then it declares what shall be evidence that a place is a common gaming-house. Then it contains regulations as to public billiard rooms. Further, in the 17th section it declares that any person who, by cheating at play, or in betting on the sides or hands of them that do play, or wagering on the event of any game, shall win from any other person to himself or any others, any sums of money or valuable things, shall be deemed guilty of obtaining such money from such other person by false pretences, with intent to cheat or defraud such person of the same.

Every word in all the provisions up to the 18th section demonstrates, as the ordinary sense of the terms imports, that in the gaming, wagering, or betting, some person is engaged with the offender as the opposite party with whom the game is

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to those mentioned in the notes by the Sheriffs:—Aitchison v. Kyle, 14th Nov. 1800, Mor. App. *voce*, Pact. Ill. No. 2; Addison on Contracts, p. 117; Wordsworth on Joint Stock Cos., p. 69; Josephs v. Bebner, 4th February 1825, III. B. and C., p. 639; Hewitt v. Brice, IV. Man. and Gr., p. 355; Knight v. Fitch, L. J. N. S., vol. xxvii, C. L. R., p. 122; Jessop v. Sutwidge, II. R., p. 65; Cross v. Rowan, II. M. and W., p. 149.

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played, or the wager or bet is made. Not one expression applies to any speculation or gambling carried on by any one party without concurrence or transaction with another, either as victim or as gaming, wagering, or betting on the other side. Two opposing parties are necessarily assumed in every one of the provisions.

Then we come to the 18th section, the whole of which must be read and considered. The 19th section is also very important, especially the preamble. Even if the words of the 18th section were in any degree ambiguous, the other clauses in the statute show beyond dispute the true character of the things to which the 18th section applies. Contracts or agreements by way of gaming or wagering are necessarily contracts in which one party is opposed to another in the gaming or wagering—each party taking one side, and with an adversary taking the opposite side in gaming or wagering; so that, if such contract were not declared to be null, there would be money or other valuable thing won by one party and lost by the other, which might be recovered from the latter. There must thus be opposing interests in such contracts or agreements, in which one may lose by the gaming or wagering and the other win, just as in the other gaming, betting, or wagering, referred to in the other provisions in the statute. There is no other difference except that this section extends the enactment to more regular and businesslike transactions, in which the gaining or wagering between the different parties is made the subject of contract or agreement. It is absolutely necessary, therefore, to found the objection of nullity upon this enactment to make out in point of fact that there was gaming between two parties, whether by the parties to the contract, or by these parties gaming on the sides or hands of other parties playing against each other. So also as to contracts by way of wagering. A proper simple wager implies necessarily that there is a party taking the opposite side of the wager, or system of wagering, whether directly, or on the acts of others on whose play or gaming the wagers are made.

When this is once understood, the next step is to ascertain what are the actual facts established by the proof in this case. And it is the more necessary to collect and bring out these facts distinctly, because they have been entirely misapprehended by the Sheriff-depute in his interlocutor.

The two defenders were desirous to speculate, in joint adventure, in stocks. That two joined in this makes no difference in the case. They had the same interest—were to share in the gain or loss; but between themselves there was no gaming or wagering. I lay aside the fact that there was a joint adventurer with the advocator, and take the case as embracing simply his acts. The defender had shares in some stocks; but none of the transactions relate to any stock he held when this system began. He applies to the pursuer, as stockbroker, to assist him in his object. That object was sheer speculation, in which he hoped to gain by the rise of stocks bought, or by the fall of stocks sold. Gambling it was, most assuredly, in the popular sense of the term. But a party may gamble in speculations without either gaming or wagering. His course of speculation was this:—The broker was to sell for him so much stock, say in the Caledonian Railway, at such a price, which would, by the course of trade, have to be delivered to the purchaser at the end of a short period. That stock he had not at the time, but was bound to deliver. At the end of the period when bound to deliver, if the stock fell in value, the broker would have to buy for him, in order to fulfil the obligation to the purchaser, and at a gain by which the defender would profit to the extent of the difference between the price at which stock was sold, and the price at which it was bought, in order to fulfil the bargain. If the stock rose in value, the broker had still to buy to fulfil the contract of sale, and the loss—that is, the difference—fell on the defender. This was the real nature of the transactions carried on for the defender by the pursuer, as broker. In some instances the transactions of the fortnight might begin in the opposite course of buying stock, which was to be sold afterwards, in order to pay the purchase-money; and then, if the stock rose, it was sold out at profit, over and above the price to be paid to the seller. In the opposite case, the defender would lose to the extent of the difference; and often these sales or purchases were made in the hope thereby of affecting the market, in raising or lowering the prices of stock, in the way which might be for the defender's advantage. But in every one of all the transactions embraced in the account, the defender had to fulfil, through his broker, positive onerous transactions, by delivering or buying stock.

It is here that the facts have been entirely misapprehended by the Sheriff-depute. Now, in every one case, the pursuer, as the defender's broker, had to deliver the stock he sold, and to take and pay for the stock he bought. This point is well stated in the Sheriff-substitute's note. But, on the evidence, I should have thought the matter proved beyond the hazard of doubt. A great number of stockbrokers, with whom the pursuer carried on these transactions, are examined, and they all declare that the transactions were onerous sales and purchases, which the pursuer had to fulfil, and did implement—that is to say, he had to give stock when he sold, and to take stock when he bought, and to pay the price. It makes no kind of difference that the brokers, between themselves, will settle on the faith of another's tickets: * the real matter of fact remains, that stock was bought and paid for, and stock sold and delivered. Fictitious transactions there are none.

No doubt an arrangement may be made between two parties, or brokers for them, by which it may be agreed that, without any real transaction, and when neither party intends to hold any shares at all, or to buy and sell any, they shall go on, one party pretending to sell L.1000 of a particular stock one day, and the other to sell back again to the former two days after, and settling between themselves for the differences only at the end of the period agreed on; and this will be a contract by way of wagering; for transaction there will be none between such parties. They wager, in fact, on the transactions of others, by which the price of stock is regulated. A agrees that B shall be held to have L.1000 of stock on the 2d of June, and B agrees that on the 4th A shall be held to have a right to that stock. If the stock rises, the difference in price is due to A, and that difference is the only matter which passes between them; and so they may go on gaming or wagering on the price of stock, as bought and sold by others, to an indefinite extent. This was the state of facts in the English case reported in Scott's Reports. But in the present case there was no such agreement with any one as to any one of the transactions carried through by the pursuer for the defender. It is not proved that any other broker, in any one case, agreed to such a wagering upon the price of stock, instead of entering into a real contract of purchase or sale. In each case stock was bought or sold; the defender was bound to pay for the stock bought, and had to deliver stock when he sold, though the pursuer often had to buy at a loss, in order to deliver. True, the defender was not to hold and retain the stock. His object was, that the pursuer was to sell off, to keep him free of loss, and to endeavour to gain by speculating on the rise and fall of the prices; and so it was pure gambling on the part of the defender, but gambling by the purchase and sale of stock for which he was onerously bound to other parties. Thus, in every essential particular, the elements are awanting to make this a contract by way of gaming or wagering. There is no contract or agreement with any other party, but an onerous contract of purchase or sale. That contract had to be implemented, in every case, by payment of price, or delivery of stock; and in every instance it was implemented. The broker was to try to keep the defender clear, by so managing the purchases and sales as to make the sales more than meet the purchases; but if not, then the onerous contract with other parties had to be fulfilled with loss. Hence arose the necessity for the broker's advances during this period of reckless speculation, and his claim for commission on these purchases and sales. In this state of facts, it is plain that the defender had not engaged in any contract or agreement by way of wagering or gaming; and the transactions he carried on through the pursuer, reckless and discreditable as they were—as pure gambling,—all involved onerous sales and purchases, though his object was to sell all he bought, and not to hold or retain any stock at all.

* One of the witnesses, Mr Paul, stock-broker in Glasgow, gave the following account of these tickets:—"There is a form of ticket used in the Stock Exchange, which is passed from one broker to another, stating the amount of stock sold, the name of the broker selling, and the name of the broker buying, and the price. It also contains the name of the broker's constituent. These tickets sometimes pass by endorsement through half a dozen hands before it comes to a real purchaser who intends to take it up and pay for the stock. The giving back of this ticket to the selling broker, with the difference, discharges the purchasing broker's responsibility. The understanding on 'Change is such, that the selling broker is not entitled to refuse to take back the ticket."

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The whole of these transactions were regularly reported, and stated to the defender at the end of each short period of settlement with others; and it is further proved, that he was frequently in the pursuer's office either giving him instructions, or receiving directions from him, as to whether the best chance of profit at the time was by making sales or purchases.

The defence against this action, then, wholly fails in the plea on which it is founded, and decree must be given for the pursuer.

I have taken, as the parties do, the words of the statute as the rule of law by which the legality of the transactions were to be determined. But I wish to say that there may be a question whether the statute referred to applies to Scotland; though I state no opinion on that point either way.

LORD MURRAY.—This party has stated as his defence the Statute 8 and 9 Vict., c. 109, which, it is said, made the common law of Scotland the statute law of England.

The question before us is, Is there anything like gaming or wagering in the transactions complained of? There is no difficulty as to the facts, for the defenders call the pursuer, than whom no one could be more capable of giving information, and I give full credit to his testimony, although others give a somewhat different account. In all gaming, one party wins and the other loses,—all cannot gain; but here so much stock is bought—it rises. A has sold, B has bought through, a broker. A may have sold at a higher price than he paid. B may in turn do likewise, in which case all might be gainers. This cannot be gaming. I am far from saying they are engaged in a laudable pursuit. But all the parties might equally lose. I cannot assimilate this to the nature of gaming or wagering, to constitute which there must be two parties, one of whom must lose.

I have been desirous to find the case of Sir James Craig, as to the delivery of wheat, which he did not possess, at a certain time and place. According to my recollection, that was held to be perfectly legal. Now that is the exact case before us. What he could do regarding wheat, I do not see why others should not do regarding railway stock. If such dealings were illegal, we should have to interfere largely in the ordinary course of business. The statute founded on I hold has no application to such transactions as those libelled.

LORD COWAN.—I concur in the views which your Lordships have expressed, and have very little to add.

The two Sheriffs agree in giving effect to the pursuer's claim; but they do so on different grounds, which it is necessary to discriminate. The interlocutor of the Sheriff-principal proceeds upon a view of the facts as established by the proof, in which I cannot agree. The findings contained in the Sheriff-substitute's interlocutor give, in my opinion, the more correct view of the import of the proof. I hold it to be established, as found by that interlocutor, "that the defenders employed the pursuer, as their agent or broker, to make purchases and sales for them of railway stock during the period embraced in the account annexed to the summons;"—"that, in as far as the pursuer is concerned, and, for aught that appears, in as far as the third parties with whom the pursuer dealt were concerned, each transaction of sale or purchase was complete in itself, and was a real or *bona fide* transaction;"—"that the defenders employed the pursuer to enter into the successive transactions condescended on in the account, for the purpose of getting rid of the prior ones by payment of differences; and specific statements of each transaction, or particular series of transactions, were regularly furnished to the defenders;" and "that the pursuer did the work and made the advances for the defenders stated in said account."

The case, in this aspect of the facts, does not raise for decision the point of law disposed of by the Sheriff. It is not necessary to consider whether, had the transactions been of a different character, the situation of the broker could have been distinguished from that of the principal. The transactions which form the subject of the pursuer's claim must first be tainted with illegality or statutory nullity as between the principals to them, before any such question can be raised. Holding the true character of the transactions to be as found by the Sheriff-substitute, I have felt no difficulty in arriving at a clear opinion, that the claim of the pursuer is exposed to no good objection.

That the purchases and sales of railway stock, to effect which, as their broker, the defender and Burns employed the pursuer, were speculations on their part,

cannot affect the legality of the transactions. They were, nevertheless, real contracts. The third parties, with whom the pursuer as broker dealt, are not shewn to have been in concert with the defenders for the purpose of carrying through gambling transactions. It may be that no permanent investment of capital was contemplated by the defenders. As regards them and this broker, the account, from the system followed in these speculations, may have come in its results to be in substance nothing else than a statement of differences between the prices at which the successive purchases and sales of stock were effected. Still, so long as there was no previous concert or agreement merely for differences with the other parties to the several purchases and sales, there was nothing challengeable in what was done. A transaction of that description does not amount to a wager. The conclusive view for the pursuer, as stated by the Sheriff-substitute in his note, is, that though there was much speculation on the part of the defenders, there was no wagering, because it requires two parties to enter into a wager, and it has not been shown that either the pursuer or defenders arranged with any second party to go into such wagering, in regard to any of the transactions embraced by the account sued for.

On the whole, therefore, I am of opinion that there is no principle in the common law that interferes with the right of the pursuer to make effectual his claim against the defender, arising as it does out of his legitimate employment as broker, in carrying through transactions in themselves not tainted with any illegality.

I may observe, that no doubt has been stated as to the Statute 8 & 9 Vict. being applicable to Scotland. I do not wish to express any opinion on the point. The case has been decided on the assumption that it is. But it is not a little remarkable that the Statute 16 and 17 Vict. c. 109, which declares that betting-houses are to be taken and deemed to be common gaming-houses within the 8 and 9 Vict., c. 109, is expressly declared not to extend to Scotland.

Lord Wood.—The case of the defender Thomson is now substantially rested upon the Act of 8 & 9 Vict. c. 109, sect. 18, which, in the argument, has on both sides been assumed to apply to Scotland, and on that footing the question before the Court is to be disposed of.

It is maintained that the transactions—all and each of them—which the pursuer was employed as broker to manage and carry through, and out of which his claim against the defender arises, were purely gaming or wagering transactions, which are void and null in terms of the statute; and that, therefore, no action can lie at his instance against the defender, either for remuneration for work and services performed, or for money advanced by him in the course of his employment. I am of opinion that the defender has failed in establishing that, in the circumstances, the transactions in question are within the provisions of the statute; and if so, it will be unnecessary to consider whether, had the statute applied, there would in point of law have been a good defence to the action.

I agree with the Dean of Faculty, that taking the case in the most unfavourable view for the pursuer warranted by the proof adduced, and in the most favourable view for the defender, it is not instructed that the transactions entered in the account libelled were of the nature of contracts by way of gaming and wagering, and so struck at by the statute. I think that, upon the proof, the contrary is the result. Gambling transactions (but which is not a statutory term) they may be. *That*, however, does not render them gaming ones; for there may be gambling without gaming. In the popular sense, speculation is gambling without gaming or wagering in the statutory meaning of these terms.

Now let it be assumed that the defender and his associate Burn, the other defender (but who has now settled with the pursuer), had come to the pursuer and told him that they wished to enter into transactions of buying and selling stock for a rise or fall—that is, in the hope that they would be able to sell at higher prices than they bought, and to buy at lower prices than they sold, and thus benefit by the differences—that stocks were to be sold which they did not possess at the time, and that they had no intention of investing in, or holding the stocks to be purchased—that their transactions in selling and buying were to be managed accordingly; shares being to be purchased to fulfil the sales made, and parties or means to be found to take up the shares bought at the settling day; or the transactions to be carried over, as it is called, in the usual way, and settled as is customary between the brokers acting for the different parties who might come to be connected

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with them, as described by several of the witnesses adduced; while the dealings in the course of this traffic were—as between the pursuer and defenders—to be adjusted at fortnightly periods by the accounts being squared by debiting or crediting the defenders with the differences between the prices of the stock, according to whether they fell or rose, and also debiting the defenders with the pursuer's commission and other charges, and by the balance so brought out, for or against the defenders, being either paid or carried forward to account to the succeeding period. And let it be farther supposed that the pursuer undertook to act, and did act, as the broker of the defenders in the management of the business, the nature of which was so explained to him, and of which, therefore, he could not but be perfectly cognizant. And, finally, that the transactions were numerous, and extended over a period of more than a year.

I am of opinion that in all this no defence would be found to the pursuer's claim. The transactions so carried on might, it is true, be merely speculative, and the defenders sheer speculators, and nothing better, having come into the share market solely as speculators for a rise or fall. But still how can such a state of facts (and nothing more adverse to the pursuer is disclosed by the proof) show that the transactions so carried on for them by the pursuer were contracts by way of gaming or wagering?

To wagering or gaming there must be two parties. The provisions of the statute are all framed on that footing. The parties must come together directly or through their brokers. In contracts within the statute there must be opposite parties, and there can be no innocent ignorant parties. If a party or his broker go to another party or his broker, and arrange or make a contract for the sale and purchase of shares, where neither party is to be bound to deliver or accept the shares, but where they are merely to pay the differences according to the rise or fall of the market, that would be gaming within the statute. But in the present case there is no evidence that any one of the contracts forming the transactions in the account libelled was a contract for payment of differences, and to be implemented by such payment. On the contrary, it appears that the transactions were with a great variety of brokers, acting for an equal variety of constituents, and as far as seen, every transaction was a real *bona fide* onerous purchase or sale from or to a party to whom a personal obligation was undertaken to fulfil the contract which he was entitled to enforce, and in which the responsibility of the pursuer as broker for the defenders did not terminate until the stocks bought or sold were either delivered or paid for.

Accordingly, taking the account libelled along with the evidence, it shews generally that shares of stock were bought and applied to the completion of the transaction when it was a sale, while again shares were sold to supply the means for the completion of the transaction when it was a purchase—the defenders being losers or gainers (and sometimes they were the latter) on each transaction respectively, as the case might be, and the settlement upon the whole of them during each fortnight resolving, if a loss, into the sum advanced by the pursuer for the defenders upon the fortnight's transactions, over and above the sum received by him on their accounting, so that it might no doubt come to this, that although the account with the pursuer is truly an account for stocks bought and sold, it by the course of dealing resulted,—as between the pursuer and defenders,—in the defenders having only to pay the differences, these differences constituting, with the pursuer's commission, under deduction of partial payments, the amount of the pursuer's demand. But then, as between the defenders, or the pursuer as their broker, and any other party, there is no evidence that the contracts were contracts for payment of differences only, and that implement on either side was to be by payment of the differences, as the prices might be at the settling day. Nor is there any evidence to prove that each transaction was not, as with the opposite broker, a real one for the purchase and payment, or the sale and delivery of the quantity of stock embraced by it, and which the pursuer, as the defenders' broker, was not bound so to fulfil; or that each transaction was not completed as a real *bona fide* transaction. If the witnesses are to be believed, the very reverse is proved, some of them speaking to transactions in the account libelled, had with themselves, and to the nature of which, and their implement as real transactions, they were consequently in a condition to depone explicitly and with certainty.

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What is stated in regard to the delivery of tickets, and the intervention (it may be in many instances) of other parties, and the arrangements that might for convenience or otherwise be made between the opposite brokers themselves, cannot in the slightest degree affect the case.

Take, as an example, any one instance of a sale of stock for a fall, but where there happened to be a rise of price, and stock is purchased to deliver in implement of the contract, the pursuer advancing the difference of price, and making any of the usual arrangements in such a case with the original purchaser's broker for the settlement of the transaction,—what would then follow at the settlement between the pursuer and defenders? Obviously, just a claim by the pursuer for the advance or difference, together with his commission for work done. The transaction on the part of the defenders would be truly speculative; but the contracts would not be the less real. It is clear law (and to hold the reverse would be against all mercantile convenience) that the validity of a contract, as a real contract for the sale of goods (and the same must equally hold in the sale of railway shares), cannot be impeached by the circumstance that at the time of the contract the vendor neither has the goods in his possession nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivering them, otherwise than by purchasing them after making the contract. And assuredly the validity of a contract for the purchase of goods, as a real contract, cannot be questioned on the ground of the buyer not having possessed at the time the means by which it was to be fulfilled. In either case there would be a good personal obligation by which implement could be enforced as between the contracting parties or their brokers, and the defenders could have no defence against the pursuer's claim for the amount of his advances and commission.

But if this would be true in any particular instance taken separately, it cannot alter the character of the transactions that there was a number of them, and that they went on for a considerable period. These things might be of importance in a question as to the pursuer's knowledge of the nature of the transactions, and the defenders' views in entering into them, and the way in which they intended them to be carried out; but their knowledge not being in question, but admitted, they are of no materiality. The transactions in the aggregate can in character be nothing else than that of the individual transactions composing it.

But, even although the proof had gone a step farther than I have assumed that it does (and which is beyond its actual amount), and granting that it had been established that behind each of the opposite brokers there had, in the transactions founded on, or most of them, been a gambling or speculating employer or principal, the defenders' position in resisting the pursuer's claim would not be improved, for the validity of the claim would not be thereby touched; seeing that still there would be no evidence to disprove the reality of the contracts entered into, or to instruct that they were by way of gaming or wagering. The contracts would nevertheless be real contracts, to be fulfilled by delivery of stock or payment of the price, which each party was bound so to fulfil, and which would be fulfilled as between the ontracting parties or those in their right, within a limited time, although it might be hat these parties were mere speculators for a rise or fall in the market, and inended that their transactions should be carried out upon that footing. But that such ras the state of matters in all or any of the transactions in question is not proved. iiving the defenders the benefit of everything that may be doubtful on the proof, ll the length the evidence goes—if, indeed, it can be held to go so far—is, that hile the contracts might on their part be speculative contracts, and known to the ursuer to be so, they were nevertheless real onerous contracts for the sale and elivery, or the purchase and payment of stock, by which in each a personal oblition to one or other of these effects was undertaken, and which the defenders or eir broker on the one hand, and the opposite party and his broker on the other, uld be compelled to fulfil *in terminis*.

So standing the case, and it being established that the transactions in the account re entered into by the authority of the defender Thomson, or approved of by m, and that the fortnightly states, when rendered, were not objected to as inacrate in any respect, I am of opinion that the pursuer is entitled to recover the lance claimed by him.

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I have not thought it necessary to refer particularly to the cases which were cited on this branch of the case. I do not know if it can be said that in any of them the point raised is directly decided. But, so far as the authorities go, they are in favour of the pursuer. Certainly none against him have been quoted; and I can see no principle at common law, or ground of argument on the statute or otherwise, on which the plea of the defender can be supported.

I shall only add, that I abstain from intimating any opinion upon the other point relied on by the defender, viz., that if the contracts were null and void under the statute, the pursuer, as the broker in them, could not recover. It could only require consideration and decision if an opposite view were adopted of the leading one. In the view I take of the latter it is entirely superseded.

THE COURT pronounced the following interlocutor:—"Advocate the cause (in so far as John Thomson is concerned): Recall the interlocutors complained of: (Here followed the findings quoted above, p. 809.) Find that the transactions carried on through the pursuers were not contracts or agreements by way of gaming or wagering. under the Act 8th and 9th of the Queen, c. 109, sect. 18, or by the common law of Scotland illegal as such: Therefore repel the defence, and decern against the defender, John Thomson, in terms of the conclusions of the summons: Find him liable in expenses, both in this Court and in the Inferior Court."

MORTON, WHITEHEAD, & GREIG, W.S.—JOHN LEISHMAN, W.S.—Agents.

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THE MARQUIS OF HUNTLY, Petitioner.—*Parker.*

Entail—Improvements—10 *Geo. III. cap.* 51, *sects.* 10, *and* 27 (*Montgomery Act*)—11 *&* 12 *Vict. cap.* 36 (*Entail Amendment Act*).—*Held* (1), that the expense of erecting a dog-kennel was an improvement on the "mansion-house and offices" in the sense of the statute; (2), that gamekeepers' houses erected on distant parts of a deer forest were not.

Question, whether such gamekeepers' houses could have been allowed as offices on the estate.

II. *Vouchers—Oath.*—Where vouchers had not been preserved, the Court allowed the expenditure on proof being adduced that it had taken place, and of the sufficiency of the work. But the Court declined to receive as evidence voluntary depositions before a justice—although they accepted as sufficient depositions in the same terms taken before a commissioner appointed by the Court.

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1ST DIVISION.
Ld. Mackenzie
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THE Marquis of Huntly presented this application under the 10th Geo. III. cap. 51, sects. 9, 10, and 27, and the 11th & 12th Vict. cap. 36, for authority to charge the entailed estate of Aboyne with outlay on improvements made since the passing of the latter Act. The Lord Ordinary, on 5th March, reported that the following questions had arisen:—

I. Whether the expense of erecting dog-kennels (L.223, 7s. 6d.) near the mansion-house, and L.180, 15s. 9d. expended on erecting gamekeepers' houses situated at a distance of several miles from the mansion-house, and required for the protection of the game in the deer forest of Aboyne, could be allowed as improvements under the 27th section of the Montgomery Act?

Mr Duncan, to whom the case had been remitted for inquiry, was of opinion that they might be allowed, on the ground that improvements of this kind upon a great estate appeared to come appropriately under the terms "offices" attached to or connected with the mansion-house.[1] He was also of opinion that the expense of erecting the dog-kennels should be allowed.

LORD PRESIDENT.—In reference to an estate of this kind, I have no difficulty in holding that the dog-kennel may truly be regarded as one of the offices mentioned

[1] Fraser, 2d Dec. 1839, 14 S. & D. p. 89; Fraser v. Lord Lovat, 27th Feb. [illegible] ante, vol. ii. p. 684. See also Duke of Athole, 4th March 1856, ante, vol. [illegible] p. 730; Munro, 7th June 1856, ante, vol. xviii. p. 994; Athole, 3d July [illegible] ante, vol. xvii. p. 1015; Farquharson, 19th June 1856, ante, vol. xviii. p. 1044.

in the statute as an appurtenance of the mansion-house suitable to the estate. I think that a dog-kennel for an establishment of this kind is as much part of the offices as a stable. Horses are for amusement and exercise, and so are dogs. I have more difficulty about the gamekeepers' houses, and I should like to hear your Lordships' opinions in regard to them. Having, in the case of the Duke of Athole, 3d July 1855, disallowed shooting lodges, as not falling under the Montgomery Act, I do not know that these gamekeepers' houses can fairly be held to fall within the statute. If it had been one house for a gamekeeper to take care of the dogs, I should have had no difficulty. But when you multiply them, and put them in various distant localities, and call them "offices," I have doubts. I place no weight on the fact which has been stated to us at the bar, that the petitioner possesses a right of forestry, and that these gamekeepers' houses are truly offices to enable the petitioner to exercise that right.

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Lord Deas.—The question comes to be very much whether a gamekeeper's house is an office. It would be odd to hold that a dog-kennel is an office, and that a house for a gamekeeper who is to go out with the dogs is not. But in this case the application is for watchers' houses, and I doubt whether we can grant them.

Lord Ivory.—I feel somewhat embarrassed, but I think that it is beneficial to allure parties to stay on their estates, by giving them all the accommodation which gentlemen resident in the country are entitled to have. In regard to the dog-kennels, I do not think it is of any consequence that they are not actually "attached to the mansion-house." The statute does not require that the offices shall be actually attached to the mansion-house, but merely that they shall come within the statutory meaning of offices "for the accommodation of the mansion-house." I also think that a gamekeeper's house is as much an "office" as a coachman's house, or other such offices necessary for amenity. But where an estate is so large that there are several dog-kennels and gamekeeper's houses necessary, I should not like to commit myself; but in this application the houses, although called gamekeeper's houses, are of the nature of houses for watching, and as such are not so much accessories of the mansion and offices as of the deer forest; and I am not prepared to say that the house of a watcher is an appurtenance of the mansion-house and its offices.

Lord Curriehill.—I think the dog-kennel is one of the offices of the mansion-house on such an estate just as much as a coachhouse or stable. The Act of Parliament deals with these improvements as suitable for a proprietor to have. They are a suitable source of recreation for persons in the position of the petitioner. My only difficulty relates to the gamekeeper's house. If there were only one gamekeeper on the estate who had charge of the dog-kennel, it is quite suitable that there should be a house for him among the "offices;" and if the question related to such an erection, I would be for allowing it. But these are outlying houses at distant parts of the forest, and far from the mansion-house; and the question is not whether they are suitable offices for a deer forest, but whether they are suitable offices for the mansion-house, for it is under that head that they are now claimed. If they had been claimed under another section as improvements on the estate,—but for the decisions, especially the cases of Athol and Grandtully, in which shooting lodges have been refused,—I should have been inclined to consider them favourably, as it is now established that the rental of shootings is to be estimated as part of the rental of the estate in determining provisions to younger children and otherwise; and offices erected with the view of rendering that rental effectual, would appear to me in principle to come under the provisions of the statute. But that is not the footing on which their expense is now claimed, and I am therefore unable to recognise the gamekeepers' houses as improvements falling under section 27 of the Montgomery Act.

II. Another point to which the attention of the Court was now directed, was, whether certain payments to labourers on the estate, for which there were no vouchers under the hands of the parties who received the money, were sufficiently instructed? The payments were entered in the overseer's book, and it appeared that that book was docqueted from time to time as correct by the factor of the petitioner, in the regular course of his periodical audit of the overseer's books. The fact of expenditure to the amount claimed having been made, and of the sufficiency of the work performed,

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was farther authenticated by a man of skill, to whom the Lord Ordinary remitted, who had examined the work.[1] The Court continued the case, to allow farther evidence to be adduced. There were now produced depositions before a justice of the peace by the petitioner's factor, and also by an overseer of workmen, verifying the payments of weekly and monthly wages contained in the overseer's books. The Court declined to receive these as being of the nature of voluntary oaths; but the depositions having been afterwards sworn to before a commissioner appointed by the Court, they were admitted.

THE COURT pronounced the following interlocutor:—" Allow the expense of the dog-kennel; disallow the expense of the gamekeepers' houses, and allow the workmens' wages; all as explained in the report," &c.

JOLLIE, STRONG, & HENRY, W.S.—Agents.

No. 182. MRS ANN SUSAN PEDDIE OR DODS AND OTHERS, Pursuers.—*D. F. Inglis—Moir.*

JOHN ROSS MACVICAR AND OTHERS (Doig's Trustees), Defenders.—*Penney—Young.*

MRS JESSIE AUSTIN OR WATSON AND OTHERS, Defenders.—*Penney—Young.*

Writ—Vitiation—Presumption—Testament—Title to sue.—A testatrix, by a codicil to a previous settlement, revoked the destination of her heritable property, and of the residue of her estate, and made special bequests of certain lapsed legacies—thereby altering provisions as to the surviving legatees under the settlement. In the codicil thirty-one words, forming a complete clause,—a warrant of infeftment—were written on an erasure. They were interjected between two clauses of bequests which were complete, and afforded no clue to what had been erased. In a reduction of the codicil at the instance of the beneficiaries under the first settlement against the trustees and beneficiaries under the codicil,—*Held* (affirming judgment of Lord Ardmillan), that the erasure was not *in essentialibus* of the codicil, and was not fatal to it. *Questions* (1), whether a reduction of the codicil would import a reduction of the settlement? (2), whether a legatee had a title to challenge a codicil on such a ground?

June 12, 1857. — 1ST DIVISION. Ld. Ardmillan C.

THE late Mrs Jane Austin or Doig died on 14th March 1849. At the opening of her repositories, her agent, a Mr Grant, produced a trust-settlement executed in April 1847, and a supplementary settlement or codicil dated 20th January 1849.

The pursuers, as beneficiaries under the trust-settlement, raised this action of reduction of the codicil directed against Mrs Doig's trustees, and certain parties beneficiaries under the codicil.

The trust-settlement, after a nomination of trustees, who were also to be the executors of the testatrix, contained a disposition of an heritable subject, Snowdown House, at Stirling, and a procuratory of resignation for completing the investiture *more burgi.* The fee of two-thirds of the heritable property was destined to the pursuers, as was also a share of any legacies that lapsed, which were to form a fund of division in order to increase certain legacies. The codicil was written in part on the same sheet of paper with the settlement. It was as follows: —" I, Mrs Jane Austin otherwise Doig, granter of the foregoing deed,—whereas the piece of ground therein described, on which the large dwelling-house called Snowdown House, offices and others, are erected, is thereby disponed to Janet Gourlay Gillies in Stirling, therein designed erroneously as daughter of Thomas Gillies, instead of Robert Gillies, Esq. of Gormyre, for her liferent use after my death; and whereas this destination, and all others conceived in her favour in the foregoing deed, have become void by her recent death, I do hereby cancel all these, and declare the same to be void and null, as I do also the

[1] Munro, 7th June 1856, ante, vol xviii. p. 994.

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disposition of the said piece of ground, mansion-house, and others erected thereon, to the trustees named in the foregoing deed; and I now, instead of the destinations so revoked, do hereby give, grant, alienate and dispone the said piece of ground and mansion-house, and others erected thereon, all as particularly described in the foregoing deed, and here held as repeated for brevity's sake, to and in favour of Mrs Jessie Austin otherwise Watson, spouse of James Watson, in Edinburgh, manager of the Scottish Provident Institution for Life Insurance, and daughter of the late Hugh Austin, Esq. of Glasgow, who was my cousin-german, and to the said Jessie Austin's heirs and assignees: Further, my whole household furniture and others, destined on page sixth of the foregoing deed to the said Janet Gourlay Gillies, I do hereby specially convey, grant and assign to the foresaid Jessie Austin, and her heirs and assignees: Moreover, I now revoke and cancel specially the destination on said page sixth of the foregoing deed, of the residue of my whole means and estates, to and in favour of the said Janet Gourlay Gillies; and I appoint and direct my trustees, instead of that destination, to pay the said whole residue of my means and estates to the foresaid Jessie Austin, and her heirs and assignees, as soon as may be after my death: Farther, Martha Campbell and Mary Campbell, in Glasgow, having died since the foregoing deed was executed, I appoint the liferent of five hundred pounds, thereby directed to be paid to them equally, to be paid after the death of Miss Martha Maxwell, in Glasgow, the liferentrix, to Mary Maxwell and Graham Maxwell, her sisters, equally, and failing either of them, the whole to the survivor; and after the death of the survivor, the principal sum itself to be paid to the foresaid Jessie Austin, and her heirs and assignees: *Moreover, I desire any notary-public to whom these presents may be presented, to give to the said Jessie Austin or her foresaids, sasine of the lands and others above disponed:* Further, I hereby provide that my personal apparel and trinkets, with my whole paraphernalia, directed on said page sixth to be divided between the foresaid Janet Gourlay Gillies and Misses Ann Peddie and Eliza Peddie, shall be divided between the two last named ladies only, equally, share and share alike: Lastly, in addition to the bequests in the foregoing deed, I bequeath to Mr William Forrest, surgeon in Stirling, my gold vinaigrette, and to his eldest son in life at my death, twenty pounds sterling, and to each of my servants, Janet Kemp and Margaret Kemp, ten pounds sterling: And I approve of and confirm the foregoing deed in all things therein contained, except in so far as now altered and added to.—In witness whereof."

The pursuers alleged that it was only on lately examining the principal deed upon record that they discovered that the passage printed above in italics was superinduced upon an erasure. No notice of this was taken in the testing clause, although a comparatively unimportant erasure of three words was mentioned in it. They pleaded;—1. That having a patrimonial interest in the means and estate of Mrs Austin or Doig, in virtue of the trust-disposition, they had a title and interest to reduce the codicil as invalid and ineffectual in law, because it was thereby attempted to diminish or take away the interest given to them by the trust-disposition. 2. The second plea had reference to an objection not insisted in, that all the proper parties had not been called as defenders. 3. The words in the codicil bearing to be a precept of sasine, being wholly written on an erasure, and no notice being taken of the fact in the testing clause, or other part of the deed, the presumption was that the erasure was made after the execution of the deed, and the deed was thereby rendered invalid, and liable to be reduced. 4. The clauses both preceding and following the part erased being complete in themselves, and it being impossible from the deed itself to ascertain what were the words for which the precept of sasine was substituted, the whole deed was thereby vitiated. 5. The codicil being set aside, the trust-disposi-

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tion and settlement remained the only effectual deed regulating the succession to the means and estate of Mrs Doig.

Mrs Doig's trustees stated that they had paid away the whole estate under the trust, and were now entirely divested. That before they had done this, the pursuers were made aware of the erasure in the codicil, and of an opinion in regard to the erasure which had in consequence been obtained by the next of kin, yet they had not only failed to intimate any intention of challenging it, but they had accepted their various provisions both under the deed and the codicil.

The first plea in defence had reference to parties not having been called. The others were:—2. The erasure in the codicil was not *in essentialibus*, and is not such as to affect the validity of the deed. 3. The parties having approbated, homologated, and adopted the codicil by taking under it, are barred from now challenging the same. 4. The pursuers having allowed the trustees to administer the whole estate, and to denude of the residue, upon the footing that the original deed and codicil together were to be taken as the settlement of the testator, cannot now be permitted to maintain the present action against the said trustees, at least to the effect of subjecting them in any liability.

The Lord Ordinary pronounced the following interlocutor on 31st May 1855:—"Finds, that in the codicil sought to be reduced, being a codicil dated 20th January 1849, added to the will of Mrs Doig, dated 24th April 1847, there is an extensive erasure, on which thirty-one words of the codicil are written, and that this erasure is not mentioned in the testing clause, although a deletion of three words on the last page is mentioned: Finds that the pursuers, in respect of their rights and interests under the provisions of Mrs Doig's will in 1847, which is a complete deed, independent of the codicil in 1849, are entitled to pursue a reduction of the codicil on the grounds libelled, in as far as it affects their rights and interests, and that reduction of the codicil on the said grounds would not import a reduction of the will: Finds that the said erasure is not *in essentialibus* of the whole codicil, or of that part of the codicil affecting the rights and interests of the pursuers, and that it is not fatal to the codicil: Therefore sustains the second plea in law for the defenders, and assoilzies them from the conclusions of the action, and decerns: Finds no expenses due to either party."*

* "NOTE.—The Lord Ordinary entertains no doubt of the right of the pursuers to pursue a reduction of the codicil, and no doubt that the codicil, which was executed two years after the will, might be reduced without reducing the will, for the codicil is not necessary to the will, which is, without the codicil, a complete and independent deed. The pursuers, cannot, indeed, approbate and reprobate the settlement; but their plea is that the codicil is null and void, and not part of the settlement; and this plea they can maintain, just as they could plead that the codicil was not subscribed. No separate plea on this point is stated by the defenders on record; but as it was strongly urged by their counsel, the Lord Ordinary has particularly adverted to it.

"The effect of the erasure is a question attended with difficulty. The erasure is of considerable extent, and it is not noticed in the testing clause, though a small deletion is noticed. In so far as regards the words written on the erasure, the writ is not probative,—the part written on the erasure is not authenticated; but the words are not required, and the defenders are willing to omit them. Whether the omission of the words is the only result, must depend on the nature and character of the erasure. The pursuers allege, that as no evidence can be led to shew what were the words erased, the pursuers are entitled to read any words in the blank which they can suggest as possible, and that such words as they could suggest would, or might, operate as annulling the codicil. The Lord Ordinary is of opinion that there is no authority for this proposition, to the extent to which it is pressed by the pursuers. Every erasure not noticed in the testing clause does

The pursuers reclaimed, and argued;—That the property conveyed in the codicil being held burgage, the precept was inept. It was also entirely out No. 182.

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not necessarily annul the deed, not even though the original words cannot be read. The extent of the erasure is an important element, but it cannot be said that every such erasure, to the extent of 30 or 40 words, necessarily annuls the whole deed. If there be fraud, actual or implied, the case is different; but in the absence of fraud, the nullity of the entire deed is not the inevitable penalty of an erasure, even though the original words cannot be read, and even though the erasure is of some extent. The erasure must be *in essentialibus*, and it is in so far as it is *in essentialibus* that it is followed by nullity. It may occur in regard to words essential to a legacy, and that legacy will be null and void; it may occur in regard to words essential to the nomination of an executor or a trustee, and that nomination will be null and void; it may occur in regard to words essential to the structure and import of the entire deed, and then the entire deed will be null and void.—Kemp v. Ferguson, 2d March 1802; M., 16, 949. Adam v. Drummond, 12th June 1810; Fac. Coll. Traquair v. Henderson, 26th June 1822; 1 Sh., 527. Strathmore v. Strathmore's Trustees, 1st February 1837; 15 S. and D., 449. Robertson v. Ogilvie's Trustees, 20th March 1844; 7 D., 236. Stair, b. 4, t. 42, sect. 19. Ersk., b. 3, t. 2, sect. 20. Bankton, b. 1, t. 1, sect. 34. Tait's Law of Evidence, p. 140. As Lord Stair says,—'What points are *in substantialibus* must be esteemed from the nature of the writ' (Stair, b. 4, t. 42, sect. 19.) As Lord Mackenzie says, in the Strathmore case,—'The existence of an erasure on the face of a deed, though not noticed in the testing clause, does not of itself afford any proof or certainty of a vitiation after the deed was signed. It just comes to this, that it was quite possible that the alteration was made after the deed was signed. There may indeed have been no such vitiation; the erasure may have been made before signing; but as the very end and purpose of a probative writ is to produce legal certainty, that end is *pro tanto* defeated by every such erasure, so far as that it at least may have been made after signing, and the Court must then look to the effect of such erasure, in case it had been so made. That effect may be to annul the instrument in whole or in part, or it may be altogether immaterial. But in the case of simple erasure, apart from all suspicion of fraud, I know no case in which an erasure is allowed to produce total nullity, unless in its own nature it was such as, when taken along with the whole deed, amounted to a vitiation *in substantialibus* of the deed. The Court are obliged, therefore, to examine the nature of the erasures, and decide what is the effect of each and all of them. What, then, are the erasures which thus open the possibility of other words having stood there at the date of the signature of the deed? Are any of them such as thereby to infer the total or partial nullity of the deed? I have examined them with attention, and I have been unable to find any one which can annul any material part of the deed, and still less the whole of it. There is not one, I conceive, *in substantialibus*.'

"In considering to what extent the erasure in the codicil is *in essentialibus*, it is necessary to attend to the structure of the codicil. The testator, after narrating the disposition of the heritable property to Janet Gourlay Gillies, and her death, cancels that disposition and declares it void, and then gives, grants, and dispones the same to Mrs Watson. She then disposes of the household furniture, by giving it to Mrs Watson instead of Janet Gourlay Gillies. Then she revokes the destination of the residue, and directs the same to be paid to Mrs Watson. Then she disposes of a sum of L.500 which had been left to Martha and Mary Campbell, who had died, and which sum she gives in liferent to Mary and Graham Maxwell, and the survivor, and thereafter to Mrs Watson. Then follows a precept of sasine, written on the erasure, and then again the bequests are resumed, the trinkets and clothes being bequeathed to the pursuer, and some trifling legacies to Mr W. Forrest and to the testator's servants. The clauses in which these several revocations and bequests are contained are distinct and separate. Each is introduced by the word 'moreover,' or 'further,' till closed by the clause of small bequests, which commences with 'lastly.' Between two clauses, each beginning with 'further,' and each containing a separate bequest, this erasure occurs. The clauses which affect the rights of the pursuers are in a preceding part of the codicil, and are independent of the clauses

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of place in that part of the deed, which thus led to a suspicion of fraud, although they had been unable to allege it specifically. Their interest in the original settlement was a sufficient title to challenge any subsequent deed said to revoke or alter it.

They could not be met by the plea of approbate and reprobate, which applied only where the deed challenged was part of the settlement under which the parties claimed. The contention here was that the codicil was not part of the settlement, therefore success in the challenge would put an end to the sole ground on which the plea rested. The only question was, whether this deed was vitiated *in essentialibus?* The principle of the doctrine of erasure was that a deed written on an erasure was not authenticated by the subscription of the granter:[1] That the testing clause did not cover words written on an erasure, unless they were specially noticed in it. But not only do words written on an erasure form no part of a deed; there is, farther, a presumption, *juris et de jure*,—unless there are means of rebutting it within the deed itself,—that the words were written after the subscription, and that there were originally other words in their place, which cannot now be ascertained or restored. An erasure in words of style, the deed in which it occurs may show to be of no consequence, and in such a case the deed will not be invalidated. On the other hand, where words are written on an erasure, in an important clause of the deed, *e. g.* the dispositive or bequeathing words of a will, the deed will not be held valid, there being no legal certainty that it expresses what the granter intended. The question here was somewhat different. The erasure here was apparently of an entire clause. Had any part of it been written not on an erasure there might have been evidence that what originally followed was a direction to a notary to give sasine. But that not being so, the presumption was that what was written there originally was not what was written there now, and if it had formed only part of a clause, it must have affected the clause which preceded it.[2] The *onus* of get-

which follow. Now, on a careful consideration of the structure and terms of this codicil, there are no grounds, necessary or reasonably probable, for presuming that the erased words were such as to annul the effect of the whole codicil. They may have been words of bequest, leaving an additional legacy; they may, perhaps, have been words of restriction or limitation of the immediately preceding legacy of L.500; but there is no fair or rational presumption that they were words of recall or qualification of the revocation of the disposition, or the gift of the heritable property and the residue contained in the previous clauses. If it be settled, as the Lord Ordinary thinks it is, that a deed is not necessarily annulled *in toto* by every erasure, but that it may be null in whole or in part, according to the extent to which the erasure is *in essentialibus*, and if that extent is to be ascertained from the nature of the deed, then the mere number of the words erased is not *per se* conclusive, though it is an element in the inquiry. Where the clauses of a deed are distinct and independent, an erasure in one clause, even though it be of many words, is not fatal to other clauses where there is no erasure, unless the clause in which the erasure occurs is essential to the entire deed. There may be a deed so indivisible in expression, so entirely a *unum quid*, that any encroachment on its totality must be fatal to it. There may be an erasure in a clause so essential to the deed, that the nullity of the clause involves the nullity of the deed. But in the present case the deed is obviously divisible and separable into clauses; neither the words written on erasure nor the clause in which the erasure occurs are indispensable to the codicil; and the nullity of the whole clause, even including the clause immediately preceding and immediately following, would not involve the nullity of the whole codicil.

"The pursuers do not seek, and have no interest to seek, reduction of the part of the codicil where the erasure occurs. They seek reduction of the entire codicil. After much consideration, and not without difficulty, the Lord Ordinary is of opinion that the grounds of reduction to that effect are not sufficient."

[1] Ersk. B. 3, T. 2, sect. 20.

[2] Stair, B. 4, T. 4, sect. 19.

ting rid of these presumptions, and demonstrating from what preceded and followed that the erasure could not be *in essentialibus*, lay on the party who founded on the erased deed. It was sufficient for the pursuers that there might have been such words as would have laid upon Miss Austin, now Mrs Watson, considerable burdens, or limitations, of the grant in her favour. The presumption of law was that there had been something material there to the advantage of the pursuers, and disadvantage of the parties now founding on the erasure.[1] It was quite true that in the case of a sasine, and certain other deeds, a vitiation in part did not vitiate the whole. But the effect of erasures in such deeds was quite different from that here, where words wholly immaterial were substituted for what in all probability had been very material. The erasure here was in the substance of the deed, where no ordinary words of style were to be expected. The pursuers were therefore entitled to judgment in their favour.

It was pleaded for the defenders;—The attempt of the pursuers was to approbate the settlement, and to reprobate the codicil as an improbative writ; but the trust-settlement and the codicil were in law one instrument. Now, the pursuers' argument was based on an opposite principle, for they contended that this erasure made the codicil improbative, while the original settlement stood. But the effect of erasure was not to render the whole deed improbative, unless it was *in essentialibus*, and it was not necessary to know what was in the original passage in order to determine whether it was *in essentialibus*. It was not said that the deed was not truly the deed of the granter, nor was fraud averred. The objection taken was purely legal and technical. The doctrine, as put by the pursuers, really amounted to this, that two lines and a half written on an erasure in any deed whatever was sufficient to vitiate the entire deed, because it was possible within that space to put in something very important. Where a deed became ineffectual from erasure, it did not do so because of improbativeness, but of a blank in the deed in that which it was important to have filled up. Hence it followed that where the deed was separable, and consisted of separate portions, each of which might be considered as a separate deed, erasure in one portion would not vitiate the whole deed, but only that particular part of it in which the erasure occurred. The present case was peculiarly favourable to the validity of the deed. Every part of it was completely independent of the superinduced clause. There was no occasion to speculate as to what had stood there originally, but if they did do so, the presumption was, that this blank contained originally another bequest. That would be in accordance with the nature of the deed, and the mere circumstance that that bequest was written on an erasure, and was therefore null, would not affect the validity of the other bequests.[2]

At advising,—

Lord President.—This case comes before us in the form of an action of reduction; and it is brought at the instance of certain beneficiaries under the settlement of Mrs Doig, against certain other beneficiaries under that settlement, and against the trustees who were appointed by her to carry her settlement into execution. The settlement consists of two writings made at different times: the first of these is a trust-deed made on 24th April 1847, and the other is a supplementary writing or codicil made at a later date—viz. on 20th January 1849—which was subjoined to the trust-deed, and was intended to make certain alterations upon it. The object of this action is to reduce that last-mentioned writing—to set it aside upon the ground that it has been vitiated and erased in an essential part. The erasure which is referred to is an erasure to this extent, that there are now superinduced upon it some thirty-one words, and these words so superinduced upon it form a

[1] Grant v. Grant, 12th May 1830.

[2] Howden v. Ferrier, 10th July 1835, 13 S. & D. 1097; Shepherd v. Grant, 6 Bell's Ap. Cases, p. 172.

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complete clause of the nature of a warrant of infeftment. It does not appear that the clause which had been there before had formed any part of the clause immediately preceding, or of the clause immediately following. They appear to be perfect in themselves; but this stands between them as an entire clause, and there is no notice taken of it in the testing clause of the deed, while there is notice taken of another and minor erasure that occurs in the course of the deed. The grounds of law on which the pursuers maintain this action are very distinctly and succinctly stated in their first, third, fourth, and fifth pleas in law. The Lord Ordinary entertains no doubt as to the right of the pursuers to bring a reduction of the codicil; and no doubt that the codicil, which was executed two years after the will, might be reduced without reducing the will, because the codicil is not necessary to prove the will, which is complete without the codicil. There is no allegation on this record of any fraud: there is nothing of that kind averred. The history of this deed, or any explanation of the erasure, we have not; nor is there any allegation as to the time when it was made. That is all left to what is said to be the presumptions and inferences of law. But it is stated that Mr Grant, a writer, produced it at a meeting after Mrs Doig's death, at which time it was erased; and that is all that is said about it.

Now, in considering this case, it is proper to keep in view what is the relative position of the parties who are trying the question. It is not a question generally as to the validity of the settlement of the deceased. It is not a question of the testacy or intestacy of the deceased. It is an action pursued by parties whose title rests on the interest which they have under the settlement of Mrs Doig, by reason of certain bequests therein contained in their favour, and being legatees under the first deed, what they say is, that this second writing interferes materially with those interests, that it displaces them in some respects in favour of other parties, legatees or beneficiaries under the deed, and that in these circumstances they are entitled to have the deed set aside.

Now this is a peculiar kind of action. No case was stated to us precisely parallel to this, the case of one legatee pursuing an action for the purpose of setting aside the interest of another legatee, or other legatees, by reason of an erasure in a codicil, and from that erasure deducing the inference that the codicil must be regarded as altogether null; and, farther still, we heard but little argument upon this point, though, in my view, I scarcely think it is necessary to a decision of the case, whether, if this codicil is to be held as no part of the will of the testator, there is any will at all by the testator. The pursuers say that they are entitled to have the codicil set aside *in toto*. There is no allegation of any operation of the superinduced clause specially upon any bequest in their favour under the deed, and no application to have the codicil reduced partially. The proposal is to have the codicil reduced *in toto*, because of an erasure which they say is *in essentialibus* of the whole matter of the codicil. They say that in place of the words written upon the erasure, they are entitled to assume that there were words originally which were favourable to them, and which either neutralised or modified the other provisions of this codicil; and that at all events, as it is impossible now to know what the testator intended, so it is impossible to give effect to his will as originally expressed in the codicil; that is, to that part of the will which is expressed in the codicil, or to any portion of it as it now stands. They say that to give effect to the codicil as it now stands, would most probably be to give effect to something quite different from what the testator intended, and consequently, that it must be altogether set aside, and no effect whatever given to it. Now, I cannot adopt that proposition. I hold that what is written here, superinduced upon an erasure, is not authenticated; that, I think, is pretty clear. But I cannot go along with the pursuers, in the course of reasoning which they adopt, as to setting aside this codicil entirely. I think that to set it aside entirely, and to set up the will, would be most unquestionably not to give effect to the will of the testator. That is very clear. I do not think that the opposite is clear. But to set aside this codicil entirely, would be to deny effect to the will of the testator.

It is distinctly set forth, in the outset of the codicil, that the main object of the testator in making it was to alter the previous settlement, and to alter it in certain particulars, which are distinctly stated. The settlement had contained provisions

specially in favour of a certain Miss Janet Gourlay Gillies. These provisions were generally of this nature, that Miss Gillies was to have the liferent of a certain house and grounds in the Castlehill of Stirling; that she was also to have certain other interests under this deed, and in particular, she was to have an annuity purchased for her with the residue of the estate, after fulfilling certain purposes, and she was to have the household furniture made over to her. The deed also contains certain provisions in favour of some ladies of the name of Campbell, giving them the fee of a certain sum of L.500, to which another lady, of the name of Maxwell, was to have the right. These three ladies, Miss Gourlay, and the two Misses Campbell, predeceased the testator. The object of her beneficence was thus defeated during her lifetime, and in these circumstances she proceeded to make this codicil,—to deal with the altered condition in which she was placed, and the interests that were thereby changed. And she begins the codicil by stating, that "whereas the piece of ground therein described."—(See *supra*, p. 820.)

By the trust-deed the fee of the property had been appointed to be divided among the two pursuers and a lady of the name of Lowrie. The testatrix begins this codicil by saying that she cancels everything that had been done in favour of Miss Gillies, now deceased, and also the disposition of the ground and mansion-house to the trustees; "and I now," she says, "instead of the destinations so revoked, do hereby give, grant, alienate," and so forth. That is a complete revocation of the former conveyance of the house, and a complete granting of these subjects in favour of Mrs Jessie Austin or Watson,—of the fee as well as of the liferent interest.

She then proceeds to deal with the furniture, which had been given to Miss Gillies, and directs that it also shall be given to Miss Austin. Then she proceeds to deal with the residue of her estate, which was to be vested in the purchase of an annuity for Miss Gillies, and she gives that also to Miss Austin. Then she proceeds to deal with the sum, the fee of which had been given to the Campbells; and, in respect of their death, disposes of what had originally been destined to them.

Now, these are all complete clauses, as the pursuers themselves say. They deal with part of the subjects clearly and explicitly in favour of certain parties who are to be favoured by the testatrix—avowedly altering her former settlement and giving the benefit to these parties.

The only other legible provision here is in regard to the trinkets, which had formerly been appointed to be divided between Miss Gourlay and the two pursuers. They are now ordered to be divided among the two pursuers themselves. Each of these clauses is complete. They are benefits given to other beneficiaries under the deed, and under this particular portion of the deed; and the contention on the part of the pursuers is, that this deed shall be set aside, so as to annul all these things which are plainly and distinctly set forth in it, as much as anything in the original deed, on the ground of this erasure, and the assumption that the erasure contained something which was contrary to and inconsistent with those complete bequests that are contained in the previous part of the deed. I do not know of any principle for holding that, if there is an erasure in any part of a deed, it is to be presumed that what was originally in that part of the deed destroyed or annulled what was contained in the rest of the deed. The erasure may destroy that portion of the deed in which it occurs. But it would be a novelty to hold that an erasure in this part of the deed should destroy what is clearly and distinctly given as bequests in another portion of it. We have many cases in which an erasure in part of a deed destroys that member or part of the deed, and in which such an erasure destroys a bequest contained in it. But that a party—a legatee under another part of the deed—should set up this theory in order to destroy the material interests of other legatees, which interests are clearly and distinctly expressed, is a principle for which I know of no authority. In all of these matters there was some interest in the present pursuers under the former deed—that is to say, there was a provision in the previous deed that all lapsed legacies should fall to be divided among certain legatees, among whom the pursuers were included, and if the testator had not dealt with these lapsed legacies, the pursuers would have got the benefit. But there was nothing to prevent this lady from dealing with them. It was natural that she should do so, and having dealt with them clearly and distinctly, I see no reason to presume that she then undid it all in these thirty-one words, or in the space which these now fill. The principle

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is fixed that an erasure in one legacy does not destroy all other bequests in the deed; and unless it is evident that something has been erased from the deed, which can be shewn, not as mere presumption, but very clearly and conclusively, to be beneficial to these parties and against the other legatees, for that is the point here, I cannot give effect to the theory contended for by the pursuers. Upon this ground, I am of opinion that on this question of erasure *in substantialibus*, in so far as the present pursuers are entitled to plead it—that is, so far as it affects their interests, there is no erasure *in substantialibus*,—that is, to the effect of annulling this deed *in toto*. I am therefore for repelling the reasons of reduction. But I abstain altogether from giving any opinion upon the point, whether a reduction of the codicil would import a reduction of the will? The Lord Ordinary finds that a reduction of the codicil would not import a reduction of the will. I do not say whether, if I set aside this codicil, I could sustain the deed at all. That is a very grave question, and upon which I would require more argument before deciding it. The principle upon which the pursuers plead this case—that an erasure in one part of a deed is a destruction of the whole—would, if legitimately followed out, lead to the conclusion that the whole settlement must be set aside; because the principle is, that you have not got at the will and the intention of the testator. Now, we may not have got at the will and intention of the testator in the whole of this deed. When that objection is pleaded, it relates to the whole settlement. That objection, therefore, is that we have not here got at this lady's will and intention as to the final disposal or settlement of her affairs. But that will not do for the present pursuers, because they say,—You have got at the will and intention of the testatrix in the first deed in 1847, and you are to disregard all that is legible and intelligible in the document explaining her will and intention in 1849, and to revert to that which appears to me to have been plainly, not the will and intention of the lady in 1849, but the reverse. It would require a great deal more argument before I could hold that, setting aside the codicil *in toto* on the ground of substantial erasure, we could leave the settlement standing. But it is not necessary to settle that point. We are under another class of cases, where various bequests stand free from erasure, and where the erasure does not interfere with these bequests. These legatees, then, even if they are entitled to plead their own interest in the case as against the other legatees, have not, in my opinion, made out a case which would oblige us to set aside the bequests in their favour contained in the other clauses of the deed.

Lord Ivory.—I come to the same conclusion. I do not say that in this case there are not considerable niceties involved in some views of the questions which have been raised; but dealing with the whole deed, studying it with the best consideration that I can give to it, and comparing one thing with another, with regard to the question that has been raised here, I am quite satisfied on the grounds stated by your Lordship, and concurring substantially though not entirely with the particular dicta of the Lord Ordinary and with the legal grounds on which he rested his decision, I am satisfied that his interlocutor must be adhered to—not in terms, but substantially.

With regard to the grounds of the reduction, I do not think that we are called upon here to impugn anything connected with the general doctrine that erasure and vitiation *in essentialibus* operates in law a nullity of the matter in which such vitiation occurs. But then it must not be overlooked—and it has not been overlooked—that neither in the decisions of the Court nor in the dicta of any of our writers, is it made a necessary consequence that an erasure shall operate the nullity of the entire deed in which it occurs. There is a principle of exception which is introduced, and which rests on substantial reason and sound sense, that wherever the matter in which the vitiation occurs is matter separable, and truly in the deed itself separated, from the other portions of the context, that the erasure affects only that part, and does not of necessity disturb the other complete and untouched portions of the deed. The case of legacies, and the case of nomination of executors, and various other cases, might be given as illustrations of this. In a deed of legacy, one legacy may be wholly erased, and ingenuity might perhaps fill up the blank with words which might affect the other portions of the deed. But it is decided that the legacy in which the vitiation occurs is the only one that suffers; and in ordinary circumstances, unless there is reason to connect it with the other portions

of the deed, it will not affect them. Here it is an entire clause that is destroyed. But where so much of a clause is left as enables you to see what it was to which it originally had reference, there again you cannot fill up and give effect to that which is partially erased, yet you take what is left as a guide in dealing with the effect the erasure is to have on other portions of the deed; and if you see evidence of an intention to separate the matter in that part of the deed from the other parts of the context, you hold that member of the deed only to be affected by the erasure.

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Perhaps a better illustration of this doctrine could not be given than by referring to two very important cases in this class of questions—the case of Grant and Shephard, and the case of Boswell of Auchinleck's entail. In the case of Grant and Shephard, there was an erasure in the first member of the destination of the deed of entail; the first member of the destination being destroyed, nobody could say when the other parties called under the destination were to come in. That operated on the whole series of substitutes, for you could not tell who was the first substitute, nor when the others were to come in, nor whether they were to come in to the exclusion of a certain family altogether. Yet in that case, while the destination was cut down, the deed, as a conveyance of property, was not struck down. It was sustained as a conveyance to the institute, which was saved *in toto*, whilst the particular matter affected by the erasure was held as null.

So in the case of Boswell; there the prohibition to sell was a prohibition to sell either irredeemably or under reversion; but the letters "ir" of the first word were written on an erasure. It was the prohibition to sell alone that was struck out of the deed. The effect of this was to give a fee-simple title instead of an entail title, which had been the intention, just shewing, that, wherever you can separate the matter which the erasure touches from the other matters in the deed, you leave as far as you can the will of the granter, and do not commit a greater departure from his will by destroying everything he has done, but limit the effect of the vitiation to that particular portion of the deed of which you can make no better.

Now the summons here seeks to set aside the whole of this codicil. Every tittle of it is to go because of this erasure, which is said to be *in essentialibus* of the entire codicil. For it is said that we do not know what may have been there. There may have been inserted a trust or a burden, or the clause may in some other way have neutralised, and perhaps given a different turn to the matters which are left. Now I would ask, on the principle of separability to which I have been referring, whether you could hold that the additional bequest contained in the deed after that blank—"Lastly, I bequeath to Mr William Forrest," &c.—shall be annulled, because in the previous part of the deed there is a vitiation? It is perfectly clear, from the form and structure of the deed, that these are additional legacies, which are not to be affected by what goes before. And so as to the rest. Could the other legatees have brought a reduction of this bequest of apparel, because in another and wholly separate portion of the deed there occurred a blank or vitiation? It seems to me impossible to maintain that. Then before the erasure there is a bequest of L.500. Could it be maintained that this was to be affected by the erasure?

These are all illustrations of the general rule of law in dealing with vitiations—that it is not a necessary consequence of a vitiation, let it be ever so essential in the particular matters in which it occurs—that it is not a necessary consequence that its essentiality in that matter shall go to the destruction of the entire deed. You shall separate it from the rest of the deed, and give effect to the deed as far as you can, for the rest of the deed stands on the will of the testator. The presumption of law is that vitiation takes place after the execution of the deed—after the mind of the testator has received full effect by the execution of the deed, and you are not to disturb the will of the testator, if you can separate it from the vitiation in the way I have alluded to.

Certainly, if there was any room to suspect that there had been any fraud committed, by tampering with the deed, by the party who is founding on it, there is a weightier construction and a weightier effect given to a vitiation in such a case *in dium corrumpentis*. But that is a different principle altogether, which does not occur here. There is nothing said here that touches the character of the parties: no fraud is insinuated. The document seems to have been in the hands of the

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testatrix, not out of her repositories; and therefore we have nothing but the simple fact, as it stands, that there is a vitiation in a particular portion of it.

It may be very true, as was argued by the pursuers, that in some cases where you have a blank not accounted for, and especially if there is any room to suspect that the deed has not been fairly dealt with, it has been sometimes said (and sometimes, I believe, done), that in order to give effect,—not to make a deed,—but in order to give effect to an erasure as an essential erasure, the party should be allowed to supply the words which he says might have filled it up. But, when he is going, to supply words for filling up the vitiation to such an effect as this, he must supply them reasonably. There must be some rational ground to suppose that the words suggested were what the testator intended. You must not take arbitrary and capricious possibilities: you are not to make wild and fanciful constructions, and insert in strange and extraordinary places what no mortal ever could have dreamt of putting in there. You must have something to support that particular ground of argument before that can be attempted. Now, with regard to what is proposed to be inserted here, in the first place, it was stated that it might have been declared that all these things bequeathed to Miss Jessie Austin were to be held in trust for certain parties. It would be very difficult to make a trust of such a kind in the limited space that we have here. But if there had been special provisions,—the provisions of L.1000, for instance,—in favour of each of the Misses Peddie,—dealt with, it might have been more plausibly urged that it was possible to insert a trust in Miss Austin's person, to the effect of giving them the same portions given to them under the other trust created by the settlement. One could more readily think that. But there are other parties besides the Misses Peddie to be dealt with. There is the case of Catherine Lowrie, another legatee, and the matter of the lapsed legacies in favour of Misses Martha and Mary Campbell. All these things must be of new provided for, if you are to deal with it on the footing of a subsequent trust. But in reference to this idea of the trust, we must take along with us this fact, that the old trust is not recalled,—it still subsists. That fact was entirely overlooked in the argument. All that was done with regard to the original trust was that the testatrix cancels "the disposition of the said piece of ground, mansion-house, and others erected thereon, to the trustees named in the foregoing deed." But except in that particular matter, which certainly touches the Misses Peddie very vitally, there is no other recall of the trust. On the contrary, there is an express confirmation of the deed "in all things therein contained, except in so far as now altered and added to."

But, further, with regard to the residue, the codicil runs thus:—"Moreover, I now revoke and cancel specially," and so on. If Miss Austin was to be trustee for performing the purposes of the former trust, is she to be both trustee and beneficiary, as she must be if this clause stands? It is the former trustees that are to deal with this and pay to Miss Austin. So that, in regard to this particular portion of the codicil, you cannot insert a subsequent trust. That would be altogether an anomaly; and if you cannot in that clause do so, neither can you in reference to any other. Then again, that Miss Austin, who is a married woman, should be made a trustee, is not a supposition very easily to be adopted; her husband would more naturally have been taken. But there is a personal *delectus* in favour of Miss Austin, which shows how the thing arises. The death of Miss Gillies suggested the necessity of the alteration. But then the testatrix deals very absolutely in favour of Mrs Watson. It is not now fulfilling any purpose of the former deed; the former deed is totally destroyed as regards the disposition of the house, and there is a new dispositive clause, which is in these words, "And I now, instead of the destinations so revoked," &c. There is here a ground for personal *delectus* in favour of Mrs Watson, which speaks more naturally to the probability of this having been an individual bequest in her favour, rather than a trust. It mattered not whether she was her cousin or not; but when she was choosing this lady as the object of her preference, it was very natural to set forth that she was the relation which she describes her to be. And then it is to Jessie Austin, and her "heirs and assignees." I am perfectly aware that heirs may be in a clause of trust, and that the heirs may become trustees on the death of the testatrix. But looking to the clause as to the house, combined with the clause as to the wearing apparel and other things, which must necessarily be of a personal and individual appli-

tion, that cuts away the ground, as it appears to me, from all presumption in favour of a subsequent trust.

The other supposition was that it might be a burden declared upon Mrs Austin. That is liable to the same difficulties with the rest, and I do not now go into them. But if it were a burden in favour of the Misses Peddie, then it must be so, because the conveyance of the property—the price of which is the main object of dispute here—in the former deed was recalled to the effect of taking the property from the trustees, and thereby destroying the power of selling it and of dividing it. If this was to be a burden, the Misses Peddie could only take by force of the words which now stand erased, because they could never go back upon the price of the subjects, the trust being put an end to, and a new disposition given. They must stand on the words which affect the new trust, and then they meet with this legal effect of the operation of erasure, that they are not certain what was there, and so cannot found on it. They cannot guess at it to the effect of giving them a bequest which was not given under the original deed, and which cannot be operated under the original deed, if the original deed is recalled, as I think it must be recalled with regard to this house. There, again, the matter ends. It is not necessary to go more into detail in reference to other points. I rest content on the general principle of the case as I have stated it.

Lord Curriehill.—The summons concludes for a total reduction of a codicil executed on 20th January 1849, by the late Mrs Doig, altering to some extent a trust-settlement which she had executed on 24th April 1847. The parties at whose instance this action is sued are not the heir or other legal representatives of the testator, but only two legatees named in the original deed of settlement. The only ground of reduction which they plead in support of the challenge is, that there is an erasure *in substantialibus* in the codicil. And the only title and interest which they set forth for insisting in this challenge is, as stated in their first plea in law, that by the codicil a provision which was made in their favour by the original settlement is diminished or taken away.

That provision consisted of these four things:—1. Two third parts of the price of the fee of certain heritable subjects called Snowdown, of which the liferent was provided to Janet Gourlay Gillies, and which was directed to be sold after her death by the trustees named in the settlement, in order that its price might be divided among the two pursuers and a Miss Lowrie; 2. A sum of L.1000 to each of the two pursuers, the interest of which was to be payable to them respectively until their marriages, when the principal was directed to be paid to them; 3. Two fourth parts of the testatrix's personal apparel, trinkets, and paraphernalia, which were directed to be divided among the two pursuers, and Misses Gillies and Lowrie above mentioned; and, 4. Two fifth parts of whatever other legacies might lapse by the legatees predeceasing the testatrix or the terms of payment, and the subjects of which lapsed legacies were directed to be divided among the two pursuers and the other three parties therein mentioned. Before the date of the codicil under challenge this last part of the provision to the pursuers had become valuable, in as much as there had lapsed, by the death of the legatees, not only a legacy of the fee of L.500 to the two Misses Campbell, but also a legacy of household furniture, and of all the residue to Miss Gillies. Of course, each and all the parts of the provision thus made in favour of the pursuers by the original settlement was revocable or alterable by the testatrix at her pleasure.

In the exercise of this power, accordingly, the testatrix, on 20th January 1849, after the death of the above mentioned legatees, executed the codicil now in question. It thence appears that by that time the defender Mrs Watson had risen into favour with the testatrix, and that her favour for the pursuer had abated, because, on the one hand, she conferred upon the former, not only the property called Snowdown, both in liferent and fee, and the fee of the lapsed bequest of L.500 before mentioned, but also the lapsed legacies of the household furniture and of all the residue; and, on the other hand, she thereby revoked the provisions in favour of the pursuers of two thirds of the price of the fee of Snowdown. She also, by providing to Mrs Watson the lapsed legacies above mentioned, of the fee of the L.500, of the furniture, and of all the residue, deprived the pursuers of the shares thereof which would otherways have fallen to them under the ultimate bequest to them before mentioned of such lapsed legacies. But, while she thus

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seriously lessened the original provisions she had made in favour of the pursuers, she left the legacy of L.1000 to each of them unaltered, and increased her bequest to them of her paraphernalia from two fourths or one-half to the whole thereof.

Several lines in this codicil have been erased, and in place of the erased words there is now written a precept of sasine,—and not only is that operation not authenticated by the testing clause, although a deletion of three words in a subsequent part of the writing is so authenticated, but that superinduced precept, besides being inserted out of place, according to the usual practice, is quite inappropriate in a conveyance of burgage property.

The pursuers, availing themselves of this erasure, now attempt to get the better of the alterations thus made by the testatrix on her provisions to them in the original settlement; and for this purpose they by this action conclude that, in respect of the erasure in one part of the codicil, it shall be reduced and annulled *in toto*.

According to my view of this question, it is not necessary to inquire whether or not, if this challenge had been at the instance of the legal representatives of the testatrix, the erasure would be held to be *in substantialibus*, because even although that should be assumed in favour of the pursuers, I do not think that they would have a sufficient legal title to insist in this challenge, in respect that that erasure does not occur in any of those parts of the writing in which their provisions are dealt with, and that all these parts of that writing are perfectly entire. The testatrix unquestionably had power to alter the testamentary provisions she inserted in her original settlement in favour of the pursuers. She exercised that power by making alterations of these provisions in the codicil, and the clauses of the codicil containing these alterations being entirely free from vitiation or blemish, the pursuers must take the testamentary provisions as so altered, and they have no right or title to challenge these alterations. Still less have they right or title to challenge the other provisions in this codicil.

They endeavour to support their challenge upon these two grounds; 1st, that the erasure renders the whole of the codicil improbative, and as null and void as if it had not been authenticated with the legal solemnities, and consequently, that the provisions in the original settlement remain as entire and effectual as if this codicil had never been adjected; and, 2d, that at all events the erasure is *in substantialibus*, as it is impossible, on the face of the writing itself, to ascertain what the erased text has been; and that, in such a case, the law presumes it may have consisted of some clause which, in existing circumstances, might have evacuated the writing, and consequently no effect can be given it. But I do not think that either of these grounds of challenge can be maintained by the pursuers.

In the first place, the legal effect of this erasure is different from what that of a want of due authentication would have been. In the latter case the writing never would have had any validity or effect as the deed of the testator. But the legal presumption being that the erasure has been made since the writing was executed, the law holds it to have been valid and effectual, and the deed of the testator, at the time it was granted. Hence all the provisions originally contained in it, including the modifications it made on the original deed, were valid and effectual, when it received the subscription of the testatrix, and was duly authenticated. And if it has since been rendered ineffectual by an *ex post facto* and unauthorised vitiation, this results not from any original or radical defect in the instrument, but in consequence of the intention which it originally embodied and expressed having been subsequently rendered uncertain and undiscoverable. And accordingly any party who is interested in restoring the deed, and has not been participant in the culpable vitiating of it, might obtain its restoration by an action of proving the tenor of the destroyed text, if he could prove both the tenor thereof, by sufficient adminicles and other evidence, and the *casus amissionis*, or how the vitiation was made without the authority of the granter.

And, in the next place, assuming that the proper effect of the erasure, even supposing it to be *in substantialibus*, is to render uncertain what the erased text has been, and what effect it may possibly have had on the other parts of the settlement, this is an objection which, however available it might be to the legal representative of the testatrix, cannot be pleaded by one legatee against another, because it may be retorted upon the challenger himself. Thus in the present case, while the pur-

suers maintain that the erased part of the text may be presumed to have consisted of some clause, whereby the provisions in favour of the defender Mrs Watson of the property called Snowdown, the fee of the legacy of L.500, and the furniture, and the ultimate legacy of the residue, may have been qualified with a clause declaring the whole of these provisions were a trust for behoof of the pursuers. Mrs Watson, on the other hand, may maintain, with equal probability, that that erased part of the text may be presumed to have consisted of an extension of the revocation contained in the preceding context of valuable portions of the original provision made to the pursuers, so as to include also that part of that provision which consisted of the sum of L.1000 to each of them. Whether or not the legal representatives of the testatrix might maintain such presumptions against both of these parties and the other legatees, is a question on which I abstain from stating any opinion, as it is not at present before us. But I am of opinion that neither of these legatees can challenge the provisions of the other on a ground which is equally applicable to the title of the challenger as to that of the party whose right is challenged. Such a challenge is in a similar predicament to that of a reduction of an act of contravention of the conditions of an entail, in cases where, although the deed of entail provides that a contravener shall forfeit not only for himself, but also for his descendants, the challenger is a descendant of the contravener; and as in such a case the challenger is not allowed to urge a plea which is fatal to his own title, so in the present case the pursuers cannot be allowed to do what would practically be the same thing.

Lord Deas.—Where an objection is taken on the ground of erasure, it is always necessary to keep in view the nature of the deed or writing in which the erasure occurs, and the relative position of the party pleading the objection. An erasure may be fatal in one sort of deed which would not be fatal in another sort of deed: —just as it may be fatal if it occurs in one part of a deed although it would not be fatal in another part of it. Here the erasure occurs in the codicil to a deed of settlement or will, and the codicil, although of a different date from the settlement, commences on the same sheet of paper on which the settlement terminates, and bears reference to "the foregoing deed." The parties challenging the codicil are two of the legatees or beneficiaries under the original deed, and their interest to maintain the challenge is, that the eventual share, provided to them by the original deed, of legacies which might lapse, has been circumscribed by the codicil, and that the share provided to them of the price of an heritable subject called Snowdown, which was appointed to be sold, had been taken away,—leaving, however, unrevoked their special legacies of L.1000 each, and their share of the wearing apparel and paraphernalia of the deceased. Beyond what has been now stated, they do not pretend to any interest in the settlements of the testatrix. They are not her next of kin or heirs-at-law. On the contrary, this character belongs to the defender Mrs Watson and her sisters.

Now, in order to determine whether the erasure in the codicil is to be deemed in *substantialibus* as in a question with these pursuers, it is necessary to consider whether it can reasonably or legally be presumed that something may have originally stood where the erasure now is, by which the revocation made to their prejudice, in the preceding part of the codicil, might have been neutralized or qualified? For, unless there be room for such presumption, it is difficult to see how they can have either title or interest to plead the erasure; or, in other words, how the erasure can be held to be *in substantialibus* of those parts of the codicil in which, alone, they are interested. To make my meaning clear:—Suppose that the codicil, after expressly revoking all bequests in favour of the original legatees, including the pursuers, had gone on to say that, in lieu thereof, the granter bequeathed the following legacies,—enumerating them,—to certain other persons named, and that, in enumerating the substituted legacies, there had occurred an erasure in the amount of one of them,—it is clear enough, I presume, that, although this would have been an erasure *in substantialibus* of that particular legacy, it would not have been an erasure *in substantialibus* of the whole codicil, nor pleadable by an original legatee: the reason being that it was neither reasonably nor legally presumable that any thing had been written, where the vitiated words or letters now stood, affecting the revocation in which alone such legatee was interested. So, I think, it is here, although less clearly than in the case supposed. The

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bequest of a share of the price of the subjects called Snowdown, and the relative conveyance of these subjects to trustees, are clearly and unequivocally revoked by the codicil; and, in place thereof, the subjects themselves are out and out disponed to the defender Mrs Watson, and her heirs and assignees. As regards the residue, the question whether the pursuers had any interest in it under the original deed depends on a question far from clear,—whether under the denomination of lapsed legacies the testatrix meant to include the residue which was thereby appropriated to buy an annuity for Mrs Gillies, who predeceased her? But, assuming the residue to have been so included, it will be observed that the codicil contains just as express a revocation of the destination of the residue, and as express a conveyance of the whole of it to the defender Mrs Watson, her heirs and assignees, as occur in regard to the subjects called Snowdown. And this is followed by an equally express destination to the defender Mrs Watson of the fee of the L.500 liferented by certain parties named; and the codicil, down to the close of this last mentioned clause, is all written plainly and correctly, without vitiation or erasure. Then comes the erased portion of the codicil,—forming, apparently, not a part of a clause, but a whole clause,—a peculiarity, in this case, which might have been very formidable, had the objection been by the heirs-at-law of the testatrix, having an interest to plead it, but which is really of no moment in this case, unless it can be reasonably held, or is legally presumable, that something may have been written there which negatived or qualified the previous revocation of the pursuers' interest in the subjects called Snowdown, and in the legacies which might lapse by the predecease of legatees. But, in order to presume this, we must suppose that the testatrix, after expressly revoking these particular bequests in favour of the pursuers, and just as expressly bestowing the subject-matter of them, out and out, on the defender Mrs Watson, her heirs and assignees, and after disposing of the L.500, also by giving the fee of it to Mrs Watson, her heirs and assignees, had proceeded to say something, which negatived or qualified what went before, in a manner favourable for the pursuers;—in other words, had made the deed inconsistent with itself, and undone, by one part of it, what she had expressly done by another,—a supposition, I think, the accuracy of which is here neither reasonably nor legally presumable. I am, therefore, of opinion that this erasure cannot be held *in substantialibus*, as in a question with these pursuers, or to affect any part of the codicil in which they are interested.

I give this opinion on the footing, which I understand to have been the condition of the argument, that no fraud is alleged. The pursuers expressly state (cond. art. 11) that "the erasure in the codicil had been made by Grant himself," the writer of the deed; but they do not say he made it without authority, or after the deceased's death. It is not pretended that the deed is in any different state now from what it was when produced and read by Grant on the day of the funeral, or found in the house of the testatrix, where one of the pursuers was resident at the time of her death. Which of these two last mentioned things occurred—that is to say, whether the deed had been in Grant's custody, or in the deceased's repositories—is not explained. But, in any view, the question falls to be dealt with as one not of fraudulent vitiation, but of legal objection; and so it has been pleaded to us accordingly.

The view now taken renders it unnecessary to consider the larger and more important question to which your Lordship has alluded, whether, assuming the vitiation here to have been *in substantialibus* of and consequently sufficient to annul the codicil, the result would have been to leave us uninformed of the last will of the testatrix, and so to deprive the pursuers of all interest to plead an objection which would have struck at the original will, as well as the codicil,—a question which would have required very grave consideration, and upon which I offer no opinion.

THE COURT pronounced the following interlocutor:—"Recall the Lord Ordinary's interlocutor reclaimed against; repel the reasons of reduction; assoilzie the defenders from the whole conclusions of the action and decern: Find the pursuers liable to the defenders in the expenses of process incurred by them; allow an account thereof to be given in," &c.

JAMES MOORE, S.S.C.—MORTON, WHITEHEAD, & GREIG, W.S.—Agents.

Humphrey Ewing Crum Ewing, Pursuer.—*D. F. Inglis—Penney—Macfarlane.* No. 183.

Mrs Jane Tucker Crawford or Ewing, and Others (Ewing's Trustees), Defenders.—*Patton—E. S. Gordon—Ross.* June 12, 1857. Ewing v. Ewing's Trustees.

Testament—Clause—Legacy—Succession.—A truster destined an heritable estate to his widow in liferent, and B in fee, in the event of his leaving no lawful issue. In the event of his leaving issue, he directed his trustees to pay to A, B, C, and D, "L.20,000 each, but said sum is only to be payable to the said B in the event of his not succeeding to the estate." In the next article of the trust-deed he directed, if he left no children, that his "trustees shall pay the haill legacies, &c., before enumerated, with the exception of the foresaid legacies to A, C, and D, which are hereby recalled, and my trustees shall, in lieu of such legacies, pay to them respectively, &c.—and my trustees shall also pay to the said B the interest of L.40,000, till such time as he shall succeed to the estate." The truster having died, leaving a widow, but no children,—*Held*, (*aff.* judgment of Lord Neaves), that B had, in the sense of the deed, succeeded to the estate, and was not entitled to the legacy of L.20,000.

The late Mr Ewing of Levenside died on 29th November 1853, leaving a widow, but no children. He never had any issue. By trust-disposition and settlement, dated 9th September 1844, he conveyed to trustees—the defenders—his whole estate, real and personal, with power to sell and dispose of the same, but excepting from the powers of sale "the estate of Levenside, and any lands which I may acquire as an addition thereto, and the furniture and others in the mansion-house of Levenside." These he directed his trustees, under the third purpose of his settlement, to convey in favour of his wife, in liferent, but so long as she should continue his widow allenarly, "and of the heirs-male of his body, and his heirs and assignees whomsoever; whom failing, the heir-female of his body, and her heirs and assignees whomsoever; whom failing," to the pursuer, and the heirs-male, &c. in fee. In the event of there being an heir-male of the testator's body, and of his attaining majority, the liferent in favour of Mrs Ewing was to cease, and such heir to be entitled to assume possession of said estate, Mrs Ewing being secured in an annuity in lieu of the liferent. By the fourth head of the settlement, the testator directed, that in the event of the succession opening to the pursuer, the trustees should burden him and his foresaids, and the estate, with payment, for the purposes of the trust, of L.40,000, as a condition of their granting the conveyance, "such sum to be payable by the said Humphrey Ewing Crum, and his foresaids, to my said trustees, and their foresaids, within two years after he or they shall succeed to the said estate, with interest from his term of entry, and thereafter till paid," the value of the moveable subjects within Levenside House and offices "eventually to be conveyed to him as aforesaid," "and that within six months after he and his foresaids shall succeed to the same." By the sixth article of the deed, the truster directed that the trustees should, in the event of my leaving a lawful child or children, pay the following legacies and annuities, and any other legacies, &c. viz.:—to the said John Crum, Humphrey Ewing Crum" (the pursuer), "Walter Crum, and James Crum, all children of Jean Ewing or Crum, my sister, and to their respective heirs and assignees, the sum of L.20,000 each; but said sum is only to be payable to the said Humphrey Ewing Crum in the event of his not succeeding to the estate of Levenside." Then followed several other bequests of legacies and annuities. The seventh article commenced thus:—"In the event of there being no lawful child or children born to me, it is hereby expressly provided and declared that my trustees shall pay the haill legacies, annuities, and provisions particularly before enumerated, with the exception of the foresaid legacies to John Crum, Walter Crum, James Crum, David Buchan, and Walter Buchan, and their foresaids, which are

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hereby recalled, and declared to be null and void; and my trustees shall, in lieu and stead of such legacies, pay to them and their respective heirs and assignees the increased legacies after specified, viz. to the said John Crum, L.30,000," &c. In the same event, of his having no children, the truster then directed payment of certain additional sums to parties not mentioned in the preceding article; and then followed a direction to the effect that "my said trustees shall also pay to the said Humphrey Ewing Crum, and his foresaids, the interest of L.40,000, at such rate as my trustees can get for the said sum, such interest to run from the date at which the foresaid legacies to his brothers are paid, and to continue payable till such time as he or his foresaids shall succeed to the estate of Levenside, on the death of my spouse, or in the event of her entering into a second marriage, when the payment of said interest shall cease and determine." The eighth article specified the term of payment of the annuities and interest of liferented principal sums. And the ninth article provided that the legacies (except those, the principal sums of which were liferented) should be paid within one year of the testator's death, but with power to pay them at any earlier period the trustees might think proper. The tenth article regulated the payment of legacy-duty, and declared the annuities and interest of principal sums to be alimentary, excluding the *jus mariti* of the husbands of female annuitants; and declaring that the provisions to those children who were to succeed to the several sums before specified, on the death of their parents, should be payable, at certain specified periods.

Mr Ewing having died without issue, the pursuer, subject to the liferent of the widow, succeeded to the estate of Levenside. He claimed the legacy of L.20,000. The trustees disputed his right, and this action was brought to determine that claim.

The pursuer pleaded;—That he was entitled to the legacy in respect (1.) that it was made payable to him by the seventh purpose of the testator's settlement, in the event which had happened, of no lawful child or children being born to him; (2.) that its payment had not been made dependent on any other event or condition whatever,—the condition or declaration attached to its payment in the sixth purpose of the settlement not having been imported into, and having no place in the seventh purpose. Even were it to be held that the condition or declaration attached to the legacy, as expressed in the sixth purpose of the testator's settlement, viz., that it should be payable to the pursuer only in the event of his "not succeeding" to the estate of Levenside, it would still be due, in respect that he had not yet succeeded to the estate of Levenside, according to the sense in which that expression had been used by the testator,—it being plain, on a consideration of the whole deed of settlement, that by the pursuer's succeeding to the estate of Levenside the testator meant its beneficial possession and enjoyment, and not the mere right of fee, subject to the liferent of the widow.

Pleaded for the defenders;—The pursuer having actually become proprietor of Levenside, and vested in the fee thereof, cannot claim the legacy of L.20,000, which was declared to be payable to him, and his heirs and assignees, only in the event of his not succeeding to that estate. The pursuer was effectually excluded from claiming the legacy of L.20,000, by having a right to the estate of Levenside. The event, on the occurrence of which alone the payment was claimable, had not happened. The legacy being in its nature and essence conditional, was not rendered unconditional by the reference to it in clause seventh of the deed. No intention to alter this essential condition was expressed in the deed. The whole tenor of the deed and provisions relative to the distribution of the estate, and in particular the provisions relative to the sums payable to the trust by the

pursuer, and the interest payable to him, were inconsistent with the construction put upon the deed by the pursuer." No. 183.

On 12th June 1855, the Lord Ordinary pronounced the following interlocutor:—"Sustains the defences; Assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses." * June 12, 1857. Ewing v. Ewing's Trustees.

Lord President.—I cannot say that this trust-deed is very easily read. It is somewhat confused in its expression and in its arrangement. The purposes which we have chiefly to deal with are the 4th, 6th, 7th, and 9th purposes—especially the 6th and 7th purposes.

The 6th purpose, which deals with the estate in the event of the testator leaving a lawful child or children, contains the first mention of this legacy, and it provides, in that event, that the trustees are to pay certain legacies to various parties therein named, including the pursuer, and to their respective heirs and assignees, and, as regards the pursuer, it adds these words:—"But said sum is only to be payable in

* "Note.—The Lord Ordinary is of opinion that the intention of the testator in this case, as discoverable on a fair construction of his trust-settlement, is adverse to the pursuer's claim to the legacy sued for.

"The testator, in framing his deed, contemplated two different contingencies—his leaving or his not leaving issue. In the event which has happened, of his not leaving issue, his estate of Levenside was to be conveyed to the present pursuer under the burden of L.40,000, to be paid by him for the purposes of the trust, and as the testator's widow was to liferent the estate, the pursuer was also to have the interest of L.40,000 in the meantime, till the beneficial enjoyment of it should open to him. All this is clear under the plain terms of the deed.

"It is also clear that, under the 6th purpose of the trust, in the event of the testator 'leaving a lawful child or children,' the pursuer, who would not then get the estate of Levenside, was to be paid a legacy of L.20,000. But the question is whether this legacy is also to be paid to him under the 7th purpose in the opposite event 'of there being no lawful child or children born to me.' In that case, the pursuer would undoubtedly have right to Levenside, either with immediate entry, or with the interest of L.40,000 during the widow's liferent; but he claims, in addition to these rights, the legacy of L.20,000, as due to him equally whether the testator has issue or not.

"The deed is not skilfully or perspicuously framed, and there are words in the 7th purpose, which, in one view, might be held to import into that purpose by reference, the bequest of L.20,000 which is given by the 6th purpose. But the Lord Ordinary thinks that the true construction of the deed excludes this view. He considers that the legacy of L.20,000, as constituted by the 6th purpose, where alone it is expressly set forth, is qualified by an intrinsic declaration, that it 'is only to be payable' to the pursuer 'in the event of his not succeeding to the estate of Levenside;' and that this condition so attaches to it as to render it wholly inoperative in the opposite event of there being no child of the testator, and of Levenside thus devolving on the pursuer. The phraseology of the 7th purpose, taken altogether, seems to favour this construction, particularly the declaration there made that the interest of the L.40,000 given to the pursuer is to begin to run from the date of payment, not of any legacy to himself, but of 'the legacies to his brothers,' therein bequeathed.

"The result thus arrived at as to the testator's meaning, is, that if he left children the pursuer was to get the L.20,000. If he left no children, the pursuer was to get Levenside under a certain burden, with an interim allowance during the widow's liferent; but that the right to the land and the legacy of L.20,000 were to be incompatible. This arrangement seems at once the most intelligible and the most consonant to the general structure and special provisions of the deed.

"A discussion has been raised as to the meaning of the phrase 'succeeding' to the estate, used in different parts of the deed. But this matter does not seem to enter essentially into the present question. If the legacy of L.20,000 is only to be payable in the event of the pursuer 'not succeeding' to the estate of Levenside, it seems impossible to hold, in any view, that this negative event has here occurred so as to make the legacy payable."

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the event of his not succeeding to the estate of Levenside," which it had been provided that in the event of the testator leaving no lawful children, the pursuer should do. In the event of there being lawful children, it does not appear that, under any circumstances, the pursuer could have succeeded to that estate.

The 7th purpose provides for the event of there being no lawful children; and in that event the trustees are directed to pay all the legacies which the testator had left in the event of there being a lawful child, with certain exceptions which he enumerates, and the legacy to the pursuer is not among those so enumerated. These excepted legacies he recalls, and instead of them he substitutes other of greater value. All these legatees were in this position, that in the event of there being a lawful child they were to get the legacies mentioned in the 6th purpose of the deed. In the event of there being no lawful child or children, they were to get better legacies than those first bequeathed to them. The clause then directs the trustees to pay to the pursuer the interest of L.40,000. This was to be payable to him till the event of his succeeding to the estate of Levenside by the death of the testator's spouse, or her second marriage. The meaning of "succeeding" is there very clear. The words which follow explain what it means. The payment of the interest is then to cease and determine.

Now the pursuer says that the legacy given to him by the 6th purpose is referred to in the earlier part of the 7th purpose, which provides that all the legacies before mentioned are to be paid, with certain exceptions; and his legacy not being included among these exceptions, that he is therefore entitled to it; and that when the deed afterwards provides for the payment of the interest of L.40,000, it must be independent of the L.20,000. Referring back to the 6th purpose, we find that that L.20,000 is only to be paid to the pursuer in the event of his not succeeding to the estate of Levenside. The pursuer says that that means succeeding to the estate of Levenside in the same sense in which the word "succeed" is used in the 7th purpose, viz., succeeding by the death or marriage of the testator's widow. It does not necessarily follow that the word "succeed" is to be used in the same sense in all parts of the deed. In the first part it is used broadly and unequivocally, and without any explanation at all. In the 7th purpose there are words which qualify and explain it. The 6th purpose is absolute, that the legacy shall be paid to the pursuer only in the event of his not succeeding to the estate, that is—not succeeding at all—not succeeding at any time. If that be so, and if it be clear, as it is, that the pursuer could never succeed to the estate in the event of the testator leaving a lawful child, it follows of necessity that this qualification was written in contemplation of the event which rendered such qualification necessary. This is an event different from that with which the clause commences, for there was no use for that qualification in that event. It limits his receiving the legacy to the event of his not succeeding to the estate of Levenside.

My view is, that you cannot read this legacy to the pursuer in the 6th purpose as placed upon the same footing with these other legacies in the 6th purpose which are left absolutely. The legacy is left to him with a qualification, which shews that the testator was contemplating the possibility of his succeeding to the estate of Levenside, and placing a bar to his getting the legacy in that event. I do not see how it could be extricated otherwise. When was that event to arise if the pursuer did succeed to the estate of Levenside? The legacy is to be paid to him in the event of his never succeeding. But that cannot be known, and the legacy, if it was to be payable at all, was to be payable within one year of the testator's death. The true way of reading the deed is, that in the 6th purpose the testator anticipated the possibility of the pursuer succeeding to the estate of Levenside, and having done so, there was no necessity for including this particular legacy among the exceptions in the 7th purpose, for the testator was not to add to it. He had already said what he intended to say as to precluding the pursuer getting the legacy in the event which the 7th purpose contemplates as the real objection to his getting it, viz., the event of his succeeding to the estate of Levenside. I am for refusing this reclaiming note.

Lord Ivory.—I am of the same opinion, and on the same grounds. The directions to the trustees to convey the estate appear to me to throw some additional light on this question, for when is that conveyance to be executed? When are the rights conferred by it to vest? There is to be a distinction as regards possession between the testator's own children if he leave any, and the pursuer. But in both

cases I think the direction implies vesting *a morte testatoris*, and the direction therefore seems to me to indicate that the testator used that phrase, "succeed to the estate," in the more important and primary sense of these words. But then if there be children, there is again a passage in the clause of importance, for the conveyance is to be to the heirs-male, and his heirs and assignees whomsoever; whom failing, the heir-female, and her heirs and assignees whomsoever; whom failing, to the pursuer. Now that is a simple destination; and if there was a child, the heirs would take as substitutes provided by the deed, and under the deed the pursuer would never come in at all. If at any time he did take, he would take not by force of this deed, but by force of the legal succession—not of the destination at all.

I do not propose to add anything to what your Lordship has said in reference to the 6th clause; but reading it along with the 7th clause, there is no room for doubt that any other conclusion than what your Lordship has arrived at would lead to inconsistency.

The provision in the sixth clause, "that said sum is only to be payable to the pursuer in the event of his not succeeding to the estate of Levenside," is awkwardly inserted. It shews, that in addition to the condition of the event of the testator leaving children, there is another condition which affects the pursuer, which does not affect the other legatees; and it is this, that the sum is only to be payable to him in the event of his not succeeding to the estate of Levenside. But if there be a lawful child, when is the period of succeeding? Is not the pursuer's legacy to be payable at the same term with the others? If so, all these conditions are to be purged during his lifetime. You are not to adopt a construction of "his not succeeding," that would lead to this result that he would not take the legacy till he is dead. It seems to me that there has been here an awkward anticipation by the testator of what he was to do under the seventh clause. I cannot make sense of the deed in any other way. It is clear that the maker of it never intended that the pursuer was to take both the estate and the L.20,000.

Lord Curriehill.—I am of opinion that the pursuer is not entitled to the legacy of L.20,000 now claimed by him, because it was provided to him only under a condition which has not been purified. That condition was, that "said sum is only to be payable to the said Humphrey Ewing Crum in the event of his not succeeding to the estate of Levenside." But he has succeeded to the estate of Levenside in virtue of the destination thereof, in the very settlement which contains this conditional legacy; for, although the trustees have not yet denuded thereof in his favour, and the testator's widow still liferents that property, yet in conformity with the principle of the cases of Gordon's Trustees, 4th December 1821, and M'Dowall v. Russell, 6th February 1824, the succession to that estate has opened to him, and, as owner thereof, he could dispose of it or burden it at his pleasure.

The pursuer says that the above mentioned condition is annexed to the legacy, only under the sixth purpose, which is applicable only to the contingency, which has not happened, of the testator leaving a lawful child,—whereas he claims the legacy under the seventh purpose, which applies to the contingency which has happened, of no lawful child having been born to the testator. But the condition is also applicable to the legacy under the seventh purpose, because the legacies thereby directed to be paid are (with five exceptions, within which this one is not comprehended) the same legacies, with all their qualifications, as are provided under the sixth purpose. The import of the sixth and seventh purposes, when read together, is this,—that the long list of legacies, as enumerated in the sixth purpose, are to be paid, whether the testator should leave issue or not, although in the latter event there should be substituted, for the five excepted legacies above referred to, legacies of larger amount, and there should be some additional legacies paid. This condition, therefore, still qualifies the bequest to the pursuer.

But he maintains that he has not succeeded to the estate of Levenside, in the meaning of the settlement, because, in other three parts thereof, the testator uses the expression *succeeding* as meaning, not the vesting of a right to the estate in the pursuer, but his entry to the beneficial enjoyment thereof on the termination of the widow's liferent; and as that event had not taken place at the expiry of a year after the testator's death, when, by the ninth purpose of the trust, the several legacies were directed to be paid, he the pursuer is entitled to payment of this legacy. But I concur with your Lordship in thinking that, in this part of the deed, the

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expression "succeeding to the estate" is used in its proper meaning; and that the testator's intention was, that the pursuer should not get payment of this legacy in the event of his acquiring right to Levenside under the settlement.

Moreover, even if the word *succeeding* in this condition had referred to the event of the termination of the liferent, I would not have held the pursuer to be entitled to decree in this action. As he not only has already succeeded to the fee of that estate, but is also to succeed to the rents thereof on the termination of the widow's liferent, the event of his succeeding to that estate, even according to his own interpretation of the word *succeeding*, was one which would happen only on the death or marriage of the liferentrix. Hence, even in that sense, the condition, on which this legacy is expressly declared to be payable, has not yet been purified. At present, at all events, it has not become payable to him, and it is a matter of contingency whether or not it will ever be payable to him, even according to his own construction of the settlement. It is no answer to this, that, by the ninth purpose of the settlement, the legacies generally are made payable a year after the testator's death; because, by the terms of the sixth and seventh purposes, this particular legacy is expressly declared not to be payable except in a contingency which has not yet been purified, and may perhaps not be purified while the pursuer is alive.

Lord Deas.—I think it clear that the truster's intention was not to give both the estate and the legacy to the pursuer. If the legacy is claimed under the seventh clause, that clause must be read as repeating the condition attached to the legacy in the 6th clause;—and this would not suit the pursuers' purpose.

The Court adhered, with additional expenses.

James Peddie, W.S.—Ranken, Walker, & Johnston, W.S.—Agents.

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The North British Railway Company, Pursuers.—*D. F. Inglis—Blackburn.*

Brown, Gordon, and Company, Defenders.—*Macfarlane—Fraser.*

Process—Title to sue—Res noviter—A. S. 11th July 1828, *sect.* 55.—Tenants of a colliery had right to use a railway belonging to their landlord, but which was afterwards conveyed to the North British Railway Company. For a few years before the tenants ceased to occupy the colliery they paid rent to their landlord as factor for the Edinburgh and Perth Railway Co. An action was now brought by the N. B. Railway Company, and by the landlord, as "factor for the said Railway Company," and "for himself," for alleged arrears of dues. They founded upon the prior sale, and homologated the payments to the Edinburgh and Perth Railway Co. The tenants stated, that the N. B. Company had never been vested in the part of the railway used by them, and pleaded, generally, that the pursuers had no title to sue. They brought a counter action against the landlord for repetition of dues paid to him, as factor for the E. and P. Company. In his defences lodged before the record in the first action was closed, he referred to a contract of sale between the N. B. and E. and P. Companies, by which the latter had obtained temporary possession of the railway, but under which it had now reverted to the former. No contract of sale or conveyance however was produced till after the record in both actions had been closed;—*Held*, that the tenants having been put on their guard by the defence in the counter action, were not entitled to add to the record in the first action as *res noviter* averments of the divestiture of the N. B. Railway Company. (2.) That the general plea striking at the pursuers' title could only be held to apply to the objections specified in the record, and could not embrace objections the knowledge of which had admittedly emerged only after the record had been closed.

Observed, Parties are bound to specify objections to title, and have no right under a general plea to maintain objections of which notice has not been given.

Production after closed record.—The record in the original action being closed, and the tenants having under a diligence recovered documents, and produced them, for the purpose of cutting down the right in the N. B. Railway Company;—*Held*, that the N. B. Railway Company were entitled thereafter to produce a sasine in their favour all along in their own possession, with a view to meet the production made by the other party, after closing the record.

DONALD SMITH PEDDIE, accountant in Edinburgh, was trustee, under deed of assumption, for Mr and Mrs Clarkson, the proprietors of the Halbeath colliery. By minute of agreement he granted a lease of the colliery to Brown, Gordon, and Company, for nineteen years from Whitsunday 1840, with the right to the use of the Halbeath Railway. It was agreed that the lease should terminate as soon as it should be found that the coal could not be wrought to a profit. Under this clause the defenders admittedly ceased to occupy the colliery on 3d April 1852.

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On 7th January 1847, Peddie, with consent of Mr and Mrs Clarkson, executed a disposition and conveyance of the Halbeath Railway in favour of the pursuers, John Learmonth, and others, as trustees for the North British Railway Company, but excepting therefrom any ground let to Brown, Gordon, and Company, whose rights and privileges under the then existing lease were thereby reserved. By that disposition Peddie conveyed, in favour of his disponees, the whole railway dues, and other profits payable for the railway, from and after Martinmas 1846.

This action was brought at the instance of John Learmonth, and others, "surviving proprietors of the Halbeath Railway, and holding the same in trust for behoof of the North British Railway Company, and Donald Smith Peddie, Esq. accountant in Edinburgh, their factor, for managing the same, and duly and specially authorised and empowered to demand and receive from the defenders the amount of the debt herein set forth, and to sue for, uplift, and discharge the same, and for himself."

The action concluded for payment of L.284, 8s. 9d. of railway dues, which the condescendence libelled as due "under the said lease, and the said disposition, assignation, and conveyance."

The defenders averred that they were formally discharged of all their obligations under the lease by a deed of discharge, dated 7th April 1853, executed by Peddie as trustee for Mr and Mrs Clarkson. That they "had not been able to ascertain who the proprietors of the railway were; and the right of Mr Peddie, they understand, was simply a right of tolerance." They set forth that, in 1846, a bill was brought into Parliament for making a railway to Perth by Queensferry, to be called the Edinburgh and Perth Railway. That "the North British Railway Company purchased a large amount of their stock, and these two Companies determined to procure, if possible, possession of the Halbeath Railway. The mode in which they proceeded is unknown to the defenders, or whether any bargain was completed; though it is set forth in the disposition produced, that the sum of L.25,000 was paid to Mr Peddie for the Halbeath Railway." They stated further that no intimation of sale was made to the defenders; that "in 1848 Peddie uplifted the railway dues payable from Martinmas 1846 to Whitsunday 1847, not on account of new purchasers, but on account of Mr and Mrs Clarkson, although, by the deed now produced and founded on by the pursuers, the railway is said to have been transferred to the North British Railway Company as from Martinmas 1846." That from Whitsunday 1847 to Whitsunday 1850, Peddie uplifted the dues "as factor for the Edinburgh and Perth Railway Company;"—but that the bill for the formation of the Edinburgh and Perth Railway having been then thrown out of Parliament;—the defenders refused to pay the dues to Peddie in that character, "unless he furnished them with fuller explanations, which he was unable to do." The defenders then stated that certain proceedings took place shortly after 1851, with the view to an adjustment of accounts; and that, on the dependence of a submission between Peddie and the defenders as to the rights of parties under the lease, matters remained dormant till 1854, when the North British Railway Company demanded a settlement of the dues, "but nothing was then done, inasmuch as the defender Mr Brown required to know *ante*

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omnia who were the true parties in right of the Halbeath Railway, and what their title was, in order that they might know with whom safely to confer. The defenders received the most contradictory statements upon the subject." That after a correspondence between the defenders and the pursuers, the present action was raised; and, on 18th December 1854, "for the first time the defenders were made aware of the nature of the title to claim the dues, and that, according to the title produced, the Edinburgh and Perth Company were not, as represented to the defenders by Mr Peddie, the proprietors; but, on the contrary, that the railway had been, as alleged by the pursuers, conveyed to the North British Railway Company so far back as 1846." In article 8 they stated, that "by the deed which has now been produced, the pursuers, the North British Railway Company, do not obtain a conveyance to the railway;" and after analyzing the deed, which the defenders alleged did not include the railway, so far as it passed through the Halbeath estate, which it did for nearly three quarters of a mile, the article concluded thus:—"This disposition and assignation contains a precept of sasine, but no sasine thereon has been produced." The defenders then stated, that "notwithstanding the alleged execution of this deed, the pursuer Mr Peddie still acted as if no such deed had been executed, and as if he were still in possession of the railway as trustee for Mr and Mrs Clarkson," and narrated the discharge by Peddie in their favour, above referred to.

They farther, on the assumption that the pursuers had a title to sue, averred that the state of debt libelled on was erroneous, and stated various objections to it.

They pleaded;—"1. The pursuers have no title to sue, at least they have produced no such title. 2. The pursuer Mr Peddie having executed a discharge of all claims under the lease, having discharged the lease itself, and the lease not having been assigned over by him to the other pursuers, neither they nor he are now entitled to insist in this action. 3. Mr Peddie himself not having been the proprietor of the railway in any character whatever, the mere conveyance of Mr Peddie's right in the railway to the pursuers did not *eo ipso* transfer to them the lease, or the rights under it, without a special assignation thereto." The rest of the pleas were to the effect that the action was uncalled for; that the defenders were willing to settle the debt on seeing the title to discharge the money, but that the debt claimed was objectionable.

The record was closed on 23d May 1855.

Of prior date, on 16th February 1855, an action had been raised by Brown, Gordon, and Company, against Peddie, for repetition of the monies alleged to have been erroneously paid by them to him from Martinmas 1846 to Whitsunday 1850, "in respect he had no title to receive the dues, while he stated the contrary; that he did not account for them to the parties on whose behalf he alleged he was receiving them, and he himself had been denuded of all right to the said railway since Martinmas 1846," in virtue of the disposition granted by him to the North British Railway Company.

To this action Peddie lodged defences on 25th April 1855, in which he stated, *inter alia*, that on 29th January 1847, the North British Railway Company agreed to sell, and did sell, to the Edinburgh and Perth Railway Company the Halbeath Railway, subject to this qualification, *inter alia*, that in the event of a certain portion of the price not being paid up within three years, the Halbeath Railway should revert to the North British Railway Company, who should have a power to sell and dispose of the same at pleasure. (Art. 6.) On or immediately after the 29th January 1847, the Edinburgh and Perth Railway Company entered into possession of the Halbeath Railway, but in the course of the year 1850 or 1851, the subjects reverted to the North British Railway Company. That during the time

the Halbeath Railway was possessed by the Edinburgh and Perth Railway Company he had acted as their factor, and that his actings had been fully homologated by the North British Railway Company.

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No disposition or minute of sale or deed of reconveyance in support of his averments had been produced before the record was closed on 3d July 1855. On 13th July Peddie produced a copy deed of discharge by the North British to the Edinburgh and Perth Company of part of the price of the Halbeath Railway, and which deed narrated the agreement of sale and the mode in which the bargain was to be completed.

During the debate in the first action at the instance of the North British Railway Company, Brown, Gordon, and Company, on 13th February 1856, moved for leave to add as *res noviter* certain averments contained in a condescendence,—articles 1, 2, and 3 of which narrated the contract of sale in 1847 between the North British Railway Company and the Edinburgh and Perth Railway Company, and stated that the latter Company paid half of the price and gave security for the balance, and that the North British Railway Company became bound by deed of discharge to deliver to them an assignation and conveyance of the Halbeath Railway under the real burden of the remaining half of the price. The condescendence then proceeded as follows:—"4. A deed of disposition, assignation, and conveyance, was accordingly executed by the pursuers in favour of the said Edinburgh and Perth Company, under which, as well as the contract of sale itself, the said last mentioned Company possessed, and still continue to possess as proprietors. This deed of disposition or conveyance is now in the possession of the directors, or persons who were directors of the Edinburgh and Perth Company. They have never conveyed the same to any other party, and in particular, have not conveyed the railway to the pursuers, who were absolutely and completely divested thereof. 5. The facts set forth in the preceding articles only came to the knowledge of the defenders since the record was closed. Prior to the record being closed the defenders stated all the facts that then were within their knowledge, or which they could discover. These were such as to make them believe that the pursuers were not the proprietors of the railway. The defenders had paid rent to other parties, viz., the Edinburgh and Perth Company, and their factor, down to 1850, and never heard of the pursuers being proprietors, or of the title which conveyed the railway to them as from Martinmas 1846, till the deed, or rather a copy of it, was produced in this process. The defenders were unable to explain this title consistently with the fact that they had paid rent to Mr Peddie as factor for the Edinburgh and Perth Company down to Whitsunday 1850. They believed that the pursuers had been divested, after 1846, by conveyance to the Edinburgh and Perth Company, and accordingly, before the record was closed, they applied for a diligence to the Lord Ordinary to recover documents connected with this matter of title. The first article in the specification was in these terms:—'All missives or minutes of sale, or other deeds, between Mr Peddie, as trustee for Mr and Mrs Clarkson, or his agents, and the said North British Railway Company, or their trustees, secretaries, managers, or agents, and between him and the Edinburgh and Perth Railway Company, or their secretaries, trustees, managers, committees, and agents, and between the said North British Railway Company, their trustees, secretaries, managers, and agents, and the Edinburgh and Perth Railway Company, their secretaries, trustees, committees, or agents, of all or any part of the Halbeath Railway, or in relation thereto, or copies of them.' The Lord Ordinary refused this diligence *hoc statu*, on 28th February 1855. The record was prepared and completed 12th March 1855. The case appeared in the adjustment roll on 20th March 1855. Being the first appearance in the roll the case was adjourned; and on the meeting of the Court in the Summer Session, the record was

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closed on 23d May 1855. The defenders not having access to the deeds which they have since discovered, were unable to set forth on the record the facts connected with the divestiture of the pursuers, and the conveyance to the Edinburgh and Perth Company, who are at present the proprietors. The following was the mode in which the defenders obtained information on the subject."

Article 6 then stated that, in the action raised by Brown, Gordon, and Company against Peddie, "Peddie, on 13th July 1855, and after the record was closed in the present action, produced the copy deed of discharge granted by the North British Railway Company for the sum of L.12,500, which had been paid to that Company by the Edinburgh and Perth Railway Company, with the object of shewing that the latter had bought the railway, and that he, as their factor, had properly exacted and obtained payment of the railway dues down to 1850. This deed recited the contract of sale between the two companies, and stated particularly the mode in which the bargain was carried out between them. It set forth that, in the event of the second instalment of L.12,500 not being paid to the North British Railway Company, which was declared a real burden upon the railway, they should be entitled, as creditors of the Edinburgh and Perth Company, to sell the railway, and from the proceeds pay their own debt. This deed, or the copy of it, was not produced in process until 13th July 1855, being long after the record was closed in the present action. This deed disclosed to the defenders the fact of the divestiture to the North British Railway Company, but owing to the record being closed in the present action before they saw it, they were unable to found upon it, or set forth in the record in this action the facts which it narrated.

"7. The North British Railway Company have received payment of the second instalment of L.12,500. At all events, they have never exercised the power of sale which they possess for payment thereof, and the railway remains the property of the directors of the Edinburgh and Perth Company. That Company has never made any reconveyance to the North British Railway Company."

On 20th February 1856, the Lord Ordinary pronounced the following interlocutor:—"Having heard counsel on the defenders' motion, made during the discussion of the cause on the closed record, for leave to introduce the averments contained in the condescendence, No. 50 of process, of facts said to be *res noviter venientes ad notitiam*, Refuses the said motion; and appoints the cause to be enrolled, that the debate on the merits may proceed; and reserves all questions of expenses." *

* "NOTE.—The record in this action was closed on 23d May 1855. Before that date the defenders Brown, Gordon, & Co., had raised their action against Mr Peddie, in which the same counsel and agent appeared for them; and in which it was stated by the defender Mr Peddie, one of the pursuers of this action, that the Halbeath Railway had been at one time sold to the Edinburgh and Perth Railway Co., the deed of conveyance was then mentioned, and was subsequently produced. The fact, therefore, if relevant, is not *res noviter veniens ad notitiam* of the defenders since this record was closed. It is a fact brought under their notice, and the ascertainment of which was within their power long before the record was closed, and from their own statement on this record it is plain that they knew the fact. The deed was referred to in Mr Peddie's defences, lodged on 25th April 1855, when the pleadings in this process were in the course of adjustment, in terms of an interlocutor of 20th March 1855, and lodged a month before the record was closed; and it was produced in the process against him on 13th July 1855, yet no motion on the head of alleged *res noviter* was made in this action till the 13th February 1856, when it was suddenly made in the middle of a debate on the merits. In such circumstances, the Lord Ordinary does not think that the averments in the condescendence of facts alleged to be *res noviter venientes ad notitiam* can be viewed in that light. They have not come to the defenders' knowledge since the record

Brown, Gordon, and Company reclaimed, and pleaded :—That there were only two considerations in this discussion,—1st, The relevancy of the averments sought to be added to the record, which could not be disputed; and 2d, The delay which had elapsed between the closing of the record, and the motion for leave to add the new averments. That delay, however, could affect only the question of expenses. Whether or not the defenders could safely pay to the pursuers was not of the least consequence. The objection was to title, and if the objection was in itself good, the answer that the defenders were safe to pay was irrelevant.

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Lord President. — The only question here is, whether there is excusable ignorance on the part of the defenders? Do the pursuers object to the defenders founding on this deed as matter of title?

D. F. Inglis, for the pursuers.—We consent to their doing so without

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was closed. It would be sufficient on the authorities that they might have been ascertained; but in this case they were actually known. The privilege of introducing new matter at so late a stage of the proceedings must be protected from abuse.

"But, separately, the Lord Ordinary is of opinion, that, having regard to the circumstances of this case, and to the position in which the defenders stand, these averments of alleged new matter of fact are really not relevant to support the defence.

"Their possession as tenants during the year for which rent is now demanded is not disputed; their liability for the rents sued for is not denied—payment of these rents to any party is not alleged—and a demand by any other party than the pursuers, the North British Railway Co., or Mr Peddie, or the Edinburgh and Perth Railway Co. (if that company be now in existence, which it is not said to be), is not even averred to be possible. Mr Peddie, from whom the defenders got the lease, and under whom they commenced their possession, is a concurring pursuer. No person on the part of the extinct Edinburgh and Perth Co. has appeared, or is named by the defenders as having a right to appear, and the North British Railway Co., who have produced a conveyance in their favour of this railway, dated in 1847, and in force during the years 1850, 1851, and 1852, have judicially undertaken to procure any further concurrence the defenders may suggest, and to give the defenders a guarantee against a demand by any party whatever for second payment. This conveyance, fortified, if that were necessary, by the concurrence of Mr Peddie as a pursuer, is a good title to sustain the demand, and to make the defenders perfectly safe in paying. The defenders are seeking to raise a cloud, in which to escape from payment of a just debt; and they ought not, in the Lord Ordinary's opinion, to be allowed to do so. As debtors in this rent, which they do not deny that they are, they have no legitimate interest, except to see that they are safe in making payment; and here there is no competition for the rents, and no challenge of the pursuers' right by any party having interest. The rise and fall of the project for making the Edinburgh and Perth Railway, for which an Act of Parliament was not obtained, and the arrangement, which ultimately came to nothing, for transferring to the Edinburgh and Perth Co. the Halbeath Railway, have been laid hold of by these defenders for the purpose of complicating and obscuring this case, and enabling them to escape, or at least to postpone their liability for payment of a debt not denied to be just. The disposition to the North British Railway Co. in 1847 remains a valid and unchallenged title. Mr Peddie, who was the author of the defenders' right, concurs in this action, and will concur in the discharge; and against all possible hazard of a demand for second payment, the defenders are offered an ample guarantee.

"Notwithstanding all this the defenders refuse to pay the debt, and now, during a debate on the merits and on the closed record, they endeavour to gather the materials for litigation, and the grounds for technical pleas in defence, out of the brief and long-forgotten history of the Edinburgh and Perth Railway Co., which was interposed between the lease to the defenders and the conveyance to the North British Railway Co. To permit them, under these circumstances, to succeed in this attempt, would, in the Lord Ordinary's opinion, be *pessimi exempli*. The ends of justice appear to him to require the refusal of the motion now made."

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farther averment. Farther, we homologate the payments by the defenders, and say they were perfectly safe to pay.

The Court, in May 1856, pronounced the following interlocutor: "In respect that the matter referred to by the reclaimers is not *res noviter*, and that it is not disputed that the deed referred to may be founded on in support of the objection to title, so far as relevant: Refuse the said reclaiming note, and remit to the Lord Ordinary to proceed with the cause, reserving all questions of expenses."

Under a diligence granted by the Lord Ordinary, the defender recovered the contract of sale between the pursuers and the Edinburgh and Perth Railway Company—discharge in favour of that Company by the pursuers, and a state of Peddie's intromissions as factor for that Company, but no conveyance. Nor did they recover any reconveyance by the Edinburgh and Perth Company to the pursuers. The pursuers then tendered production of a sasine upon the disposition of 1846 in their favour, to which the defenders objected as incompetent.

The Lord Ordinary pronounced the following interlocutors:—

"17*th February* 1857.— . . . . Finds that the pursuers allege on record that they are proprietors of the Halbeath Railway, and that it has not been disputed that they were proprietors of the railway prior to February 1847: Finds that the defenders object to the pursuers' title to sue, on the ground that, by an alleged sale by the pursuers to the Edinburgh and Perth Railway Company in February 1847, the pursuers were denuded of their title as proprietors: Finds that the pursuers produced in support of their title a disposition, assignation, and conveyance in their favour, containing a precept of sasine; but that the instrument of sasine was omitted to be then produced, and has been at the debate now referred to by the pursuers' counsel, and tendered as a production at the bar, but the production thereof has been opposed by the defenders: Finds that the fact of the pursuers being infeft at the agreement, in February 1847, may be important, and that it is essential to the ends of justice that the pursuers' right should not be dealt with as personal only, if they were truly infeft, and finds that the sasine ought to be in process: Therefore allows the same to be produced, under reservation of the question of expenses.

"*Edinburgh*, 18*th February* 1857.—The Lord Ordinary having resumed consideration of the case—In respect that the pursuers' title, as proprietors of the Halbeath Railway, standing on disposition and sasine, was not destroyed by the personal right conveyed to the Edinburgh and Perth Railway Company; and that on the reversion, in terms of the agreement, of the personal title on non-payment of the second instalment of the price, the right again stood in the pursuers, as proprietors undivested; and in respect that the rents or railway dues, now sued for, are for use and possession during a period for which no payment to any party has been previously made, and no payment has ever been demanded by any other party than the pursuers—Repels the first plea in law for the defenders; and appoints the cause to be enrolled, that the defenders may be heard, if they desire it, on their other pleas; and reserves the question of expenses." *

* "NOTE.—The defenders do not seriously deny that the sums concluded for are due. It is certain that they have not been paid, and that no other party has demanded or is demanding them. The objection of want of title, taken in the face of the pursuers' offer of guarantee against any demand for second payment, is a technical legal objection urged against the manifest equity of the case.

"Notwithstanding this, the Lord Ordinary has carefully considered its legal effect, he is of opinion, 1st, That, looking to the nature of the pleas, and the whole circumstances, the sasine produced at the bar by the pursuers to support the title of proprietorship alleged in the summons, ought to be admitted, subject to some

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The defenders reclaimed, and prayed the Court "to find that the pursuers, not having libelled upon a title by sasine, are not entitled now to produce or found upon such a title; to find that, in any circumstances, the pursuers are not entitled to produce said sasine after the record had been closed, the sasine having been in their own possession; to order the said sasine to be withdrawn from process; and, in any view, to disallow production of the pursuers' sasine; to sustain the first plea in law for the defenders, that the pursuers have no title to sue, and to dismiss the action accordingly; to find the pursuers liable in expenses to the defenders," &c.

They pleaded;—That the only question was one of form, which was expressly regulated by Act of Sederunt.[1] Considerations of what was essential for justice were irrelevant. The question now was, was it competent for the pursuers at the last moment to produce that sasine? Admittedly, it was all along in their possession. They were aware of it, and advisedly withheld it until the last moment, when they thought it might be of importance. But these were not circumstances in which the Court would allow the rules of Court to be overturned. If this were allowed, there was no case in which a record being closed, a party might not produce at any time whatever documents he pleased, and might purposely keep back documents on which the whole case might be found to hang. Lord President.—Has there been anything produced by the defenders which required production of this sasine to meet it? *Macfarlane*, for the defenders.—Nothing but the contract of sale; but it is not explained by the pursuers that the sasine was intended to meet that production. Their object was to libel the action upon a different title from that upon which it was originally brought; and, in these circumstances, this production was incompetent. If so, the second inter-

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award of expenses, in the way of modification or otherwise, when the cause is concluded; and, 2dly, That if the sasine is so received as a production, and the pursuers' completed title viewed as the radical right, reverting, in terms of the agreement, with the Edinburgh and Perth Company, then the defenders' plea, urged against a demand for dues never paid to any one, and never claimed by the Edinburgh and Perth Company, and arising during a period when the Edinburgh and Perth Company did not possess the railway, is not well founded. Mr Peddie is himself a concurring pursuer in this action. It is not alleged by the defenders that there are any parties now representing the Edinburgh and Perth Company who can claim these dues, or, indeed, that a demand for second payment by anybody is possible.

"It is specially stipulated in the agreement founded on by the defenders, that, 'in the event of the sum of L.12,500, secured on the contingency above contemplated on the Halbeath Railway, not being paid up within three years, the said Halbeath Railway shall revert to the North British Railway Company, &c. That the Edinburgh and Perth Company did not get their Act of Parliament, and that this sum was not paid within three years, and that therefore the railway did revert to the North British Railway Company, are facts which were not in argument disputed by the defenders. But the feudal title having been all along in the pursuers, their right of proprietorship does not rest on the clause of reversion or retrocession, but on the original radical title,—the effect of the reversion being only to discharge the personal right of the Edinburgh and Perth Railway Company.

"In these circumstances, the Lord Ordinary has repelled the defenders' first plea in law."

[1] A. S., 11th July 1828, sect. 55, provides, that, "after the record is made up and closed, it shall no longer be competent for the party in any case to produce any writing which was in his possession or within his power at the time of completing the record, unless he shall instruct that it is *noviter veniens ad notitiam*; but it shall be competent to the parties to apply for a diligence for recovery of writings in modum *probationis*; or to produce such writings previously in their power as may be rendered necessary by the production of papers made by the other party after the record is closed."

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locutor, which proceeded on the assumption that this production was competent, must also be recalled. No title could be revived under that condition by which the property reverted to the pursuers in certain events, without a declarator to establish it. There was here no renunciation or evidence of renunciation of right by the Edinburgh and Perth Railway Company. It was not to be assumed that the property had so reverted without evidence to that effect.

The pursuers pleaded;—That the title libelled in this action was the disposition and conveyance by Peddie, with consent of the proprietors of the Halbeath colliery, in favour of the pursuers. In objecting to the pursuers' title, therefore, the defenders could only mean that this disposition was not a good title on which to sue the action. But in the absence of anything to take off its effect, that disposition was as good as any possible title in a petitory action. The record was closed on that production. In the defenders' condescendence of *res noviter*, they alleged that the Edinburgh and Perth Railway Company now possessed the Halbeath Railway under a deed of conveyance by the pursuers, who were thereby absolutely and completely divested. That was the only deed that could be said to be *res noviter*, and was the deed referred to in the interlocutor of May 1856. But it had not been recovered, for this reason, that such a deed never did exist. In these circumstances, the defenders having contended that, under the agreement of sale and other documents recovered by them, a personal right was created in the Edinburgh and Perth Railway Company, sufficient to destroy the personal right in the North British Railway Company,—the answer was, that there was not such a personal right; but it was not necessary to discuss that point, the nature of the pursuers' right being made clear by the sasine in their favour, and that sasine was therefore produced for the purpose of meeting the argument raised by the defenders upon their new productions. That was not against, but in accordance with the Act of Sederunt.

Lord President.—In the previous discussion, it is stated that you consented to the defenders founding on "the deed" without additional averment. They now say that that means the contract of sale as well as the conveyance to the Edinburgh and Perth Railway Company.

D. F. Inglis, for the pursuers.—That was not the meaning of my concession, which was, that if the defenders should produce such a conveyance as they said existed, I agreed to their founding on it without opening up the record.

Macfarlane, for the defenders.—Our understanding was that the contract of sale was included in the Dean's consent. Moreover, the contract of sale has been produced without objection.

Lord Deas.—Strictly speaking, the pursuers' consent was equally necessary to enable the defenders to found on the contract of sale.

Lord President.—I wish to refer to my notes of the former discussion, in order, if possible, to find a clear solution of the interlocutor of May 1856, for it allows a certain deed to be founded on in support of the defenders' objection to title, and if that clearly applies to the conveyance, that deed is not now founded on. There is no allegation on record that there is any such disposition, and the interlocutor would then be out of the way that creates the difficulty.

On 5th June the case was again called.

Lord President.—There are here two interlocutors of the Lord Ordinary brought under review. The first deals entirely with the producing of this sasine at the present stage of the case. It appears to me that the pursuers were entitled to produce the sasine, not upon the grounds stated in the interlocutor, but in respect of the productions made by the defenders since the record was closed. Being of that opinion, the first interlocutor of the Lord Ordinary will fall to be recalled.

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In his second interlocutor the Lord Ordinary has repelled the first plea in law for the defenders, in respect of the reasons contained in his first interlocutor. I have considerable difficulty in adopting that ground of judgment. It rather appears to me that the whole matter rests on a personal title here, and that the sasine does not avail much in the question we have to decide. I am therefore not disposed to concur in this interlocutor. There are various objections to the pursuers' title set forth on the record, on some of which we have not heard parties. Therefore, I would suggest that this interlocutor should be recalled *in hoc statu*, and that we should appoint parties to be heard on the first plea for the defenders.

Lord Ivory.—I entirely agree as to the grounds of recalling both interlocutors. We cannot hold the pursuers entitled to produce this sasine on the ground stated by the Lord Ordinary. But the documents produced by the defenders give the pursuers an independent ground for producing it.

As to the other interlocutor, the action is not libelled on a real right, but is founded altogether on personal title, and therefore I am prepared to recall that interlocutor *in hoc statu*, but I think parties should be further heard.

Lord Curriehill.—I concur in the judgment suggested on both points. The question of title may refer to the disposition by Peddie to the North British Railway Company, or to an alleged divestiture by that Company in favour of the Edinburgh and Perth Railway Company, and alleged re-investiture. The question raised on the record is this: Is the title there referred to only a conveyance by Peddie in favour of the North British Railway Company, or does it also include such investiture of the Edinburgh and Perth Railway Company, and re-investiture of the pursuers? The discussion should have reference to that question.

Lord Deas concurred.

The Court pronounced the following interlocutor:—"*Edinburgh*, 5th *June* 1857.—The Lords having heard counsel for the parties,—Recall the interlocutor of the Lord Ordinary of 17th February last; but find that the pursuers are entitled to produce the instrument of sasine following on the disposition, assignation, and conveyance, both in their favour, in respect of the productions made by the defenders since the record in the cause was closed: Further, they recall *in hoc statu* the interlocutor of the Lord Ordinary of 18th February last, and allow the parties to be heard on the first plea in law for the defenders, and on the state of the record."

When the case was called, neither party proposed to make any alteration on the record.

When the case was advised,—

Lord President.—This case has been a very unfortunate one. It has been frequently here, and it is now before us upon a record, which, to say the least of it, is very unsatisfactory with reference to the point which has been argued to us.

When the case was before us last the attention of the parties was called to the state of the record, and doubts were expressed whether it contained anything upon the subject of the divestiture or re-investiture of the North British Railway Company. But both parties say they are resolved to stand by the record as it is. If a proposal had been made by either of them to make the record more perfect, I would have entertained that proposal, and considered the regulations under which it was to be agreed to. But both parties have repudiated that course, and they insist on the case being dealt with rigidly on the record as it stands.

That being so, we have to deal with the defenders' objection to the pursuers' title. The record does set forth such an objection, and looking to the record as presented to us, I could draw no inference from it except that the title of the pursuers was objectionable, in respect of what is stated in article 8 of the defenders' condescendence. The record states a specific objection to the title produced by the pursuers, and says that by that title the pursuers could not, and did not, obtain a conveyance to the Halbeath Railway. The result of the whole is summed up in the first plea in law for the defenders, that "the pursuers have no title to sue, at least they have produced no such title."

Now it is impossible to read that plea otherwise than by reference to the record, and I cannot admit the broad doctrine contended for by the defenders, that it is not incumbent on them to state in the record the specific nature of their

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objections to the pursuers' title,—that if they choose to state a plea that the pursuers have no title, under that plea they have right to adduce any objection of divestiture, or anything else that may arise in the course of the proceedings. Still less would I be disposed to admit that a party is entitled to set forth in the record specific objections to the title of the pursuer with a general plea of this kind, and then say, he does not mean to plead these objections at all, but something else which he has reserved, and therefore I construe that plea in the way which I am to mention. The defenders have already said in the record that the title the pursuers have produced is not a good title to the Halbeath Railway; the plea, therefore, can only mean that the document produced is not a good title to this railway. But at a later stage of the case the defenders discovered that there were proceedings whereby, as they say, the North British Railway Company were divested of this railway in favour of the Edinburgh and Perth Railway Company, and they desired to have that proceeding connected with the state of the facts averred in the record, and they applied to the Lord Ordinary for leave to have the record opened up and this matter added to it. That application was put on the ground of *res noviter*. The Lord Ordinary refused that application. He observed that the transaction which they alluded to as a supposed divestiture,—the document on which that was supposed to rest had been brought under their notice in another action between them and Peddie, one of the pursuers in this action, before the record in this action was closed; and that, therefore, they were not excusably ignorant of that transaction. It is not enough, in an application for leave to add new matter to a record, that the party making the application was ignorant of the facts averred to have come recently to his knowledge. He must be excusably ignorant of them. The defenders were here put on their guard as to the existence of this document. The Lord Ordinary refused the motion on that ground. That interlocutor was reclaimed against, and we were also of opinion that the matter was not *res noviter*. That appeared to us very clear.

The defenders said they had ascertained that there was a deed of conveyance of the Halbeath Railway by the pursuers in favour of the Edinburgh and Perth Railway Company. "This deed of disposition or conveyance is now in the possession of the directors of the Edinburgh and Perth Company," and that, I suppose, is the disposition which, under their discharge for the L.12,500, the North British Railway Company became bound to grant. After a good deal of discussion, we thought that the whole matter alleged was not *res noviter*; and I think the 5th article of the defenders' condescendence went far to support that conclusion, for it says that the defenders "believed that the pursuers had been divested after 1846 by conveyance to the Edinburgh and Perth Company; and, accordingly, before the record was closed they applied for a diligence to the Lord Ordinary to recover documents connected with this matter of title." In that position of matters, with the deed referred to in defence by one of the pursuers in another action, and the defenders' own admission that they believed that the pursuers were divested, I could not hold that the divestiture was a matter of *res noviter* which they were entitled to put on record as such, and we so decided.

We have since heard an argument which was apparently intended to bring under review that judgment, and to reopen that question of *res noviter*. The defenders' argument, on that point, went mainly to show that we had so decided under some mistake, and had been under the impression that the document referred to had been produced in the other action before the record in this action was closed. I never understood the Lord Ordinary to say so, but merely that it had been referred to in defence in a case between the same parties; that the defence had been lodged, and therefore seen before the record was closed in this action. The deed of discharge was lodged long before the motion was made to add these averments to this record. Therefore, if it were competent to us to open up that question of *res noviter*, nothing has been said to lead me to a different judgment than we have pronounced. The defenders knew, or ought to have known, of this divestiture. It is also plain that the defenders do not aver such divestiture in the record.

It is said that there are facts averred from which investiture may be inferred; that it is alleged that Peddie was factor for the Edinburgh and Perth Company, and that that is equivalent to saying there was a divestiture of the North British Railway Company in their favour. I must recur to the observation I formerly

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made, that there is not an averment of divestiture at all. It is stated that the defenders had "reason to believe" that there was a divestiture, but in that state of the averments, I cannot hold that this record covers the objection of divestiture; and it would be *pessimi exempli* to allow the defenders now to plead an objection of that kind, where they have not stated it in record, and also where they admit that they believed the fact to be as they now state it, and yet that they withheld that statement from the record. I cannot sanction the doctrine that a party stating specific objections to the title produced, and putting on record a plea of this kind we are now dealing with, is entitled, under cover of that plea, to raise a question of this kind as to divestiture. It was his duty to have made that statement on record, and allowed the pursuer an opportunity of answering it. The defenders have not done so, and therefore I am for repelling their objection to the pursuers' title. I do that with the less difficulty that I do not see much in the objection itself.

LORD IVORY.—I am of the same opinion. Certainly this record is not in a satisfactory shape, whether as regards the averments of the pursuers or the defenders. But with reference to the matter attempted to be introduced into the case on the application of the defenders as *res noviter*,—that is a decided point. We have held that there was no *res noviter*. Then, when we come to the record as it stands, what is the ground of action? The defenders were originally the tenants of this railway, and of the Halbeath colliery. The title of the pursuers is set forth in the summons as assignees to any rights or proceeds of this Halbeath railway, which Peddie, the landlord of these parties, would have been entitled to exact from and after Whitsunday 1846. That is quite express as to the title to sue for any dues exigible from the defenders under their lease. The pursuers libel on both the assignation and the lease. It may be shewn that Peddie is divested of his title, but upon that title the summons is laid. Again, the action is at the instance of the North British Railway Company, and of Peddie, their factor, and "for himself." Peddie, therefore, is not pursuer merely as in right of the North British Railway Company, but in his own right. And in the statements by which the summons is supported, he sues for any right he might have under his original title of landlord, as regards the tenants; therefore there is first the title of their direct landlord, and also of the cedent from that landlord, upon the disposition which is produced. That title, so libelled, is complete. What is the defence? It is that the title is not good, because of certain objections which are stated in article 8 of the defenders' condescendence. The objections are somewhat of a technical kind. But none of them assert a divestiture. The objection is to the sufficiency or validity of the title founded on in the summons. And in the pleas in law that comes out still clearer. Divestiture is not intended to be alleged; so that whether you look to the statement of facts, or the pleas in law, it is perfectly clear that the ground of objection to the title as libelled is simply that it was an insufficient title, and would not avail the pursuers.

The objection which is next taken on the ground of divestiture is no longer an objection to the sufficiency or validity of the title produced. It is an admission of that title, and a statement that it was an investiture, but that the pursuers have parted with it to another party.

I entirely agree, that if the objection to title was to be rested on any such ground, it ought to have been specifically set forth in the record. That is a new [illegible]se. It is an admission that title is libelled, and an assumption that admitting [th]at title to be good, it has been transferred, and given away to another party. [Th]at cannot be assumed. There must be a specific statement to that effect, and [th]ese defenders have not made such a statement.

Again, in regard to the matter of *res noviter*, the defenders tell us why they did [no]t state it in the record. They say that they only came to know about it after [th]e record was closed. The defence of divestiture was not within the record, and [w]e are told why it was not within it. The only way in which it was proposed to [pu]t it in, was on the footing that it was an entire novelty. But the defenders [ad]mit that they did know of it before, and therefore there is an end of that objec[tio]n to title. How far that is to go is a different affair. An objection to title is [no]t final—that is, it is not exclusive of going into the grounds on which that title

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is to be supported. It is an objection to the title as laid; but on the merits of the action the parties have still to enter.

LORD CURRIEHILL.—I so entirely concur not only in the results, but in the grounds of your Lordship's opinion, that I have little to add. The subject of this action consists of dues leviable for the use of the railway. The summons sets forth that the defenders are liable in payment of them in virtue of a certain agreement entered into between them, on the one hand, and Peddie, as representing the family of Clarkson, on the other hand. The pursuers libel upon and produce a disposition and assignation from Peddie in favour of the North British Railway Company. That document expressly conveys the railway dues; and therefore there is a clear title in favour of the North British Railway Company to sue for these dues. But further, Peddie the cedent concurs with them in the action, so that the pursuers' title is ample and sufficient. The defenders, however, disputed that title; and particularly in article 8 they set forth the nature of their objection to it, and the record is closed without any other objection to title being stated. There is no allegation of divestiture from beginning to end of the record. The defenders alleged that they were unable to state this in the record, because they were ignorant of it. But we are now dealing with that record as it stands. We have already decided that this was not *res noviter;* but yet the opportunity was given to the defenders of moving to have the record opened up, on the ground that it did not sufficiently state the pleas of parties. But as they have not availed themselves of that opportunity, I am satisfied that the objection of divestiture is not properly before us; and I am very glad that your Lordship has expressed your opinion so strongly, that a defender is not entitled to bring forward any objection he pleases under cover of a plea generally stated as to want of title. I entirely concur that this would be setting the Judicature Act at defiance, and would introduce an improper system of pleading.

LORD DEAS.—I so entirely concur, that I should only repeat what has been already said, were I to enlarge farther. The defenders have peculiarly little reason to complain if the forms of process be strictly enforced against them, for full opportunity was offered to them to make the record more satisfactory, and they declined to do so. The sole objection urged at this bar, to the pursuers' title to sue, was their alleged divestiture in favour of the Edinburgh and Perth Railway Company. But no such objection is stated in the record either as matter of fact or matter of law. I thought, at one time, it might possibly be intended to lurk under statement 4th. But this statement was explained by the defenders' counsel, Mr Fraser, to refer to a proposed transaction, which never took effect, between the two Railway Companies on the one part, and Mr Peddie, on behalf of Mr and Mrs Clarkson, on the other part. The very words of the defenders' 1st plea indicate that it had no reference to divestiture:—"The pursuers have no title to sue, at least they have produced no such title." The precise meaning of this plea we find from the relative statement in art. 8, where it is said that the line of railway is excepted from, or not embraced in the conveyance libelled on, and that the pursuers have produced no other title than that conveyance. The plea, therefore, is not that the pursuers had a title and are now divested of it, but that they never had a title at all, which is quite different. It it settled by the interlocutor refusing the condescendence of *res noviter*, that the defenders knew, or were bound to know, of the deed which they now say operated as a divestiture. If, therefore, it was meant to be maintained that they were divested, this should have been averred as matter of fact, and then the plea of no title might have covered the objection. We must hold, therefore, that there is a title to sue. The title to discharge is a subsequent consideration. I come to this conclusion the less reluctantly, because the argument did not satisfy me there was divestiture even if we could have gone into it.

THE COURT pronounced the following interlocutor:—"The Lords having heard the counsel for the parties on the first plea in law for the defenders, Repel that plea, and decern: Find the defenders liable to the pursuers in the expenses incurred by them since 18th February last, the date of the Lord Ordinary's second interlocutor reclaimed against by the defenders; and remit the cause to the Lord Ordinary that the same may be proceeded with, and with power to

his Lordship to order an account of the expenses hereby found due to be lodged and taxed, and thereafter to decern for payment thereof." No. 184. — June 12, 1857. Urquhart v. Grigor.

SMITH & KINNEAR, W.S.—ANDREW HOWDEN, W.S.—Agents.

ISABELLA ROSS OR URQUHART, Pursuer.—*Gordon—John Lorimer.* No. 185.
ALEXANDER GRIGOR, Defender.—*Young—A. B. Shand.*

Reparation—Agent and client—Neglect of professional duty—Measure of damages.—In an action against an agent for damages sustained by the loss of an action alleged to have been occasioned by the negligence of the agent, chiefly in allowing circumduction and decree by default to pass without intimating to his client the interlocutor allowing proof;—*Held* not necessary to aver that the agent acted fraudulently or collusively; but

Action dismissed, in respect—(1), although it is the duty of an agent generally to intimate an interlocutor allowing proof, the failure to do so had not been proved; and (2), the pursuer had not condescended upon any evidence which could have been available.

Observed, that had it been proved that the action had been lost through *crassa negligentia* on the part of the agent, the conclusions of the action so lost would not necessarily be the measure of the damage, but the Court would inquire into the soundness of the claim.

THIS was an action of damages raised in the Sheriff-court of Ross-shire against an agent in consequence of alleged misconducting of litigation in that court, in which he had acted on the employment of the pursuer, Mrs Urquhart, an old woman of humble rank. The facts of the case were as follows:— June 12, 1857 — 2D DIVISION. Sheriff of Ross-shire. R.

1. In the year 1850, the respondent had, at Mrs Urquhart's instance, raised an action against one James Brander for recovery of an alleged loan of L.30. The defender in that action deponed on a reference that there was no loan, but that an acceptance in favour of the pursuer's father had been deposited with him in security of rent, and that he had received the contents. The action founded on loan therefore failed; and

2. In 1851, in the knowledge of the whole circumstances, the respondent raised an action of count and reckoning applicable to the contents of the bill. Brander pleaded prescription, and denied resting owing. The Sheriff-substitute, on 23d February 1853, pronounced an interlocutor allowing a proof before answer; and on 25th February he pronounced another fixing a diet, and granting "diligence against witnesses and havers—the proof to be commenced by the pursuer," &c.

This interlocutor Mrs Urquhart said was never intimated to her. This was not admitted by the respondent, who, however, led no proof, and the following interlocutor was pronounced:—"*26th April* 1853.—Circumduces the term for proving against both parties; and in respect the pursuer failed to adduce any evidence in support of her averments, sustains the defences on the merits; assoilzies the defender from the conclusions of the libel; finds the pursuer liable to him in costs."

The defender reclaimed against this interlocutor, arguing, that the *onus* of proof did not lie on his client, but upon Brander, who had admitted that the contents of the bill had come into his hands. This reclaiming note was dismissed by the Sheriff-substitute, whose interlocutor was allowed to become final without any appeal being taken.

3. An action of damages precisely similar to that now before the Court was brought against the respondent, but allowed to drop.

4. Mrs Urquhart brought the present action against Grigor, concluding for payment of L.30, as the "loss and damage" sustained by her in con-

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sequence of the defender having failed to intimate to her the interlocutor allowing a proof in the second of the cases, and "to cite witnesses," and to appeal to the Sheriff from the judgment of the Sheriff-substitute circumducing the term for not proving, and assoilzieing the defender.

After the record was made up, the pursuer alleging not only that the interlocutors allowing and fixing the diet for proof had not been intimated to her, but that witnesses had been at hand to prove her case, and were ready to be adduced, and the defender denying these allegations, both parties renounced probation.

The Sheriff-substitute assoilzied the defender, and found the pursuer liable in expenses,* and an appeal against his interlocutor was dismissed by the Sheriff-depute.†

A note of advocation for Mrs Urquhart was reported to the Second Division, in terms of the statute. It was argued for her;—If Grigor knew the whole circumstances from the first, and that it was impossible to succeed in the count and reckoning, it was most improper in him to raise the action at all, merely to give it up when he was allowed an opportunity of establishing his case. In any view, he ought not to have allowed circumduction to pass without intimating the proof to his client, and giving her an opportunity of adducing evidence. By diligence, the bill and receipts, showing how the contents had been paid, might have been recovered; or perhaps the oath of the defender in the original action, the terms of which had seemed to furnish grounds for a count and reckoning, might have been used; but the defender had not even made a new reference to oath. He indeed reclaimed, and contended that the admissions in the record were sufficient to lay the *onus* of accounting on the defender; but it was another gross failure in duty on his part to allow the adverse judgment on this point to become final without either intimating it to his client or appealing. The defender was

* Note.—After a narrative of the facts, the note proceeded :—

" At the hearing, the agents on both sides agreed to take a judgment on the case as it stands, without any further proof than is contained in the admissions and documents in process; and the Sheriff-substitute is of opinion, that, in the circumstances above stated, the defender is entitled to be assoilzied. The original debt, if there was one, was about 25 years old when the first of the four actions was raised by the pursuer, and, consequently, was proveable only, if at all, by writ or oath; and the alleged debtor swore negatively of the averment of resting owing under the pursuer's own reference. Then it is not alleged, in regard to the action of count and reckoning, that the pursuer gave her agent any writings to support it, or that any such writings existed; and parole evidence would have been incompetent and inadmissible. To ' cite witnesses' and inform the pursuer of the diet of proof would therefore have been useless; and as useless would it have been to appeal against the circumduction. Thus there is nothing, it is conceived, to warrant the conclusion that the pursuer has really suffered loss through a failure of professional duty on the part of the defender."

† " Note.—The Sheriff cannot hold that the situation of an agent conducting a process is to be assimilated to that of a messenger employed to execute diligence. The latter is employed to do a specific act, and has no discretion whatever; so much so, that if he fails to do the act for which he is employed, he is subjected in damages, though it might be apparent that nothing could have been recovered had the diligence been executed.—Chatto, 17th Jan. 1811. But an agent employed to conduct a case in the inferior Court has a very considerable amount of discretion committed to him. He is not bound to communicate with his client at each step of the process, and such communications would not be allowed in a question of expenses. Unless, therefore, he has acted collusively or fraudulently, the Sheriff is not disposed to hold that he renders himself liable to the client in damages by not proceeding with a proof which he regards as hopeless. Looking to the history of the previous processes, the Sheriff does not think that the agent committed any error by means of which any actual damage has arisen to the appellant."

not entitled to plead upon his denial of the averment that he had not intimated the proof; for he had nowhere condescended upon how or when, or even alleged that, he had intimated it. To make out her position that her agent, if in conducting her case he was guilty of *crassa negligentia*, was responsible for its loss, it was only incumbent to show that she had a fair case to litigate; and the defender, on whose advice she had brought the action, could not be heard to argue that it was one in which she could not possibly prevail.[1] No. 185. — June 12, 1857. Urquhart v. Grigor.

The respondent pleaded;—In the first action against Brander, he had denied, on a reference to his oath, the averments made by the pursuer in the count and reckoning; and it was not to be supposed that, on a reference in the latter action, he would have admitted them. The respondent, in the exercise of his discretion, had been of opinion, 1st, that there were no writings, of which he was aware, that could prove his client's case; and 2d, that parole proof being incompetent, he was not bound to ask his client if she had witnesses to adduce. He had never been instructed that she had any documentary evidence; and at the date of the interlocutor allowing the proof, parties to the suit were not admissible as witnesses. The course he had taken was therefore the proper one to adopt in the discharge of his duty. He could not be blamed for want of professional skill in acting on an opinion that parole proof was incompetent, when the Sheriff-substitute's note showed that the same opinion was held by the Judge before whom he practised. That opinion was a sound one; but even assuming parole proof to have been competent, the advocator was bound to have condescended on what she could have proved by parole, or at least on the names of the witnesses she could have adduced, in order to make her allegations relevant to infer liability against the respondent for not giving her an opportunity of adducing them. Lastly, the averment that the respondent had failed to duly intimate the interlocutor to the advocator was denied, and probation had been renounced.

Lord Justice-Clerk.—Whatever opinion I might form on the facts of this case, I could not adopt the doctrine of the Sheriff-depute, that an agent stopping short in a cause, and not going on to proof, so that the case is at once decided against his client, without previous communication to that client, shall not be liable in damages, unless he acted collusively or fraudulently. In many cases the partial abandonment of the cause without communication with the client, may at once be a ground of liability, although the agent *bona fide* believed that the case was hopeless. Having accepted the employment, communication with the client before the case is thrown up is in most circumstances a positive duty, especially when that client lives at the distance only of a few miles. But a great deal may depend on the nature of the case, the instructions received, and the character and conduct of the client. Neither am I at all disposed to allow more discretion to a country agent in regard to such a step without the knowledge of the client, than to an agent in this Court, especially if the latter has acted on the advice of counsel. It is true, as the Sheriff says, that the responsibility of an agent and of a messenger are not in the general case the same; and loss it may be necessary in most circumstances to prove in the case of the former, although that may not be required in the case of the latter. But, on the other hand, the liability of the agent may often be as broad as in the case of the messenger; and certainly one of the least favourable cases for the agent is to drop the cause after an interlocutor allowing a proof has been obtained, without the knowledge of or communication with his client, and without any pretext that an application for funds to assist him to go on has been neglected or been fruitless. Circumstances may justify such a step, and the character of the case may be an important matter for the agent in

[1] M'Millan v. Gray, 2d March 1820, F. C.; Macfarlane's Executors v. Ferguson, 6th June 1834, Sh. vol. xii. p. 824; Anderson v. Torrie, 31st Jan. 1857, ante, 356.

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defending himself against liability. But the step is a strong proceeding, even when there is no reason to doubt that the agent acted as he believed for the best, and may often subject him at once in damages. It would have been a very strong proceeding in this case, when the agent undertook the action in question in the full knowledge by that time of the whole facts.

But after fully considering the case, I do not find proof, such as the Court can go on, that the agent did give up the action referred to without communication with the client or her brother; and the lapse of three years without complaint to or against the agent is a fact much in favour of the latter. Further, it would be necessary in such a case as the present to shew that there was proof which might have been adduced, and that loss and damage were sustained by the act of the agent in not having sufficient proof. Now, it is not made clear, or indeed properly stated, that any proof could have been adduced; and loss and damage in the circumstances of the cause referred to, through the case being dropped, has not been proved or rendered even probable. The notion of taking the amount of the bill for L.30 at once as the measure of damage is quite absurd in the circumstances.

Certainly the case is in a very unsatisfactory state; but that was the result of the joint act of the parties, concurring that the case should be decided without any further proof than is contained in the admissions and documents in process. Now I find no admission by the defender to the effect of supporting the action, as to the non-communication with the client, and no document which instructs the same.

A good deal of matter quite extraneous to the ground of action libelled on has been introduced into the discussion. But we can only proceed on the ground set forth in the summons, and I cannot say that the averments which I have read are proved.

The second ground, if it is a separate ground of liability, involves a very serious point as to an agent's responsibility. The defender reclaimed against the interlocutor circumducing and assoilzieing. So far as we can judge, the reclaiming petition stated a very reasonable view to the Sheriff-substitute; but he refused the petition. But the Sheriff-substitute, in his note in this case, having full knowledge of all the facts as to the claim against Brander, states in very decided terms that in that case parole proof would have been incompetent, and that it is not averred that the pursuer has given his agent any written documents to instruct a case which could not be proved by parole. This is very weighty testimony in favour of the defender, being the opinion of the Judge who refused that reclaiming petition, and who is a most experienced and intelligent person. The agent acquiesced in that interlocutor, and did not appeal to the Sheriff-depute. It cannot be maintained that an agent is bound to appeal every interlocutor, or to communicate with a client in regard to every interlocutor in the cause. On that subject the agent must have large discretion, and to hold him liable in damages because he acquiesces in the view of the Sheriff-substitute, is a view of an agent's position not warranted by any authority. Accordingly, no case was cited in support of judgment on that ground in the pursuer's favour. Most clearly loss, certain loss, must be proved to have arisen from that act of the agent. And the view stated by the Sheriff-substitute shews that such loss was not sustained. I should think the acquiescence in that interlocutor was an incautious act; but as a ground of liability, where the honesty and good faith of the agent is not impeached, there is no warrant for sustaining it.

It is very true that the situation of a country agent, acting for an ordinary country woman, must often be very troublesome and vexatious; and, if a client's case is being fought, he is often told afterwards that he has incurred too much expense, and involved his poor client in expensive and useless litigation, when the obstinacy of the client is the sole cause. But still he is the client's agent, and the tendency of the Sheriff's note is to create an impression of much greater and more absolute personal control and command of the client's interest than I wish to sanction.

On the other hand, as to the act of not reclaiming against the interlocutor of the Sheriff-substitute, as the client availed herself of the professional skill of the defender, he is entitled to say that he acted in the safest way for his client, according to his professional skill and his knowledge of the case; and in this case I think that defence is available to him.

I do not go on the explanation given to the Sheriff, at his desire, in the answers to the reclaiming petition. That statement is not proved, and, probable as it is, I do not rely upon it. The case was then a concluded cause.

It seems to me that there has been a sort of persecution of this agent, looking to the date and history of this alleged debt to the pursuer's father.

Lord Murray.—I have come to the same conclusion. The position of a party who acts as the agent of an ignorant woman is one of great responsibility; and her losing a debt to which she thought herself entitled, calls for our compassion; but compassion for her must not lead us to injure the defender by making him liable to her, unless that loss has been owing to his culpable neglect of the business he had undertaken.

But there must be some very serious instance of mismanagement before I would be inclined to hold that he has been guilty of *crassa negligentia*.

If a litigant has a good case, in which a proof is allowed, and the agent fails to do his duty in the way of preparing for and leading the proof, and does not intimate that he intends to give up the agency, that is a gross failure in the performance of his duty. But there must be something more condescended upon to show that the loss arose from such failure than we have in this case. I do not see sufficient reason for altering the judgments in the Court below; at the same time it is right to say, that if there had been made out a case of gross negligence, without any malice on the part of the defender, that would have been sufficient, in my view, to have made him liable for the debt which was lost through such negligence. But in the course of the whole of this process the pursuer has never made any clear statement of the proof by which her claim might have been established, or of any circumstances which, to my mind, bring home to the defender the charge of negligence preferred against him.

Lord Wood.—I am of the same opinion. I certainly could not carry the protection of an agent as far as the learned Sheriff by his note would appear to do, if what is there stated were to be understood as a general proposition, viz., that to make an agent responsible for neglect of duty, it must be proved that he acted fraudulently or collusively. There may, I apprehend, be many acts of an agent in the conduct of a cause which might be said to amount to neglect of duty, but which, unless something special were qualified and proved in regard to them, would resolve merely into error in judgment; and, although the error in judgment were shewn to be a very manifest one, still I think that in such cases something more would require to be proved, and that it might be necessary to prove fraud or collusion.

Then, as regards the present case,—if it had been a fact in the case that no intimation had been made to the client of the interlocutors allowing a proof, and fixing a diet for proving, I should have been of opinion that the agent was liable for the loss the client had thereby sustained. But, although the case may be in a very unsatisfactory state for judgment, we must deal with it on the footing on which the Sheriff-substitute's note shews that it has been placed by the parties. The note bears (and its accuracy is not disputed) that the parties "agreed to take a judgment on the case as it stands, without any farther proof than is contained in the admissions and documents in process."

We are tied up to this; and it being so, it appears to me to be conclusive against the pursuer's claim as founded on the first alleged failure in duty by the defender, viz., the non-intimation of the interlocutors as to proof. The averment of non-intimation is denied by the defender. There is, therefore, no admission, and the documents afford no evidence of it. Non-intimation, therefore, cannot be taken as a fact in the case, and if it is not established, then the reverse must be held to be the fact, and so that ground of responsibility cannot be sustained.

It was indeed suggested, that to require the pursuer to instruct non-intimation was to put on her the proof of a negative, and that the *onus* lay on the defender. But, granting it were so, the question now is not who was bound to prove. That is excluded. The only question is, what is it that is admitted on the record or proved by the documents?

But, further, if there be no proof of non-intimation, the pursuer can, as it appears to me, have no case on the second alleged failure in duty on the part of the defender. For the second neglect of duty pleaded is not rested on the allegation that the

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defender failed to lead proof, of the existence of which he was aware; but that, by not intimating the interlocutors, he failed to give the pursuer an opportunity of putting him in possession of the evidence, or the names of the witnesses that would have been supplied, and that were ready at hand to be brought forward. But, in the absence of the fact of non-intimation, it cannot be so; and the defender avers that the pursuer had no evidence to adduce;—an averment which has not been met by any statement on the record that he was informed of any evidence. In this state of matters, I do not see how, on the admission or productions, any liability can attach to the defender on the second ground on which it is maintained.

As to Brander's deposition in the prior process, it was hardly contended that it was admissible. But, even if it were, the not making use of it would only amount to an error of judgment. Or, suppose the defender thought the oath negative, and that it would not avail as a foundation for the action, and that he was wrong in this, it appears from the Sheriff-substitute's note to the interlocutor of October 1856 that he was of the same opinion. Then, as to witnesses, and assuming he had been informed of any, and had not offered to adduce them because he thought parole proof inadmissible, he has the authority of the Sheriff-substitute in support of that view. And here I may observe, that the pursuer has not yet referred to any writings or witnesses by which it is said her claims could be instructed. But I apprehend that it would have been essential to do so when the alleged loss is stated to arise from the agents' neglect in not leading proof.

With regard to the third ground of liability, I entirely agree in the view which has been taken by your Lordships.

I have only to add, that it is a circumstance not a little remarkable, and which gives a very unfavourable impression of the whole case, that, while Brander was assoilzied from the action against him in May 1853, and the expenses decerned for in July thereafter, the present action against the defender was not raised till 10th May 1856.

Lord Cowan.—On the only point of general interest involved in this case, I concur in the opinions of your Lordships. I cannot acquiesce in the ground of the judgment of the Sheriff-principal, as laid down by him in his note. There is no doubt that an agent must be allowed the exercise of a certain amount of discretion in the management of a case, and the distinction drawn by the Sheriff between the situation of an agent and of a messenger is well founded. But if an agent in the exercise of his discretion departs from the usual course of procedure, and acts with gross negligence, he will be responsible. I quite concur in your Lordship's repudiation of the Sheriff's opinion that the agent is not liable in this case, unless he has acted collusively or fraudulently; it is sufficient to render him responsible that he is chargeable with gross negligence in his conduct of the suit. On this principle we acted in the recent case that came before us from Aberdeen.

Your Lordships have gone into the facts, and hold that there was no gross negligence in this case. I differ from your Lordships, though I am, therefore, afraid that my views may be erroneous. I think there is enough to shew that this agent did not conduct the count and reckoning with a due regard to his client's interests, and that through his negligence those interests have been sacrificed. There had been a previous action against Brander based upon a loan, and, on a reference to his oath, the defender had distinctly sworn that, while there was no loan, he had received the proceeds of the bill, and that a part thereof was still in his pocket. That first action was necessarily cast, because there was no loan. The defender was the pursuer's agent in that action, as he was in the action of count and reckoning which followed most naturally in consequence of the deposition of the defender Brander. The question is—Did the agent discharge his duty in the management of the latter action? He gets an interlocutor allowing a proof. He gets a second interlocutor fixing the diet, and granting diligence against witnesses and havers. I have no doubt that it was at that time in the contemplation of the parties and of the Sheriff-substitute that there should be a proof by parole. The agent does not go to the Sheriff with a reclaiming petition, on the ground that he had no proof to lead. He allows the second interlocutor to stand, yet he leads no proof. Thereafter the term is circumduced, and the defender assoilzied, in respect the pursuer had led no evidence. This was all done without a single step being taken by the agent, and without any intimation being made to his client. He then presents a

reclaiming petition, on the ground that the *onus* of proof lay upon the defender, Brander, and that, though the pursuer had led no evidence, it was not she but the defender who ought to have done so. The Sheriff-substitute, however, adheres; and though the agent believed, according to his own account, that the *onus* of proof lay upon the defender, he allowed the judgment to become final without taking the opinion of the Sheriff-principal. The effect of this acquiescence was to make the judgment final.

No. 185. — June 13, 1857. Drummond v. Lindsay.

I am of opinion that the agent was not justified in acting as he did without communicating with his client, and without authority so to act, express or implied. The averment is, that he did not so communicate. I hold that communication with her was his duty. She might have left her case to the defender's oath, and she ought to have had the opportunity given her of making a reference, especially considering the nature of the oath Brander had emitted in the former action. I hold that the *onus* of proving that he did communicate with his client lay on the defender. The pursuer cannot be held bound to prove a negative. It is the defender's case that he did communicate, and if he has failed in doing so, his defence falls, and his liability is clear. But he did not do so; and when called upon by the Sheriff, in the interlocutor ordering answers to the reclaiming petition, to explain "the grounds upon which no intimation was made to the pursuer of the proof allowed," he says, in his answers to the reclaiming petition, that he had no communication whatever with the petitioner, and he goes on to explain, that he had corresponded all along with her brother, and acted under his authority. If that were proved, it might justify the agent's actings, but there is no proof whatever of it, and even no averment about it upon the record, the allegation being made for the first time in the answers to the reclaiming petition.

I will only add one word more in reference to the extent of the damages claimed. I agree with the Chair, that this is not a case where the whole L.30 can be demanded as damages. Suppose an agent is employed to prosecute a claim alleged to amount to L.30, but takes no proper steps, and is guilty of gross negligence, it cannot be said that the measure of the mere claim, supported by no proof, is to be held the measure of the damage. It must be open for inquiry, what the true amount of the debt was for which decree might have been got, so as to fix the amount of damage incurred. At all events, this is a point that would be for serious consideration.

The Court pronounced this interlocutor:—"Adhere to interlocutor complained of: Remit the case *simpliciter* to the Sheriff: Find the advocator liable in expenses," &c.

Geo. Munro, S.S.C.—William Muir, S.S.C.—Agents.

Dame Margaret Forbes Walker Drummond and Others (Drummond's Trustees), Petitioners.—*Dundas—Pattison.* No. 186.

Donald Lindsay, Respondent.—*D. F. Inglis—E. S. Gordon.*

James Moncrieff Melville, Objector.—*Penney—Moir—A. B. Shand.*

Trust—Judicial factor.—The Court, on the representation that a trust-settlement had been destroyed, and on the application of one of the parties who had been nominated trustees and certain of the beneficiaries, appointed a judicial factor *ad interim* to manage the trust-estate. The other parties who had been named trustees concurred in the appointment. Thereafter, the tenor of the trust-deed having been proved, and several of the parties named trustees having accepted, held that the appointment of a factor did not supersede the trust; and, therefore, on the application of the accepting trustees, it was recalled.

On 20th February 1856, Lady Drummond and her two younger sons presented a petition narrating, *inter alia*, that the late Sir Francis Walker Drummond had died in 1844, leaving a trust-disposition and settlement, which had since been destroyed by two of the parties nominated trustees; that the wishes and directions of Sir Francis had been entirely frustrated; that his heritable and personal estates had been possessed, and, to a great

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extent, sold, and diverted from the purposes to which they were destined; that large and serious losses had arisen to the estate; and that the wreck of the estates themselves was on the eve of being sold for payment of the debts of the heir-at-law, in whose person titles had been made up, in disregard of the terms of the settlement. The petition therefore prayed for the appointment of a judicial factor with the usual powers, "to the intent and effect that he might execute the trust, and fulfil the several purposes thereof." They stated that none of the parties "named as trustees in the trust-deed of Sir F. W. Drummond have accepted the trust, and that the trust cannot be carried into effect without the intervention of the Court."

The petition implicated Sir James Drummond and Mr Melville, W.S., the latter of whom, it was also alleged, was very largely indebted to the trust-estate.

Answers were lodged by these parties, and also by the petitioner William Douglas Dick, and thereafter, of consent, the Court, on 11th March 1856, appointed Mr Lindsay, accountant, to be judicial factor, with the usual powers, and decerned *ad interim*.

Thereafter the same parties who had petitioned for Mr Lindsay's appointment raised an action of proving the tenor of the trust-disposition and settlement,— which action was unopposed; and, on 28th February 1857, the Court found the *casus omissionis* and the tenor of the trust-deed proved. By that deed Lady Drummond and William Douglas Dick were appointed trustees along with Sir James Drummond and Mr Melville, and full powers of administration and management were conferred on the trustees.

This petition was now presented by Lady Drummond and Mr Dick as "accepting trust-disponees and executors," with concurrence of the testator's younger sons, for recall of Mr Lindsay's appointment, on the ground that he was not appointed for the purpose of carrying out, and had not the power to carry out, the purposes of the trust-settlement; that, at the time of presenting the petition for the appointment, Lady Drummond and Mr Dick had no title under which they could accept the office of trustees and executors under the trust-disposition and settlement. But, the tenor of that deed being proved, they had now accepted of the office, and were the only accepting trustees and executors under the deed; and, in order to their being fully vested in the trust-estate, it was necessary that the appointment of judicial factor should be recalled.

Answers were lodged by Mr Lindsay, stating that he had no personal wish to continue in office or to resign.

Answers were also lodged by Mr Melville, who objected to the recall of the appointment, because (1.) It was made on the application, and with the consent of the present petitioners; (2.) Because it was not contemplated to be of a temporary but a permanent nature. Otherwise, it would have been opposed by him; (3.) That circumstances had not changed since the appointment in 1856, nor from what they had been for some years previously. Lady Drummond and the petitioners had the draft of the trust-deed in their possession, and might at any time have accepted, but they had practically renounced the office of trustees and executors by assenting for twelve years to a family arrangement, by which the trust-deed was laid aside. They were also liable to personal exceptions of a serious nature; (4.) That the disputes and differences which had arisen between the trustees nominated by Sir Francis Drummond were such as to render it necessary for the benefit of the estate and of all concerned, that the management should remain in neutral hands.

He declined to act as a trustee, and he now judicially minuted that declinature, but he pleaded, that he was entitled to oppose this application, which evidently had for its object the personal aims of the petitioners, and to enable them the more effectually to harass him. They had already

brought actions against him, concluding for L.100,000, and it was therefore plainly expedient that the estate should be managed by a neutral third party. It was on the footing that the trustees had all declined that the appointment had been asked for and consented to.

The petitioners pleaded;—That the factor had been appointed to preserve what was practically an intestate estate, but which was so no longer. There was therefore no necessity for his continuance in office. His appointment was not inconsistent with the subsequent vesting of the trustees. Mr Melville, who had been named a trustee, declined to act. He had therefore neither title nor interest to object.

The judicial factor declined to take part in the discussion.

Of this date the case was advised,—

Lord President.—There has been a material change of circumstances since this appointment was made. The trust-deed has been set up. It was then non-existent. If it had then existed, and the parties who applied for this appointment being themselves trustees, had made the application on the ground that none of the trustees had accepted, I would have construed that into a declinature on their part to accept. But that was not the case, and that is not the construction to be put on the words of the application, "that the trust could not be carried into effect without the intervention of the Court." The petitioners have invoked the intervention of the Court, and have proved the tenor of the trust-deed, and although a judicial factor is appointed, with the usual powers for the management of a trust-estate, it does not follow that if a trust-deed be discovered, or the tenor of it proved, the parties named trustees are not to give effect to that deed. The object of the appointment was said to be to give effect to the purposes of the testator. But we did not accede to that. It would have been very dangerous to do so, not knowing whether the averments regarding the trust-deed were correct or not. But it was quite necessary in the circumstances that a judicial factor should be appointed to preserve the estate, and we made the appointment, with the ordinary powers, for that purpose. But the tenor of the trust-deed being now proved, I do not think that parties are barred by that appointment from now giving effect to the trust-deed by accepting the office of trustees and executors conferred on them.

Mr Melville may have exercised a sound discretion in declining to be a trustee, but we have no authority for saying that "the trustees" are at such variance amongst themselves in regard to the management of the trust-estate, that the appointment of a neutral party to manage it is necessary. We cannot give effect to that argument, and therefore, in my opinion, there is no sufficient ground for continuing this appointment.

Lord Ivory.—I am entirely of the same opinion. When the case was formerly here there was no subsisting deed of trust effective as a managing title. Nothing could be done under it. The parties nominated trustees could have taken no step for recovery of debts nor removing of tenants. They could have done nothing practical at all. If they had then brought a proving of the tenor, the same appointment of a manager for the preservation of the estate might have been necessary; and it is impossible, now that the trust-deed is set up, to say that the parties who asked for an interim management, when there was no existing title, shall be debarred from coming forward, now that there is an existing title, and acting under it.

Lord Curriehill.—I concur.

Lord Deas.—I agree. The only ground on which we could have appointed a factor to supersede the trust-deed would have been that the whole trustees had declined to accept. Now these parties, when they petitioned for this appointment, perhaps did not contemplate accepting, and possibly it would have been better for all parties that the judicial management should continue. But we have nothing to do with that. The petitioners are entitled to change their mind, so long as there has been no declinature to accept, and what we have to do with is not so much the mind of the trustees as of the testator, who desired that his estate should be managed by them. That must be carried into effect, unless the trustees have placed themselves in a position to bar them from acting under the trust. I do not think that they have done so. There was no per-

No. 186. manency in the appointment itself so long as it was in the power of the trustees to accept.

June 18, 1857.
M'Gibbon or Davidson.
Jack or Craig v. Jack.
Blantyre v. Glasgow, Paisley, and Greenock Railway Co.

THE COURT refused to award expenses against Mr Melville, and pronounced the following interlocutor:—"Having resumed consideration of this petition, with the answers thereto, and heard counsel for the parties, and a minute being made at the bar of a statement made for Mr Melville, the Lords recall the foresaid appointment of the said Donald Lindsay as judicial factor on the estate, heritable and moveable, of the said deceased Sir Francis Walker Drummond, and decern."

RANKEN, WALKER, & JOHNSTON, W.S.—DUNDAS & WILSON, W.S.—Agents.

No. 187. MRS MARGARET M'GIBBON OR DAVIDSON, Petitioner.—*G. G. Bell.*

June 18, 1857. *Husband and wife—Process—Curator* ad litem.—In a petition by a
1ST DIVISION. married woman for the appointment of a judicial factor to protect her rights
C. under her marriage contract against certain actings of her husband, the trustees therein named having declined to act, the Court appointed a curator *ad litem* before pronouncing the usual order for intimation and service.[1]

HILL & ROBERTSON, W.S.—Agents.

No. 188. MRS MARGARET JACK OR CRAIG, Pursuer.—*Logan.*
JAMES JACK, Defender.—*Scott.*

Process—Jury trial—Proof on commission.

June 19, 1857. SEE supra, p. 748.
1ST DIVISION. Ld. Mackenzie. L. The Lord Ordinary now reported this case, on a motion by the pursuer,—the defender objecting,—to have proof on commission, as the property was of very small value. The Lord Ordinary was of opinion that, following the precedent of Fairholme,[2] the pursuer's motion ought to be granted.

MOTION granted.

DAVID CORMACK, S.S.C.—JOHN WALLS, S.S.C.—Agents.

No. 189. LORD BLANTYRE, Pursuer.—*D. F. Inglis—Monro.*
THE GLASGOW, PAISLEY, AND GREENOCK RAILWAY COMPANY, Defenders.—*Patton—Hector.*

Railway—Clause—Construction.—A railway company were bound to keep the slopes of all cuttings and embankments formed on a certain estate—except where "in rock"—properly soiled and sown;—*Held,* that the slopes at the top of a rock-cutting were not "in rock," and that natural grass intermixed with furze and broom on the embankments did not satisfy the statutory obligation.

June 19, 1857. 1ST DIVISION. Ld. Ardmillan. C. THE Glasgow, Paisley, and Greenock Railway Company obtained an Act, which provided, "That the slope of all cuttings and embankments formed on the estates of Lord Blantyre shall, at the expense of the said Company, be dressed and finished, and afterwards maintained in a neat and sufficient manner; and where not in rock, such slopes shall be sown and soiled and maintained in grass, and the said Company shall not be entitled to make any use of the slopes of such cuttings and embankments as may become their property, except by planting the same with consent in writing of the said Lord Blantyre, his heirs and successors, or by cutting the grass thereof."

[1] M'Gibbon or Alcock, Petitioner, 3d June 1840, ante, vol. ii. p. 1091.
[2] Fairholme v. Fairholme's Trustees, 16th Dec. 1856, supra, p. 178.

No. 189.

June 19, 1857.
Blantyre v. Glasgow, Paisley, and Greenock Railway Co.

In an action by Lord Blantyre to enforce this obligation, the Lord Ordinary made a remit for the purpose of distinguishing what was matter of fact from what was matter of opinion as to the state of the railway slopes and embankments. Various reports were made, the last of which contained the following passage in reference to that part of the railway—" (1), Between Bishopton Bridge and the mouth of the tunnel; and (2), the part of the line north of the tunnel entrance. In regard to both portions, the reporters have to report that the slopes lying between the top of the rock on each side of the railway, and the walls which separate the defenders' grounds from the adjacent fields, have not been formed by cutting these slopes out of the rock, but by placing the debris or excavations from the railway above the soil which was previously there:—That so far as the reporters can now ascertain, the top soil of the railway was not preserved separately or laid on the slopes,—the slopes being formed by throwing up the materials excavated from the railway, generally consisting of rock-sand and earth, and which slopes were afterwards roughly dressed or levelled in some parts, while in others nothing appears to have been done in addition to throwing down the materials. These slopes are now generally covered with rough natural grass, interspersed with broom and furze bushes, while in part large stones are seen protruding."

On 5th June 1855 the Lord Ordinary pronounced an interlocutor, in which, after findings as to the obligations imposed on the Railway Company, and a finding that " the slopes above the cuttings between Bishopton Bridge and the mouth of the tunnel, and to the north of the tunnel entrance, are to be viewed as 'in rock,' within the meaning of the Act of Parliament, and that therefore the obligation 'to sow, soil, and maintain in grass,' as distinct from the obligation to 'dress, finish, and maintain in a neat and sufficient manner,' does not apply to them," he " decerns and ordains the defenders, at their own expense, to soil and sow in grass the slopes of the embankments, and also any slopes of cuttings which may not be in rock, and to dress, finish, and maintain the same in a neat and sufficient manner, and to take such steps in relation to the walls of the embankments as may be necessary for these purposes, provided the same do not affect the security of the railway, or the safety of the public; with this view, appoints the said operations to be performed at the sight of Mr Henry Wylie, civil engineer," &c.*

Both parties reclaimed against the interlocutor, so far as adverse to them. The reclaiming note for the Railway Company was refused without discussion, but in defence against the reclaiming note for Lord Blantyre, they pleaded ;—That the entrance and exit of the tunnel were properly in rock, and so where there was a perpendicular rock-cutting, with a slope at the top, that was equally to be considered " in rock." With regard to the slope of the embankments, the Railway Company were not bound to make them an ornament to the landscape. All they were bound to do was to prevent their being an eyesore, or, at most, to keep them in accordance with the surrounding country, which was here not in a state of high cultivation. The embankments being covered with rough natural grass, intermixed with furze and broom, sufficiently fulfilled the requirements of the statute.

* " NOTE.—The Act of Parliament does not contain any obligation to construct the railway in any particular manner, so as to afford any specified angles for slopes; and accordingly, if the fact were, that, as the line has been formed, the dressing and maintaining in grass was impossible, the Lord Ordinary would not have considered the defenders bound to reconstruct the railway; but impossibility is not alleged, and as regards the slopes of the embankments, it is clear that the defenders have not fulfilled their obligation, and that they can do so if they take certain steps suggested by the reporters."

No. 189.

June 19, 1857.
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Lord President.—The defenders are bound by their Act to sow and soil, as well as to dress, finish, and maintain "in a neat and sufficient manner," all slopes, although formed of debris of rock, such not being to be viewed as "in rock" in the sense of the Act.

Lord Deas.—I am of the same opinion on both views of the argument. I think, even if the statutory obligation of the Company were to be read as they read it, they have not fulfilled that obligation. Materials for arriving at this conclusion are afforded by both reports. For both shew that the natural soil on the slopes has been covered by debris from the rock cuttings, and then some parts roughly dressed or levelled, and some not at all,—leaving large stones protruding,—which certainly cannot be said to be dressing and finishing the slopes in a neat and sufficient manner, as the Company admit they were bound to do by the Act of Parliament. But I think, farther, that the statutory obligation of the Company was, according to the plain, natural, and grammatical construction of the words used, an obligation to sow, soil, and maintain in grass all the slopes which are not on rock. I do not say another construction might not be put on the words if this construction were shewn to be extravagant or absurd. But that is not the case, and therefore the words must receive their natural meaning.

Lords Ivory and Curriehill concurred.

The Court repelled the defence, and pronounced the following interlocutor:—"Recall the interlocutor of the Lord Ordinary reclaimed against: Find that the defenders are bound by the Act of Parliament quoted in the summons, under which their line of railway has been constructed, to dress, finish, and maintain in a neat and sufficient manner the slopes of all cuttings and embankments formed on the estates of the pursuer: Find that where such slopes of cuttings are not 'in rock,' the defenders are bound to sow, soil, and maintain them in grass: Find that the slopes above the cuttings between Bishopton Bridge and the mouth of the tunnel, and to the north of the tunnel entrance, are not to be viewed as 'in rock' within the meaning of the Act of Parliament, and therefore that the obligation 'to sow, soil, and maintain in grass,' as distinct from the obligation 'to dress, finish, and maintain in a neat and sufficient manner,' applies to them: Find that the slopes, both of cuttings and of embankments, have not been sowed, soiled, and maintained in grass, in terms of the Act; and that in reference to all these slopes, such sowing, soiling, and maintaining in grass, is necessary to the dressing, finishing, and maintaining in a neat and sufficient manner: Find that it is not alleged by the defenders that the steepness of the slopes of the embankment is such as to render it impossible to dress them and maintain them in grass in all respects according to the Act: Therefore, decern and ordain the defenders, at their own expense, to soil and sow in grass the slopes both of the cuttings and of the embankments, so far as practicable, and to dress, finish, and maintain the same in a neat and sufficient manner, and to take such steps in relation to the walls of the embankments as may be necessary for those purposes, provided the same do not affect the security of the railway, or the safety of the public; and appoint all the said operations to be performed at the sight of Mr Henry Wylie, civil engineer, who is hereby empowered to give such directions to the defenders as he may consider necessary and proper for carrying into effect the foregoing decerniture, and is ordained to report to the Court *quam primum* how far the said decerniture has or has not been implemented: Find the defenders liable to the pursuer in expenses of process incurred by him to this date: Allow an account thereof to be given in, and remit to the auditor to tax the same when lodged, and to report."

Dundas & Wilson, C.S.—Hope & Mackay, W.S.—Agents.

THE EARL OF GALLOWAY, Complainer.—*Penney—Moir—E. S. Gordon.* No. 190.
THE REV. JAMES GRANT, Respondent.—*D. F. Inglis—Cook.*

June 20, 1857.
Earl of Galloway v. Grant.

Process—Relevancy—Proof before answer.—A debtor in a bond to the Ministers' Widows' Fund suspended a threatened charge by the collector for interest, on the ground that he had already paid the interest to the charger's clerk, and got a receipt, which the charger alleged was forged. The suspension also proceeded on the ground that the clerk was the agent of the charger, duly authorised and accredited to receive payment. The charger denied the alleged employment and agency, but not the fact of payment;—*Held* (altering judgment of Lord Neaves, *diss.* Lord Ivory), that before disposing of the question of forgery, there ought not to be a judgment on the relevancy of the other reasons of suspension, but that the real state of the facts should be ascertained before deciding whether the clerk was or was not in law to be held as the agent of the charger, or as authorised and accredited by the charger to receive payment for him.

1ST DIVISION.
Lord Neaves.
C.

THE Earl of Galloway brought this suspension of a threatened charge by Dr Grant, as collector of the Widows' Fund for the Church of Scotland, for L.173, 12s., being the half-year's interest due 1st May 1854 upon a bond for L.9920, granted in 1827 by the late Earl and the complainer in favour of the then collector of the Widows' Fund, and his successors in office. The reasons of suspension, after setting forth the loan, were as follow:—

"*Art.* 2. The respondent Dr Grant has, during the last ten years, been collector of the funds belonging to the Ministers' Widows' Fund. His office, or place of business, as collector during that time was, and still is, situated in North St David Street, Edinburgh; and part of the same house or office was, and still is, occupied by Mr John Mackenzie Junner, S.S.C., who and his clerks acted as the clerks of the respondent in his capacity of collector foresaid, and were and are employed and authorised by him to collect the funds belonging to the said Ministers' Widows' Fund.

"Art. 3. The practice in the office of the respondent, as collector of the Ministers' Widows' Fund, in regard to the sums secured on loan belonging to said fund (which are of large amount) has been, during the said period, and down to June 1854, as follows:—Receipts were written out in the office of the respondent, or of Mr Junner, by the clerks employed by them, from forms furnished or adopted by the respondent, for the half-yearly payments of the interest on the said loans; which receipts, signed by the respondent, were entrusted to clerks employed by or for behoof of the respondent, and authorised by him to receive payment of the said interests. The interests were not collected or received by the respondent personally.

"*Art.* 4. The complainer's successive agents, Mr John Russell, Messrs John and Alexander Russell, and Messrs Russells and Nicolson, have been in the almost invariable practice, from the date of the said bond, to pay the termly interests due to the Ministers' Widows' Fund, by delivering a cheque for the sum on their bank account, to the clerk of the respondent, or of Mr Junner, acting for and authorised by the respondent, who thereupon handed them a receipt for the amount; and these clerks were understood to be, and in point of fact were, the agents authorised and accredited by the respondent to receive said termly payments of interest. The demand for payment of the interest due half-yearly, on 1st May and 1st November, was not in general made until some days thereafter, and generally of dates between the 12th and 19th of said months respectively, although the drafts by the complainer's agents for the amount of the interests were frequently written out on the term day of Whitsunday or Martinmas, so as to be ready for delivery when the same were called for.—Ans. 4. Admitted that the interest due by the complainer was not always or generally demanded on the very day on which by arrangement the same was payable. Admitted that the complainer's agents generally paid by draft, with the explanation that in every instance,

No. 190. — June 20, 1857. Earl of Galloway v. Grant.

and in whatever form payment was made, it was invariably upon a receipt signed by the respondent as collector. *Quoad ultra* denied.

"Art. 5. In May 1854, a clerk of the name of Ollason, who was employed in the office of the respondent, or of Mr Junner, and who had been employed by or for behoof of the respondent on several former occasions, to collect the interests due on loans made by the Ministers' Widows' Fund, was entrusted by the respondent, or the said John Mackenzie Junner acting for and authorised by the respondent, with receipts for said interests, written out by Ollason, or by some other clerk in the office of the respondent, or of Mr Junner, and signed by the respondent; and Ollason was empowered or employed by the respondent, or by Mr Junner, acting for and authorised by the respondent, to apply for, and on the respondent's account as collector foresaid to receive, payment of the said termly interests due in or about the month of May 1854.—Ans. 5. Denied.

"Art. 6. On the 19th of May 1854, Ollason was in possession of several receipts for interests due to the Ministers' Widows' Fund, signed by the respondent; and, among others, a receipt for the half-year's interest of the said loan of L.9920 payable by the complainer, and was empowered or employed by the respondent, and by the said John Mackenzie Junner, acting and authorised as aforesaid, or by one or other of them, to receive payment of said interest. On that day Ollason, while in possession of the receipt signed by the respondent for the interest due by the complainer, called at the office of the complainer's agents, Messrs Russells and Nicolson, for payment of said interest.—Ans. 6. Denied that Ollason was empowered or employed by the respondent, or by Mr Junner acting for and authorised by the respondent, to receive payment of the interest due by the complainer in May last. *Quoad ultra*, not known and not admitted.

"Art. 7. Ollason, on said 19th May, presented a receipt apparently having the respondent's signature to it, as collector of the Widows' Fund, which is expressed in the following terms, the proper and usual terms of the receipts granted to the complainer's agents for this interest.—(Here the receipt was inserted.)

"Art. 8. The complainer's agents, believing that Ollason was authorised by the respondent, as a trustworthy person, to receive payment of the interest due on said loan, as on former occasions, handed a draft on their bank account with the Union Bank of Scotland for L.168, 10s. 9d., in payment of said interest, in favour of the respondent or bearer, and Ollason handed to the complainer's agents the receipt above quoted, apparently bearing the respondent's signature.—Ans. 7 and 8. The respondent has no knowledge of the matters set forth in these articles, except through the statements of the complainer; but it is believed to be true, that on or about the date herein mentioned, Ollason exhibited to the complainer's agents the pretended receipt herein referred to, and that they paid to him the sum specified in the said document, which Ollason at the same time handed to them. Denied that the said document bears the signature of the respondent. Not known whether the complainer's agents believed that Ollason was authorised by the respondent to receive payment of the said interest. Denied that he was so authorised, or that the respondent had given the complainer's agents any cause to believe that he was so."

The complainer then set forth that the money was again sent for on 2[illegible] May "by the respondent, or by Mr Junner as acting for the respondent;"—that his agents were then told by Junner that a forgery had been committed;—that they communicated with the police, and ascertained that a criminal charge against Ollason had been preferred;—that no farther communication was made to them till 31st May, when the respondent addressed a letter to them demanding payment, but that, in consequence of the delay to take

measures against Ollason, he escaped from the country; and after detailing a correspondence which then ensued between the complainer's agents and the respondent, the complainer stated:—"Art. 17. Ollason was sent by the respondent, or by Mr Junner, as acting for and authorised by him, with instructions to apply for and receive payment of the interest due by the complainer; and he was the respondent's agent for that purpose.—Ans. 17. Denied.

"Art. 18. The receipt delivered by Ollason to the complainer's agent was written in the same terms as the receipts formerly issued from the respondent's office, and in the same handwriting as the receipts subscribed with the respondent's genuine signature; and the signature, 'James Grant,' subscribed thereto, appears to be the genuine signature of the respondent."

The complainers then stated that similar receipts had been presented to other persons with a like result, and,—"Art. 20. Assuming, but not admitting, that the receipt handed by the respondent's agent, Ollason, was forged, still the payment made to Ollason was made by the complainer's agent in *bona fide*, and believing that Ollason was the respondent's agent, which in point of fact he was; and the payment was obtained by the fraud of Ollason, the respondent's agent, and in consequence of facilities afforded to Ollason for the commission of said fraud by and through the negligence of the respondent, as collector foresaid, or of Mr Junner, his clerk, acting for and authorised by him."—Ans. 20. The respondent does not doubt the *bona fides* of the complainer's agent. *Quoad ultra* denied.

The complainer pleaded;—1. The interest threatened to be charged for, having been paid by his agents to Ollason, who was empowered or employed by the respondent, or by Mr Junner, acting for and authorised by him to receive the same, and Ollason having delivered a receipt therefor bearing the signature of the respondent, the threatened charge ought to be suspended. 2. Assuming but not admitting that the respondent's signature to the receipt so delivered to the complainer's agents, is not the genuine signature of the respondent, and that Ollason has not accounted to the respondent for the money paid to him, the respondent must bear the loss occasioned by the fraud of his agent Ollason, more particularly as facilities for the perpetration of said fraud were afforded by and through the negligent conduct of the respondent, or of Mr Junner, his clerk, or one or other of them. 3. The respondent, or Mr Junner, his clerk, acting for him, having, after the discovery of the alleged fraud committed by Ollason, his agent, delayed to communicate the same to the complainer's law-agents, and having, without consulting the complainer's law-agents, taken measures as for his own behoof—which resulted in Ollason having time to make his escape—is not now entitled to subject the complainer or his agents in the loss occasioned by said fraud.

The respondent stated, that only one receipt for the interest due by the complainer had been signed by him, and it was still in Mr Junner's hands on 23d May, while on the other hand he had not received the money for which it should have been exchanged. "It followed that the complainer's agents, if they had parted with the money, had been defrauded by the exhibition of a false receipt, and that this money was probably in the hands of the party by whom this fraud had been perpetrated."

He pleaded;—(1.) That payment on a forged receipt is no payment to the creditor whose name is forged, and does not liberate the debtor. (2.) Payment, although made *in bona fide* to a party supposed to be, but who is not the agent for the creditor, is no payment to the creditor, and does not liberate the debtor. (3.) The pretended receipt held by the complainer being a forgery, with which the respondent is in no way connected, and for

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which he is in no respect responsible, it cannot be set up on any ground as evidence of payment against the respondent. (4.) The complainer not having paid the interest in question to the respondent, or any agent authorised by the respondent to receive payment, is now liable in payment of the same.

On 6th March 1855, the Lord Ordinary pronounced the following interlocutor:—"Finds that apart from the question as to the genuineness of the charger's alleged signature to the receipt for the payment in dispute, no relevant ground has been stated by the suspender for suspending the threatened charge complained of: Therefore repels the reasons of suspension except in so far as depending on the genuineness of the said signature, and decerns, and appoints the case to be enrolled for further procedure."*

* "NOTE.—The suspender is threatened to be charged for payment of a sum of interest as due on a bond granted by him to the Ministers' Widows' Fund, of which the charger is collector. In defence against the threatened charge, the suspender alleges that he paid the interest in question to a clerk of the name of Ollason, employed under the charger, and he refers to a receipt for the amount purporting to be subscribed by the charger. If that receipt is genuine, the suspender must prevail. The charger, however, alleges that the signature adhibited to it is forged, and this question may ultimately need to be disposed of in the case, either by the suspender admitting the forgery, or by an investigation being made into the state of the fact.

"But before disposing of the question of forgery, the suspender, with the concurrence of the charger, was desirous to have a judgment on the relevancy of the other statements made by him in his reasons of suspension, and the Lord Ordinary has disposed of this matter by the interlocutor now pronounced.

"The reasons of suspension referred to, may be reduced to several heads indicated by the three special pleas which the suspender has put upon record.

"1st, The first ground of suspension seems to be that Ollason having been employed to receive payment of the interest in question, and having given the receipt founded on for the money, the payment is good.

"It does not, however appear, that the record raises any case of general authority on the part of Ollason to receive or discharge the interest. It is not said that Ollason had power himself to grant receipts, nor did the suspender pay on Ollason's own receipt. The allegation is, that according to the practice of the party, 'receipts were written out in the office of the respondent, or of Mr Junner, by the clerks employed by them, from forms furnished or adopted by the respondent, for the half-yearly payments of the interest on the said loans, which receipts, signed by the respondent, were intrusted to clerks employed by or for behoof of the respondent, and authorised by him to receive payment of the said interests.' The nature of this allegation obviously is, that the clerks were merely employed to receive the money from the debtors of the fund upon delivering, and in exchange for a receipt signed by the charger, and it seems impossible to hold that upon that footing any clerk had authority to bind the charger, by taking money either upon his own receipt, or upon a receipt to which the charger's genuine signature was not attached.

"But the suspender under this plea has also contended that Ollason's position was such as to accredit him to third parties, and create a guarantee that whatever receipt he might tender should be held as genuine. The Lord Ordinary, however, cannot find sufficient grounds in the suspender's allegations to justify any such view. There may possibly be cases where a clerk or collector is so introduced and recommended as to entitle third parties implicitly to rely on the correctness of all his actings and representations. But no such specialty seems here to be set forth, and the plea must therefore be bad, unless it can be held that any clerk or servant employed to receive money upon his master's genuine receipts, can equally discharge the debt by giving a receipt where the signature is forged. The Lord Ordinary is not prepared to adopt such a proposition.

"It is obvious that the *onus allegandi* here lies on the suspender. He is due this money if he cannot show that he has duly paid it either to the charger or to a

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The complainer reclaimed, and pleaded;—That he had set forth relevant grounds of suspension. In equity the burden of the loss should fall on the respondent, whose servant committed the forgery, rather than on the complainer, against whom no want of caution was alleged. But authority to receive payment, and a presumption that the document offered as a receipt was genuine, might be raised up by the course of practice; and such receipt, though forged, might yet protect the party who made the payment against second payment. The complainer's averments brought this case within that category. There might be such prior accrediting as would make a forged receipt equivalent to a good one.[1] The argument of the respondent denied the effect of such accrediting in any possible case; for the respondent said that the party who presented the forged document was not within his mandate. In point of fact, that was tantamount to saying that there could be no prior accrediting. The general rule that payment on a forged document would not avail was undoubted. But it was equally true that there were cases in which prior accrediting would avail. Had Ollason, a stranger to the complainer and his agents, presented a forged receipt, and they had accepted it in exchange for their money, the loss must have fallen on them; but that was not the case averred in record. Ollason had been employed on former occasions to collect this money. He was accredited to

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rson authorised to receive it. The only receipt he exhibits is one bearing the arger's signature; but if that is not a genuine receipt, he must condescend on ar and specific circumstances which will rear up the forged document into the sition of a genuine one. This the Lord Ordinary thinks he has not done.

"2d, The second ground of suspension seems to be that the charger must suffer the fraud of Ollason as his agent, particularly as facilities were afforded for the petration of it by his own conduct.

"The extent and effect of Ollason's agency has been already noticed, and it is y necessary here to add, that the Lord Ordinary sees no cause of fault made out the charger's part as affording facilities for the fraud here committed. Ollason s employed in the office of Mr Junner, who is clerk to the charger, in his capacity collector. Ollason had thus the means of seeing what was done, and the opporuity of imitating the charger's handwriting, but no facility was given in this pect, beyond what may exist in any similar department, and therefore no farther ponsibility seems to rest on the charger than what the general rules of law ose on a creditor. If Ollason had improperly procured a genuine receipt by charger, and embezzled the money after he had received it on delivery of such eceipt, the suspender's pleas would have been applicable. He would have been e to exhibit a good voucher, and he could have pleaded the practice as a suffit warrant for his dealing with the bearer of that document. But the case would e rested on the delivery of the genuine receipt, and the delivery of a receipt h a forged signature cannot have a similar effect.

"3d, The third plea is founded on alleged *mora* or neglect on the part of the rger or his agents after the fraud had been committed.

Such a case of personal exception may no doubt be made out against a party se name has been forged, and who, after knowing the fact, allows the party red to remain ignorant of the fraud until some prejudice is done by the delay. But no facts seem here to be stated sufficient to support such a plea.

It is not alleged that either the charger or Mr Junner knew of the forgery the 23d of May, and on the same day, it is admitted that the suspender was le aware that a forgery had been committed, and communicated with the police he subject. It is said, indeed, that Mr Junner then stated that he did not w on whom the loss would fall. But what passed was enough to put the susler on his guard, and on his inquiry as to his own position and risk of liability.

Altogether then, apart from the question as to the genuineness of the receipt, Lord Ordinary sees no ground of suspension here stated, that can, in his opi, be remitted for proof or investigation as relevant."

[1] Orr and Barbour v. the Union Bank of Scotland, 31st Jan. 1852, ante, vol. xiv. 95, H. L., 7th August 1854.

No. 190. receive it, and it was not even necessary in this case to shew a receipt in order to prove payment by the complainer. But if necessary for the complainer's discharge to shew a receipt, it was no answer on the part of the respondent to say that Ollason's mandate was to give a genuine receipt, and that having acted beyond his mandate in giving a forged receipt, the complainer shall be liable. If the question be limited to this, whether Ollason acted beyond his mandate, no master would ever be liable for his servant's misconduct, for the answer would always be conclusive that the servant acted beyond his mandate. Here the authority to draw the money was admitted. But why stop there? Was Ollason not accredited to give a receipt as well? No doubt the respondent intended that his servant should give a good receipt, but the authority to receive payment could not be separated from the authority to give a receipt. Ollason was equally accredited to do both things, and if he acted improperly in that matter, and if there be no blame imputable to the party who paid, the impropriety of the servant must fall on the master, and not on the innocent party who paid the money.

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Pleaded for the respondent;—The averments on record fall short of imputing to the receipt in question the character of a good document, or of attaching to Ollason such authority to receive the money, as if the respondent himself had called for payment of it. They amount only to this, that Ollason had authority to exchange for the money a receipt containing the genuine signature of Dr Grant. The creditor in the bond says that he has not received payment. The argument of the debtor is, that he has done something which as in a question between him and the creditor is equivalent to payment. The thing alleged was payment to somebody else who was entitled to receive payment, and the broad question therefore was, whether there was payment to a party entitled to receive payment as for the creditor in the obligation? A clerk in the respondent's office was sent with a receipt to exchange it for money. What was the position of that clerk? He was said, not as a matter of fact, but as an inferential statement, to be the agent for the respondent. He was not. He was a messenger; just the same as a person sent to the bank to draw a cheque and bring the money to the respondent. He was no doubt a messenger of trust. But the trust reposed in him was simply that he would bring the money to the respondent, and not embezzle it. That being so, if he imposes on another person, be it by forgery or anything else, shall I be responsible? It was here assumed that Ollason was in possession of the receipt, which ought to have been given to the complainer. If that was the case intended to be made by the complainer, the averments did not cover it. It was not said that Ollason was in possession of two receipts—a forged receipt and a genuine receipt (art. 6). But the complainer says that the receipt was genuine; therefore there was no question how far a party entrusted as a messenger with a genuine receipt, having forged and embezzled the money, would render his employer responsible.

On 28th January 1857, the Court pronounced the following interlocutor —"In respect of the special circumstances of the case, they, before answer allow the suspender to give in a minute, setting forth the additions or alterations which he proposes to make in explanation of his statements in the closed record, and appoint the minute to be lodged within ten days."

In accordance with that interlocutor the following minute was lodged:— "1. The respondent never has personally collected the half-yearly sums of interests payable to him as collector of the Ministers' Widows' Fund, on loans from that fund. He always intrusted the duty of collecting these interests to Mr Junner and his clerks. In point of fact, these interests were in use to be paid to and received by the clerks of Mr Junner, who, with the respondent's knowledge, were habitually sent for that purpose to the office

of the several agents of the persons to whom the respondent, and his predecessors in office, had lent the funds under their charge as collectors; and these clerks, on payment of the interest being made to them, were in use to deliver to the agent making the payment, a receipt signed or bearing to be signed by the respondent, acknowledging payment of such interest. 2. James Greig Ollason had been in Mr Junner's office for about four years prior to Whitsunday 1854, and had been frequently employed by the respondent, or by Mr Junner with the respondent's knowledge, to apply for payment of the interests due by those who had borrowed money from the Ministers' Widows' Fund. Ollason was frequently employed to write the receipts for the respondent's signature. On or before Whitsunday 1854, he wrote all the receipts for the interests payable in the month of May of that year, including those which were in use to be paid by Messrs Russells and Nicolson, C.S., Mr Alexander Stevenson, W.S., and Mr George Wedderburn, W.S., for their respective clients; and all the receipts so written by Ollason were signed by the respondent, Dr Grant. 3. Ollason was employed by the respondent, or by Mr Junner with the knowledge of the respondent, at various dates in the said month of May, to go to the several agents above named, and to other agents, and to require them to pay to him, as representing the respondent, the interests due by their respective clients, and Ollason was employed as aforesaid to receive payment of these interests. 4. When Ollason called at the office of Messrs Russells and Nicolson, the agents of the suspender, on the 19th May 1854, and asked them for payment of the interest due by the suspender, Ollason had in his possession a receipt written by him, and signed by the respondent, for the interest due by the suspender. 5. Messrs Russells and Nicolson had for a number of years before Whitsunday 1854, paid the interests due by the suspender to clerks sent by the respondent, or by Mr Junner as acting for the respondent; and, having reason to believe that Ollason was authorised or accredited by the respondent to receive the interest due by the suspender in May 1854 (which was the case), they handed to him, as representing the respondent, a draft on the Union Bank of Scotland for the amount; and Ollason then gave them a receipt, the body of which is in his own handwriting, bearing a signature purporting to be that of the respondent, and in all respects similar to his genuine signature, which the suspender's agents at the time believed, and still believe, to be his genuine signature. 6. Ollason was authorised to ask and receive payment of the said interest, as representing the charger; and in taking payment of the interest from the suspender's agents, Ollason acted in accordance with his instructions. Assuming, but not admitting, that, as alleged by the respondent, the receipt handed by Ollason to the charger's agents has not the genuine signature of the respondent attached thereto, Ollason, as agent of the respondent, disobeyed his instructions by withholding the genuine receipt and giving a forged receipt in exchange for the money paid by the suspender's agents; and the suspender reserves his right to insist for delivery of the genuine receipt. 7. The interest due by Mr Stevenson's clients was paid to Ollason on the 17th day of May 1854. The interest due by Mr Wedderburn's client was paid to Ollason on the 8th day of the same month. At the time when these payments were made by Mr Stevenson and Mr Wedderburn to Ollason, he was in possession of receipts for the respective amounts written by him and signed by the respondent. The receipts given by Ollason to Mr Stevenson and Mr Wedderburn were in Ollason's handwriting; and a signature was attached to each, purporting to be the respondent's genuine signature, and which these gentlemen believed, and still believe to be his genuine signature. 8. The respondent did not himself generally attend to his duties in the collection or receipt of interests payable to the Ministers' Widows' Fund. In particular, he was absent from his office, from the 13th, to or about the 25th May 1854. He

No. 190. did not sufficiently inquire as to the character of Ollason, as a person worthy of trust; and the remuneration paid to Ollason by the respondent or Mr Junner was inadequate and insufficient for the services of a proper person intrusted with the discharge of such responsible duties; and while the respondent had taken caution from Mr Junner for his actings and intromissions, he did not take caution from Ollason. Dr Grant was, on or about the 23d of May 1854, aware of all the facts now alleged by him, but he did not communicate with the suspender's agents until the 31st May, when he made a demand for payment, as stated on the record."

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The case was again called on the 10th March 1857. The complainer pleaded;—That it was not his case,—that the genuine receipt constituted Ollason's mandate; so that if the receipt were forged the mandate fell. Possession of the receipt was set forth simply as a part of the execution of the duty otherwise imposed on him.—(*Arts.* 2, 3, 4, *and* 6 *of minute.*) Payment being instructed, it would be immaterial whether there was a receipt or not. The complainer's case was within the law of master and servant. It was not a case of mandate at all, but fell within that principle under which a master was liable for even the criminal misconduct of his servant, provided he be acting in the discharge of his duty.

The respondent objected to the minute being received. The object of the minute was to allow the complainer an opportunity of explaining certain articles,—*inter alia*, arts. 3 and 17,—which, it was supposed, might be construed to cover the relation of principal and agent, exceeding the measure of authority conveyed in a person sent with a receipt to get money in exchange for it. A genuine receipt was the only thing which conferred authority, and the only thing on which the parties paying ever relied. The minute did not specify instruction, and only demonstrated that the suspender had nothing to say more than what he had already said in his record.

LORD PRESIDENT.—We can only receive the minute of consent. Therefore it must now be refused.

The case was again called several times,—the Court expressing great difficulty in understanding the precise meaning of the complainer's statements.

On 13th June 1857, the case was put to the roll.

LORD PRESIDENT.—The majority of the Court are of opinion that there should be a general issue in this case. We do not know what amount of authority may have been given to Ollason. We wish, *in hoc statu*, to recall the interlocutor of the Lord Ordinary.

D. F. Inglis, for the respondent.—What the Court are practically determining is, that there are sufficient averments here of agency. We wish to know the ground of that judgment; as, in the event of an appeal, we might be met with a technical difficulty on that subject.

Of this date the case was advised.

LORD PRESIDENT.—The most advisable course is to recall the interlocutor of the Lord Ordinary *in hoc statu*, and let the whole case be tried at once.

There are two questions involved. 1st, Whether the receipt No. 27 is or is not genuine? Parties are agreed that this question must be tried. If the receipt shall be found to be genuine, the suspender must prevail. 2d, In the event of the receipt not being genuine, there is still another question, namely, whether payment was made to an agent of the charger duly authorised to receive payment? The suspender avers that he paid to Ollason, and he avers that Ollason was the agent of the charger authorised and accredited to receive payment. It is denied by the charger that Ollason was his agent, or was so authorised or accredited. (See reasons of suspension, 4, 5, 6, 17, 20, and answers to these reasons). I

think that the real state of the facts should be ascertained before we decide whether Ollason is or is not in law to be held as the agent of the charger in the matter, or as authorised and accredited by the charger to receive payment for him. By what evidence the averments are to be instructed is not a point to be disposed of at this stage. The fact of payment to Ollason does not appear to be disputed; and at all events, as the payment is said to have been made by a bank cheque, it may perhaps admit of proof. The real question on this branch of the case is as to the alleged authority of Ollason. On the first hearing of the cause, it did appear to me that the manner in which the suspender had made his averments on that subject was not indicative of much confidence in the actual facts, if fully disclosed, and I cannot say that this impression has been removed by what has since taken place. But still the averments are there, and although I think that the suspender might have been more specific, without committing the irregularity of setting forth evidence, I cannot say that his averments are either not sufficiently pregnant to be relevant in any sense, or are so evasive as not to be admissible.

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I think that the practice, which appears to be increasing, of pronouncing an interlocutor of relevancy in each case before allowing an inquiry into the facts, is in many cases inexpedient, and I think that the present is such a case. I do not think that there is here any question of law or relevancy which ought to be decided before going to trial. I would therefore propose to recall the interlocutor of the Lord Ordinary pronounced on the matter of relevancy *in hoc statu*, and allow the suspender an opportunity of having an issue or issues adjusted, to try both branches of the cause.

Lord Ivory.—I am disposed to be of a contrary opinion. This case came before the Lord Ordinary on an application by both parties for a judgment on the question we are now dealing with, and it was with the concurrence of the Lord Ordinary that this branch of the case has been separated from the matter of forgery; and it seems to me to be a strong measure, after the case has been put into this shape, that it should be again restored to the shape against which both parties fought at the early stage of it. I think that the Court is bound to deal with this interlocutor in the form in which it has been brought here.

The case divides itself into three questions—1st, the question of authority; 2d, the accrediting of Ollason with reference to the receipt on which he obtained payment; and 3d, the question of personal exception or *mora*. With reference to this last, it is not now insisted on. With regard to the accrediting, we are not here an issue which excludes the question of authorisation. But it is very material, in analysing the record, to distinguish the question of authority from the question of accrediting. On the question of authority, the difficulty arises at present in the reading of the record, which is neither distinct, precise, nor even intelligible. There is a great deal of difficulty in this case, from the double shape in which the parties have chosen to deal with it. There is a case of authority. There is a case of no authority. There is a case of authority in so far as Ollason may have been authorised to receive money on a proper and genuine receipt, but none on the footing that he was to receive the money on a forged or false receipt. The record appears to be industriously vague, equivocal, and evasive. It is a disingenuous record. The suspender was called upon to make it more precise, and he did not do it; and it is impossible to read it without seeing that the complainer has gone as far as he may go to make a shew of relevancy, while, after all, upon the special question of authority, there is no relevancy whatever in his averments. A party placed in the situation of the suspender, and allowed to amend his record with the view of enabling the Court to read it, was bound to make it precise and intelligible. He has not done so. But taking it as we have it, I cannot find out what it is that the complainer means to say was the authority given, or the thing authorised to be done. It was not to levy money without a receipt at all, nor to levy money upon a forged receipt. On the contrary, when you read the whole record, as common sense would suggest, the authority alleged is to receive the money in exchange for a genuine receipt. It is said that Dr Grant signed receipts, and authorised Junner and his clerk to levy the money: That Ollason was sent out with the genuine receipt, and that he had it in his possession when he did levy the money, but instead of giving the genuine receipt he gave a forged one. There is a total blank when you come to extend the authority. The expressions vary in almost every article of the

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record; sometimes it is that the clerk was "authorised," sometimes "employed," sometimes "empowered," sometimes it is "acting for," sometimes "accredited," sometimes that he was "an agent," sometimes it is that he was "entrusted" with the receipts, sometimes that he was "in possession of them." There is no mode or shape in which this matter may be stated, in order to create ambiguity and confusion, which has not been adopted; but I cannot read the record in any other way, as a *bona fide* averment, than that Dr Grant so conducted himself in authorising the party in possession of these receipts so signed by him as to make that party his agent in levying the money. But there is no shadow of averment that there was authorisation by Dr Grant, direct or indirect, to levy money without his signed receipt: No general *prepositura* is alleged. Nothing but that in a certain shape of things the party holding the receipts was the party representing Dr Grant, and so entitled on his authority to levy the money.

Now when a party comes into Court with a case of this kind, he is bound to make his case such that the Court and his opponent may know precisely what it is. There can be no intelligible issue without that, for if he takes an issue now with reference to all the three shapes of his case, it may mean one thing or it may mean another thing, but it cannot mean all the three things together; and therefore I think the authority must be specified in such a way that the issue shall speak of the species of authority, its extent, and the matter to which, and the manner in which it applied, otherwise there would be danger in sending it to a jury, for embarrassment would inevitably arise. Precision must be in the averments and in the issue, and then the jury will determine whether the proof comes up to that. It is not their province to deal with ambiguous matters under an issue capable of different interpretations. If it had been stated in so many words that Ollason was authorised to uplift the money upon a receipt which was genuine, but that he went to the complainer and gave another forged receipt, which forged receipt he never was authorised to deliver, it would have been difficult to refuse an issue as to the authority upon the non-genuine receipt. There may be a case of authority here, because if the receipt was genuine, there was authority to levy the money upon it. But that is the only authority spoken of. It is only said that Ollason, being entrusted with one receipt, gave another. Was he fulfilling any order of Dr Grant or Mr Junner in giving the forged receipt? The authority in this sense amounts to a case of mandate; it does not signify whether it be betwixt agent and employer, or betwixt master and servant—it is still an authority emanating from mandate. It is authority emanating from the mind and will of the party authorising that lies at the root of the whole matter. What I object to in this record is, that there is no relevant averment of authority in the distinct sense of the word "authority," when that word is defined according to the ordinary rules of common sense. On the contrary, you find this averment, that there were two receipts—a good one, for which there was authority, and a bad receipt—for which there was no authority. The record does not set forth any authority at all for what Ollason did, and therefore, upon that point, I have no difficulty in agreeing with the judgment of the Lord Ordinary. Confusion is thrown into the case by introducing two questions as one, which must be kept distinct. This is not a question of accrediting. As a question of authority, it cannot be so treated. Accrediting can only come into the case when the question of authority fails. When authority is made out, the party is agent, and binds his principal. With accrediting, the party does not act upon authority merely, but, being put in a situation to cheat a third party, he makes the party accrediting him responsible for what he does. We are to deal with the question in that shape. I am of opinion that there is no case of accrediting in the record. It is not said that the forged receipt was accredited. It is said that there could be no accrediting of a forged receipt. But that is a mistake. The books are full of such cases. Now, is there any allegation of the accrediting of Ollason? All that is said is that the respondent authorised Junner, and that Ollason was a clerk of Junner, and that he was sent out on several previous occasions with similar receipts. But it is not said that Ollason was ever sent out with similar receipts to the suspender, or that the suspender knew that he had ever been sent out with such receipts. There is no connection between Ollason and the suspender. It is not said that any *prepositura* was given to Ollason. You must connect the party deceived with the party who deceived him. But if you merely say that the charger's carelessness deceived

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many others—unless you can say that this deception, having become known to the suspender, he himself was thereby deceived by it, you say nothing to the purpose. There is no such averment here. I think, on the whole matter, that the Lord Ordinary has taken a right view of the case. The complainer having shaped the record to meet his case, he is entitled to no favour, and therefore I shall read the ambiguities, not in his favour, but against him. I see nothing but an averment of authority to levy money on a receipt signed by Dr Grant. I see no averment of an authority to levy money on a receipt not signed by Dr Grant. If that had stood alone, there is sufficient to justify the interlocutor of the Lord Ordinary. It does seem to me to be a most dangerous thing to adopt the doctrine that merely because a man holds the character of a clerk, without being entrusted with any department, or any general *prepositura*, but merely because he has been employed to levy money on a genuine receipt, he is to make his master responsible, when, without the knowledge of his employer, he levies money on a forged document.

Lord Curriehill.—I entirely concur in the judgment suggested by your Lordship in the chair, and also in the grounds of it. I have not experienced difficulty in reading this record. It appears to me quite intelligible. It raises the question whether or not Ollason was authorised to receive this money. The difficulty is in determining whether or not these statements made in support of that alleged authority are relevant. I think that that is an important and general question, but as I am not to offer any opinion on the subject at present, I abstain from entering on the views which have occurred to me in regard to it. But the statements of the complainer are denied, and, in ignorance of the facts, I refrain from deciding the question of relevancy, which, after all, may not have any application to the real facts of the case, as these shall be disclosed.

In the administration of justice, it is in the discretion of this Court to determine whether they shall ascertain the facts, or dispose of the relevancy of the application of them in the first instance. After having heard the arguments of the bar, and after considering the question of relevancy, I think it is better to wait till we know the actual facts of the case, than to decide the law now. And it is upon this ground that I agree with your Lordship that this interlocutor should be recalled in *hoc statu*, and that the facts should be first ascertained.

Lord Deas.—I concur with your Lordship in the chair in holding that the interlocutor of the Lord Ordinary ought to be recalled; and I do so upon the single ground, which I understand to be substantially the ground relied on by your Lordship, that no judgment whatever, upon law or relevancy, ought to have been pronounced at the present stage of the cause, but that the preparation of issues ought to be proceeded with in the usual way. Whether the particular issues which may be proposed can be granted will be a subsequent question.

A practice, as your Lordship has observed, has been recently creeping in of at once pronouncing, upon the closed record, a separate and independent judgment upon relevancy;—that is to say, a judgment upon a hypothetical state of the facts which may not be the real facts,—the consequence of which is, where the relevancy is sustained, that parties must run the gauntlet of litigation, it may be both here and in the House of Lords, at double cost, great waste of time, and, very often, to no other purpose than that of finding, when the merits come to be tried, that the case decided on relevancy was an imaginary case, and that all the ingenuity and labour bestowed on it by the bar and the bench have been thrown away. Even when a judgment is obtained dismissing the action as irrelevant, this is by no means necessarily the end of strife;—for the judgment may or may not stand; and, if it does stand, the result may be that another action is resorted to, and important and difficult questions raised whether a new action be or be not competent, which could scarcely have happened if the cause had gone to issue and been decided after the facts had been ascertained. The recent practice of the Outer House is neither in accordance with the ancient and better practice of this Court, nor with the spirit of our new forms of process under the Judicature Act, whereby it is obviously contemplated, as indeed it was under the statutes of 1815 and 1819, (55 Geo. III. c. 42, and 59 Geo. III. c. 35), that decisions upon law or relevancy before trial, shall be the exception and not the rule. So strongly was the expediency of this felt, that large classes of cases specially appropriated for trial by jury were directed by the Judicature Act (sect. 28), to be at once remitted to the jury court without

No. 190. — June 20, 1857. Earl of Galloway v. Grant.

discussing law or relevancy, and it was only by getting a special order sending them back, on cause shewn, that such discussion could take place before trial. Even then the decision of such causes was not entrusted to the Lord Ordinary, who was directed by sect. 65 of the A. S., 11th July 1828, to report to the Inner House. As regarded cases not appropriated by the statute for trial by jury, it was only in the special circumstances set forth in sections 13 and 16 of the statute, that power was given either to the Lord Ordinary or the Court to decide questions of law or relevancy before trial or probation. The enactments in the Judicature Act still regulate the whole of this matter, with this difference only, that the Jury Court and Court of Session being amalgamated by the statute 1, William IV. c. 69, there is no longer room for transmission and retransmission between the two Courts. We have a discretionary power to determine law or relevancy before trial; and in certain cases, such as cases of fraud, to which special rules are applicable, there may be a strong expediency in doing so. But in the general case the discretion is one to be cautiously exercised, keeping in view the principles and consequences I have alluded to, and by no means as a matter of course in every case, even when the parties have put on record an objection to the relevancy, which they have not done here. A decision upon relevancy, under a closed record, is, it must be kept in view, a very different thing from—what it is apt to be confounded with—an examination into the correctness of the summons and defences, and whether the grounds of action in the summons are sufficiently particular and clear, and the conclusions regularly and clearly deduced therefrom, all which, under the express terms of sect. 6 of the statute, ought to be ascertained, before the Lord Ordinary, at a stage of the cause when there is no closed record, and when he may either dismiss the action, reserving to bring a new one if otherwise competent, or order an amendment of the libel. A decision upon relevancy, under a closed record, is, in a certain sense, a judgment upon the merits. In what sense and to what effects it is so I do not wish to consider here, because that is a question which, in one aspect of it, is very seriously raised in another case now before us for judgment. Undoubtedly a judgment dismissing an action in whole or in part, as irrelevant in point of law, without ascertaining the facts, is, in any view of it, a judgment not lightly to be pronounced; and, in the present case, I can see no ground whatever for following that exceptional course. What is called relevancy here is truly an important question of law, hypothetically put to us, which may never arise, and which, if it does arise, may be, fittingly enough, disposed of at the trial, subject to a bill of exceptions, or, upon the application of the verdict, if the verdict shall be so framed as to raise that question. The whole enactments I have referred to in the Judicature Act, proceed upon the footing, which is conformable also to our previous practice, that there may be questions of relevancy which ought not to be disposed of before trial; and I think we are taking no startling view in holding that such may be the case here, when we see that the respondent deliberately closed the record without stating any plea whatever against the relevancy, although he seems latterly to have asked and obtained a judgment just as if he had stated it.

Taking this view of the right course of procedure, I express no opinion upon the legal questions alluded to by Lord Ivory, and I have formed none. I agree with Lord Curriehill that the more nice and important these questions are, the greater the objection to deciding them upon a hypothesis, and I am not for so deciding them.

Lord President.—I wish to state that I did not mean to indicate any opinion on any of the hypotheses that have been suggested. I did not mean to express an opinion on this case, or on any other that might be imagined.

The Court pronounced the following interlocutor:—"Recall the interlocutor of the Lord Ordinary *in hoc statu*, and appoint the parties to give in the issue or issues, which they respectively propose as issue or issues for the trial of the cause, and that *quam primum*."

Rankin, Walker, & Johnston, W.S.—James Robertson, W.S.—Agents.

PETER HALKET, Petitioner.—*Thoms*.
DAVID HALKET'S TRUSTEES, Compearers.—*Webster*.

No. 191.

June 23, 1857.

Halket.

Poors' Roll—A. S. 21st Dec. 1842, *sect.* 5.—In an application for the benefit of the Poors' Roll, the kirk-session had omitted the usual certificate. After a favourable report on the *probabilis causa*, the Court remitted to supply the omission.

1ST DIVISION.

AN action having been brought against Halket by the trustees of a predeceasing brother, he applied for the benefit of the Poors' Roll for conducting his defence. The report on the *probabilis causa* was favourable, but the reporters directed the attention of the Court to the circumstance that there was no certificate "under the hands of the minister and elders with regard to their knowledge of his circumstances and character, as required by the Act of Sederunt." There was in process a letter from the session-clerk, to the effect that the session intended to certify that all the facts spoken to by the applicant in his examination were not within their knowledge.

Thoms, for the petitioner, now pleaded;—That all the information required by the Act of Sederunt was before the Court, although not formally stated. The Act prescribed merely an examination, although it was technically known as a certificate. A certificate had been repeatedly dispensed with.[1] Farther, the objection ought to have been taken in the Single Bills, this petition being now in the Summar Roll; and, at any rate, after a favourable report, no objection to the certificate could be stated.[2]

The pursuers compeared, and maintained, that under the Act of Sederunt, it was never too late to object to a party getting on the Poors' Roll. In the cases cited, there had been certificates; but here there was none. It was now incompetent to supply the omission, because the three months allowed by the Act of Sederunt, within which a party must be admitted or refused, would be exceeded.

LORD PRESIDENT.—This point is quite competently before us. There must be a remit to grant a certificate. Confessedly there is none here. As to the limitation of time in the Act of Sederunt, the objection by the compearers would only lead to the emission of a new declaration by the applicant, and to his making this application over again. The omission here was no fault of his; and the Court can competently enough make a remit to get it supplied, without beginning the whole matter of new.

The rest of the Court concurred.

THE COURT pronounced the following interlocutor:—"In respect that, by the Act of Sederunt dated 21st December 1842, the minister and elders are directed, when they examine an applicant for the benefit of the Poors' Roll, to certify how far the statement given by the party consists with their own proper knowledge, or that of any one of them; or whether its credit rests on the information of others, or solely on the statement of the applicant; in which latter case they shall certify whether he or she be of good character, and worthy of credit: And, in respect that the reporters for the poor have pointed out the omission of the minister and elders to give such a certificate in this case, remit to the minister and elders to supply this omission, and to give such a certificate as it may be in their power to give in the circumstances.

DAVID T. LEES, S.S.C.—EDMUND BAXTER, W.S.—Agents.

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[1] Cuming, 27th Jan. 1831, 9 S. 342; A B, 21st June 1832, 10 S. 673.
[2] Oal v. A B, 9th July 1836, 14 S. 1120.

No. 192.

June 23, 1857.

Dargie v. Magistrates of Forfar.

1st Division. Lord Neaves. C.

WILLIAM DARGIE, Pursuer.—*Macfarlane.*
THE MAGISTRATES OF FORFAR, Defenders.—*Millar.*

Process—Jury Trial—Expenses.—There is no absolute rule that the granting a new trial is conditional on payment of the expenses of the first trial.

SEE ante, vol. xviii. p. 343.

This case went to trial on 18th March 1856. The jury returned a verdict for the pursuer. The case then came before the Court on the motion of the defenders to have a new trial, on the ground of the verdict being contrary to evidence. The Court were of opinion that a new trial should be granted. The pursuer then moved, as a condition of granting the new trial, that the defenders should pay the expense of the first trial.[1] It was stated that the rule on the subject in the Second Division was absolute.

After consultation,—

LORD PRESIDENT.—The case of Shiells was peculiar, and not conclusive either way. I have communicated with the Judges of the Second Division, and find from them that there is no absolute rule in regard to expenses. At the same time it is very common to give expenses of the trial, in so far as it is conceived that the party applying for a new trial is entitled to have the reconsideration of a jury. We think that this case falls under that class, and that the pursuer is entitled to have the expenses of the last trial, so far as not available for the next.

THE COURT pronounced the following interlocutor:—"Set aside the verdict in this cause, and grant a new trial on the defenders paying the expenses of the former trial, so far as not available for the next trial: Appoint an account thereof to be lodged," &c.

D. CURROR, S.S.C.—SANG & ADAM, S.S.C.—Agents.

No. 193.

Ralston, Goodwin, and Co. v. M'Lean.

RALSTON, GOODWIN, AND COMPANY, Pursuers and Respondents.—*Penney—A. B. Shand.*
JOHN M'LEAN, Defender and Advocator.—*D. F. Inglis—Scott.*

Process—Pleas in law.—In an advocation, a plea stated at the bar for the fir[st] time, and raised neither in the inferior Court nor in a note of additional pleas i[n] law lodged in the Court of Session, *held* to be excluded.

Proof.—In an action of resting-owing, where the defence was non-liability, [a] proof was allowed, and partial excerpts from the pursuer's books produced ;—*Hel[d]* incompetent to refer to these excerpts with a view to prove payment, no such pl[ea] having been stated, and no excerpts or productions made with reference to such [a] defence.

June 23, 1857. 1st Division. C. Sheriff-court of Lanarkshire.

RALSTON, GOODWIN, and COMPANY, iron merchants in Glasgow, brough[t] an action against Wilson and M'Lean, sometime callenderers in Glasg[ow] now dissolved as a company, and Robert Wilson and John M'Lean, the ind[i]vidual partners of the company, for payment of L.46, 18s. 1d., "being th[e] amount of an account for goods sold by them to the defenders, pe[r] account commencing the 5th day of July and ending the 15th day o[f] September 1853." Wilson was now bankrupt, and the following was th[e] note of the defence made for M'Lean:—"The defender John M'Le[an's] procurator stated that the defence was — Preliminary: That the defe[nder] Wilson's trustee has not been made a party to the action. On the merit[s]: A denial of the present defender's liability to the pursuer for the sum s[ued] for."

[1] Shiells v. Edinburgh and Glasgow Railway Co., 4th July 1856, ante, vol. x[viii.] p. 1200.

The preliminary plea was repelled, and a proof allowed of the averments of parties. No. 193.

Amongst the items charged were three items for furnishing a pitch chain, the total cost of which, with carriage, was stated at L.30, 7s. In regard to these, it was urged in defence that they had been ordered and used by Wilson as an individual, and not for the firm of Wilson and M'Lean. Excerpts were produced from the pursuer's books, shewing, *inter alia*, that the account was entered as against Wilson alone, he having dealt with the pursuers before entering into partnership with M'Lean, and the name at the head of the account never having been changed. June 23, 1857. Ralston, Goodwin, and Co. v. M'Lean.

The Sheriff-substitute (Skene), on 12th January 1855, pronounced the following interlocutor:—" Finds sufficient evidence that the goods charged for in the account libelled on were furnished by the pursuers to the defenders: Finds, with regard to the pitch chain in particular, that it was ordered by Mr Wilson, one of the partners of the defenders' firm; that it was erected in the defenders' premises, and intended to be used in the defenders' business: Finds no sufficient evidence that Mr Wilson ordered it for himself individually, and not for his firm: Finds, therefore, that the pursuers are entitled to charge the chain against the defenders, and that the price charged therefor is moderate and reasonable: Finds no evidence that any part of the account libelled on has been paid: Therefore decerns against the defender, in terms of the conclusions of the libel; and finds the defenders liable to the pursuers in expenses."

On appeal, the Sheriff-depute adhered, on the ground " that the articles sued for, and in particular the pitch chain, were ordered by Mr Wilson for the company, and suitable for the business of the company, and not for him as an individual, and in respect the pitch chain was delivered at the premises of the defenders."

M'Lean presented a note of advocation, which was reported to the First Division along with a note of additional pleas in law, all directed to support his plea of non-liability.

At the bar, however, he pleaded payment of the account, at least such items of it,—amounting in all to about L.16,—as did not refer to the pitch chain, as to which last he argued on the evidence that he was not liable. He founded this plea upon one of the excerpts produced, and maintained that, assuming the debt sued for to be constituted as a good debt against him, it must be held, on the evidence of the pursuer's books, to be paid and extinguished.

Replied;—The excerpts founded on were not made or put in for the purpose of proving payment. They were incomplete, and stopped short of what should have been copied from the ledger to give a fair view of the state of accounts between the parties to meet a plea of payment. Therefore the excerpts could not, in the circumstances, be founded upon as evidence of payment.

Lord President. — A sufficient case has not been made out for altering the judgment of the Sheriff. As to the chain, the question really is, to whom was the furnishing made? and the evidence instructs that it was made to the firm and delivered at their premises, not that it was furnished to Wilson for himself and on his individual credit. Therefore, so far the defence of non-liability fails.

The next question relates to this L.16, 11s. 10d., the balance of the original account over and above the L.30, the cost of the pitch chain; The defence now maintained is payment. That was not pleaded in the inferior Court, nor was the evidence directed to that inquiry. It was not referred to in the additional pleas in law in this Court, but it is now founded on an excerpt from the books of the pursuer,—the history of which excerpt we have not very clearly before us. How it came into process, we do not very well see; but it certainly was not produced with reference to any question of payment, for none was raised. In that state of matters I cannot hold that we have evidence that these sums were paid. A party's books

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may prove against himself when applied to on any particular point of which they ought to contain the record, but in this case, where payment is not alleged in defence, or raised in the proof, I cannot hold that this excerpt is evidence of such payment, and therefore on both points I am for adhering to the judgment.

LORD IVORY.—I am of the same opinion. With regard to the chain, as the case is presented to us, the Sheriff-substitute has taken a correct view of the matter. The question is not what the chain was suitable for, or even what became of it. The question is, upon whose credit was it furnished? The evidence is quite enough to fix the liability on the company.

In reference to the plea of payment, I go chiefly on this, that there is no defence except non-liability stated on record. That is not a defence of non-payment, and therefore, whatever latitude may be given under the recent statute to vague and unsatisfactory defences, it would be giving a totally opposite construction to the natural meaning of a plea of non-liability if we were to hold it tantamount to a plea of payment. The defence of payment is an admission of the original liability. There being no such defence here, I do not think the defender is entitled to be heard on it. But, besides, there is not satisfactory evidence that there was payment.

LORD CURRIEHILL.—I concur.

LORD DEAS.—I am of the same opinion. Two defences have been pleaded at the bar,—1st, payment; and 2d, non-liability. But the latter alone is stated in the record. Now, payment is a matter of fact and ought to have been stated in the record. I doubt if introducing it into the pleas in law in this Court would have been sufficient. But, at all events, this is not done. The statute (16 and 17 Vict. cap. 80, sect. 3) requires that the minute shall state concisely the grounds of defence, and the schedule appended to the Act gives instances of how this should be done—shewing clearly that, although short, the defences are intended to be intelligible and specific. Were it otherwise, indeed, the record could only be calculated to mislead. In the present case the full account was appended to the summons, and letters had passed about it previously, so that the advocator, if he meant to plead payment, could have no excuse for merely pleading non-liability, which was, in truth, inconsistent with the supposition of payment. If the advocator suffers hardship from the state of the record, it is a hardship for which he has himself to blame. But I do not see that he suffers any. For it is plain enough that when the excerpt, so much dwelt upon, from the respondents' books was made, the object in view was to obtain entries bearing on the question of non-liability, and not upon the question of payment, which had not then been raised. Upon the 2d point, viz., whether the chain was ordered for, and delivered to, the advocator, the proof is not perhaps, in all respects, so satisfactory as it might have been; but, on the whole, I agree with your Lordships that the result of it is in favour of the respondents.

THE COURT pronounced the following interlocutor:—"Advocate the cause, and recall the interlocutors complained of: Find that it is sufficiently established as matter of fact, that the pieces of pitch chain, the charges for which, and the carriage thereof in the account sued for, and amounting to L.30, 7s., are the only items in that account liability for which has been denied by the defender, M'Lean, were furnished to the company of Wilson & M'Lean, of which the defender, M'Lean, was a partner: Find as to the remainder of the account libelled on, amounting to L.16, 11s. 1d., payment of which, though not pleaded in the record, was the only defence urged at the bar, that such payment has not been instructed: Find, in point of law, that the advocator, M'Lean, is liable for the account sued for, and that payment of any part thereof has not been instructed: Therefore, decern against the defender and advocator, M'Lean, in terms of the conclusions of the libel in the inferior Court: Find the defender and advocator liable to the pursuers in expenses of process, both in the inferior Court and in this Court: allow an account thereof," &c.

JOHN GALLETLY, S.S.C.—ROBERT STEWART, S.S.C.—Agents.

THE NORTH OF SCOTLAND BANKING COMPANY, Pursuers.—*D. F. Inglis—Macfarlane—Fraser.* No. 194.
JOHN DUNCAN, Defender.—*Penney—Moir.*

June 25, 1857. North of Scotland Banking Co. v. Duncan.

Reparation—Defamation—Title of a banking company to sue an action of damages or slander.—A banking company brought an action of damages for slander against he writer of a letter reflecting on members of the committee of management. This tter was inuendoed as "of and concerning the pursuers," and as calumniously epresenting, "that through the fraudulent connivance of the committee of manageent some of their number had been allowed to put their hands into the bank till," c.; "that the money so taken away was substantially of the nature of a payment y the members of the committee of the bank or some of them to themselves;" that e transaction was similar to a "juggle" which had caused great loss to the bank, d affected its character and reputation, a few years ago; and that the persons in e management of the bank were not entitled to public confidence. There was no erment of malice or intent to injure the bank;—*Held* (*aff.* judgment of Lord rdmillan, *diss.* Lord Deas), that the action at the instance of the bank was relevant -the inuendo sufficiently fixing the slander as directed against the corporate body, d not the members of committee merely.

1st Division. Ld. Ardmillan. C.

THIS action was brought by the North of Scotland Banking Company gainst John Duncan, writer in Aberdeen, concluding for L.10,000 of mages and reparation for alleged libel. It was one of several actions for e same libel all brought against Duncan, the pursuers in these other tions being certain directors of the bank in their individual capacity. his case now came before the Court on the question of relevancy; and it as arranged that the decision in this case should rule the others. The rsuers' allegations were as follows:—

"Art. 1. The pursuers have their head-office in Aberdeen, where their nking business is conducted under the superintendence of a board of rectors, and a committee of the directors, usually styled the committee of anagement. Now, as well as on the 23d of January 1857, and previously, e board of directors is and was composed, *inter alios*, of Mr John Duguid ilne, senior, advocate, Aberdeen; Mr George Elmsly, coach-builder there; r Alexander Gibb, civil-engineer, Aberdeen; and Sir Thomas Blaikie, night, residing in Aberdeen. These gentlemen, excepting Mr Elmsly, are so members of the committee of management.

"Art. 2. The pursuers transact a considerable business both in the town d county of Aberdeen, as well as in the adjoining counties, and elsewhere roughout the country. In particular, &c.

"Art. 3. A few years ago the character, credit, and stability of the purers' bank were seriously affected, in consequence of very large losses it d sustained through the mismanagement and malpractices of the manager the time, and of some of the persons who had been for some time, and rticularly in or about 1846, in the management and direction of the affairs d business of the bank. The parties alluded to, it was discovered, had en in the practice of drawing from the funds of the bank large sums of oney for the purposes of their individual speculations, and of allowing ge advances to be made to others, without giving or obtaining any security, adequate security, therefor. The consequence was, that it was found at considerably more than one-half of the capital of the bank had been t, over and above the whole of what was called the reserved fund. But a change in the manager and in the direction, and by subsequent prudent d careful management, the bank has gradually recovered its character, edit, and stability; and when the letter, afterwards more particularly verted to, was published, it had entirely re-established itself in the good inion of the public, and was in a very prosperous condition.

"Art. 4. It was in this state of matters, as regards the pursuers' bank, t the defender wrote and published, or caused to be written and published,

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in a newspaper called the 'Aberdeen Free Press, Peterhead, Fraserburgh, and Buchan News, and North of Scotland Advertiser,' of Friday the 23d January 1857, a statement, in the form of a letter, addressed by him to—'The Shareholders of the Aberdeen, Peterhead, and Fraserburgh Railway,' in which, among other things, he made the following statements:—

"'The Act (alluding to an Act of Parliament which a rival Railway Company were then seeking to obtain), whether successful or not, however, naturally induces inquiry how (meaning the rival railway scheme or party) *they* made up *their* deposits. It certainly was not from their shareholders.

"'The North of Scotland Bank coffers are open to them for all purposes, and at all times. How comes this? Why, because the committee of management of that bank consists of Mr John Duguid Milne, senior; Mr Elmsly, coach-builder; Mr Gibb, civil-engineer; and Sir Thomas Blaikie. Every one knows the connection of these four individuals with the Great North of Scotland Railway, and with the Formartine and Buchan Railway. As promoters of this last-named scheme, Messrs Milne, Elmsly, and Gibb, by connivance with the other two members of the bank committee, had simply to put their hands into the *bank till*, and transfer any sum they chose to Mr Robert Milne, the Great North of Scotland secretary; and thus that secretary obtained for deposits on the Formartine scheme, . . . L.27,000

And on the Denburn scheme, ...	9,000
Total, . .	L.36,000

What security did he give? Looking to the subscription contracts, we find

that the Formartine and Buchan contract amounted to . .	L.277,500
The Denburn branch, ...	90,000
	L.367,500

Of this sum the following parties subscribe,—

Alex. Anderson, advocate in Aberdeen, . . .		L.40,000	
W. Adam, Esq. of Ranna, ...		50,000	
Robert Milne, secretary, ...	L.59,000		
And „ „	50,000		
		109,000	
			199,000
Subscribed by contractors and others, .			L.168,500

If the bank committee chose to advance the deposits from themselves to themselves as the promoters of the Formartine and Buchan Railway, it was only such a juggle as was done in 1846 by some of the same parties; and such a juggle as was done in the Royal British Bank in London the other day. Public opinion is rather outspoken on Mr Macgregor's conduct about the Royal British Bank; but have we not a nest of Macgregors in the members of the committee of the North of Scotland Bank?

"'Mr Gibb is a civil-engineer. It was not for his great talent in that line that he was selected for the Formartine and Buchan line, but for his influence as a financier at the North of Scotland Bank Board. The promoters of the railway may have paid dearly for the purchase of that influence, seeing the value of his engineering plans to be so questionable. If, however, the influence of a bank had not been so acquired, where would the Formartine and Buchan Railway promoters have gone for their deposits? They could go nowhere else. They have referred the banking friends of the Aberdeen, Peterhead, and Fraserburgh scheme to the guarantee subscriptions made by me last year, as sufficient to justify the refusal of credit to our undertaking. I would in answer refer all financiers, and especially the shareholders generally of the North of Scotland Bank, to the circumstances con-

nected with the North of Scotland Railway Subscription Contract of 1846, which was signed by Adam and Anderson, William Gordon, broker, Mr Jopp, advocate, Mr Thomas Blaikie, and others, to the tune of upwards of L.100,000. Did they pay the money so subscribed for? No; but they as directors forfeited their own shares as shareholders. Oh, shade of Macgregor! have *you* done worse than this?'—All as set out in the said newspaper and letter themselves, which are now specially referred to."

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In art. 5 the pursuers quoted a letter published by their manager, to the effect that the bank had not made any advances to "the Denburn or Aberdeen Junction Line," and obtained ample security "for any comparatively small advances we have ever made on account of the other *line*."

"Art. 6. Notwithstanding of this, the defender again published his letter, above referred to, and partly set out in article 4, in 'The Northern Advertiser,' of 27th January 1857, an advertising paper published in Aberdeen, and having a very extensive circulation" there, and throughout the county.

"Art. 7. The statements quoted above, in article 4, are of and concerning the pursuers, and the defender did thereby falsely, calumniously, and injuriously represent and assert, that through the fraudulent, or at least reckless and improper, connivance of the committee of management of the bank, some of their number had been allowed to put their hands into the bank till, and take away or transfer any sum they chose to Mr Robert Milne, the secretary of the Great North of Scotland Railway Company; that, in point of fact, large sums had been so taken away or transferred; that the bank held no security for the sums so taken away or transferred; that the money so taken away or transferred was substantially of the nature of a payment by the members of the committee of management of the bank, or some of them, to themselves; that the transaction was only such a juggle as was done in 1846, by some of the same parties, thereby meaning and intending that it should be understood, that the present committee of management indulged in the same description of malpractices which had caused so great loss to the bank shareholders, and affected its character, credit, and reputation a few years ago, as above mentioned; and that the persons now in the direction and management of the affairs and business of the pursuers' bank, were as little entitled to public confidence as John Macgregor, who had been for some time previously held up by the public press, and generally talked of, as a person through whose improper conduct the Royal British Bank of London had become bankrupt, and the shareholders, and others connected therewith, had been ruined or seriously injured, or did make statements or representations of a similar import.

"Art. 8. The statements or representations of and concerning the pursuers' bank, referred to in last article, have been extensively published. . . They are entirely false. No person has been allowed to put his ands into the till of the bank and take what funds he pleased. . . . No uggle or malpractices have been indulged in, and no transaction has taken lace, or been connived at, by their directors, or committee of management, in ny respect irregular or improper, or inconsistent with good and safe banking.

"Art. 9. The whole of the defender's statements, made of and concerning he pursuers, as above referred to, are not only entirely false, but have been nade in the most reckless manner, in the worst spirit, and without any just ause or excuse. They have been most injurious and detrimental to the ursuers in their trade and business, have already created mistrust and alarm mong those who deal with them, and are calculated seriously to affect them their character, credit, and reputation with their customers and the public enerally. And this all the more, that the defender is a well-known individual, not only in Aberdeen and surrounding district, but throughout the ountry. He is an advocate in Aberdeen in large practice. He is one of e directors of the rival bank in Aberdeen, known as the 'Aberdeen Bank;'

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or Aberdeen Branch of the Union Bank of Scotland. He is at present chairman of the directors of the Deeside Railway Company; and, not long since, he was chairman of the directors of the Caledonian Railway Company."

They pleaded;—That, in the circumstances condescended on, the defender, in respect of the false, calumnious, injurious, and libellous statements published by him, of and concerning the pursuers, is liable to them in damages and reparation, as concluded for.

The defender, in article 1 of his condescendence, stated:—"With regard to the transactions of the North of Scotland Bank in 1846, which are referred to by the pursuers in their summons, the defender believes and avers the state of the matter to have been this:—That various individuals obtained from the directors of the bank advances to a very large amount, in connection with railway speculations, and in particular with the projected formation of the Great North of Scotland Railway. Most of the influential directors of the bank were at the same time directors of that railway. These advances from the bank funds were made in many cases without security, and in others with only inadequate security. The result of these incautious and improper proceedings was, as stated by the pursuers themselves, an enormous ultimate loss to the bank."

He then stated, that these advances were chiefly on account of the Great North of Scotland Railway, which was now completed, and had given rise to two rival schemes for the purpose of accommodating those districts which the Great North of Scotland Railway did not supply, the one the "Formartine and Buchan" line, avowedly promoted by the directors of that company; the other, "the Aberdeen, Peterhead, and Fraserburgh Railway," of which the defender was the principal promoter. That "in the course of the parliamentary contests between these rival schemes much excitement was created, and the credit and financial arrangements of each were unceremoniously handled, both in the form of newspaper warfare, and otherwise;" and after particularising certain attacks upon the defender's scheme, and stating that large sums were advanced by the pursuers to the "Formartine and Buchan line" in consequence of the members of the bank committee being also directors of the Great North of Scotland Railway Company, he stated:—

"Art. 5. The defender thought himself entitled to characterise this course on the part of the bank as being a repetition of the same reckless and improper course which had produced so much injury to the bank in 1846, and was led, not unnaturally, to compare it to the case of the Royal British Bank, which was then the subject of general conversation, where the directors, it was understood, had been in the habit of making large advances to each other with inadequate security, and where the result had been a great loss to the shareholders. The defender had no intention of imputing, and did not impute any dishonesty to the pursuer or the other members of the direction;—he simply intended to point to the conduct of the bank directors in advancing money from themselves, as directors, to themselves as directors or shareholders of railways, in order to defeat a rival project, as reckless and improper, and likely to produce a repetition of the misfortunes which had overtaken the bank in 1846. And this, as a principal promoter of the Aberdeen, Peterhead, and Fraserburgh line, he was naturally led to do, in considering how the sources forming the deposits of the rival line had been procured."

The defender pleaded;—"1. The bank, as such, have no title to pursue the present action of damages, and have made no averments relevant to support an action of damages, at the instance of the company, as separate from the actions at the instance of individual members of the board of direction, to whom alone any allusion is made in the letter libelled."

The Lord Ordinary, on 2d June 1857, pronounced the following interlocutor:—"Finds that the pursuers have made averments relevant to sup-

port this action, at the instance of the North of Scotland Banking Company and their manager, on their behalf: Finds that the pursuers have alleged sufficient to pursue this action: Therefore repels the first plea in law stated for the defender, and reserves the question of expenses." * No. 194.

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* "NOTE.—The first plea in law for the defender must be considered, in regard to this action alone, without reference to the separate actions, at the instance of the individual directors. The directors are the managing body, but they alone do not constitute the corporation; and if the Bank, as a corporation, has been slandered and injured, and has relevant grounds of action for reparation, the right of action cannot be destroyed by the fact, that certain individual directors have raised separate actions for the individual injury they suffered.

"It is not disputed that an action of damages, for reparation of injury inflicted by slander, may be competently raised by the incorporation, if there be relevant grounds of action. It is not disputed that this action, if relevant at the instance of the bank, is competently raised. There is no plea of privilege. There is no plea of insufficient specification, either as regards the wrong, or the injury alleged. The plea urged is, as was explained at the bar, that the defender's letter complained of as libellous, does not contain any defamation of the bank, whatever may be its import in regard to the directors and the Committee of management. It is rather singular that the defender, in the 5th article of the statement of facts, says, that 'the defender thought himself entitled to characterise this course on the part of THE BANK, as a repetition of the same reckless and improper course, &c. &c.; while he pleads that there is no libel on the bank at all. But, apart from this criticism, it is, in the opinion of the Lord Ordinary, impossible to read attentively this letter, without perceiving that it contains statements defamatory of the bank as a body corporate, as an institution dependent on public confidence and credit.

"The persons alleged, in this letter, to have been engaged in transactions of a most culpable and discreditable character, are directors and members of the managing committee of the bank. The transactions so alleged are in the department of their management, and, 'by connivance with the other two members of the bank committee,' so that the whole bank committee are involved; and among the acts alleged to have been done by individual directors, by connivance with the bank committee, is that of putting their hands into 'the bank till.' The reference to the proceedings of the same bank in 1846, and to the recent conduct of the Royal British Bank in London, gives additional point and sting to the statements of the defender.

"The pursuers allege that these statements are false and calumnious, and that hey have already injured the bank, and are calculated still further to injure the ank in character, credit, and reputation. The Lord Ordinary does not doubt that, the statements are false (and, *in hoc statu*, their falsehood must be assumed), ey are calumnious and injurious, and that action for reparation cannot be refused.

"The whole letter must be read and construed fairly. It is not an incidental tice of a piece of conduct, culpable or fraudulent, on the part of an officer of the ink. It is not an accusation against a manager or a director, written in the terest of the bank, with a view to protect the bank from further injury at the nds of the alleged offender. Such cases were put in illustration of the defender's gument. But they are not in point. In this case the accusations are direct and equivocal, and were repeated in a different newspaper, after being publicly denied the manager of the bank. They affect the directors and the managing comttee in their management of the affairs of the bank; and particularly, in their arge of the bank till; and the result of the general belief of such accusations uld not be otherwise than seriously injurious to the bank. A bank, as a corporan, has, indeed, no personal feelings, and an action for mere *solatium* for wounded ling is unsuitable. But a bank, sustained by public confidence, has no better itage than credit and character; and a false accusation affecting its credit and racter, and injuring it by creating distrust and alarm, is surely a wrong of a nderous description, for which reparation may be sought.

In the cases of the Society of Solicitors v. Robertson, 16th November 1781, 13935; the Incorporation of Fleshers of Dumfries v. Rankine, 10th December

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The defender reclaimed, and pleaded;—That there was nothing said against the solvency of the bank, or the honesty or fairness with which it conducted its transactions, but only that certain of the directors were engaged in a railway speculation, and had abused their position as bank directors to promote that railway undertaking. That might be a libel which would entitle these individuals to damages against the defender. But it was no libel against the bank. It was not said that the effect of the charge had been to diminish the credit of the bank, or the value of the shares.[1] Therefore the bank had no interest to sue for damages. The question here was, Who was defamed? If it had been said that the company conducted its business in a discreditable manner, that would have been defamation of the company, for which action would lie. But if it were said that the cashier had gone off with L.100,000 of the bank funds, that might be defamation of the individual, but not of the bank, for it was not a statement that the bank had committed anything wrong, but that somebody had done wrong against the bank—in the words of this letter, that "the cashier had put his hand into the till of the bank," and yet such statement might most materially affect the credit of the bank, but no action would lie. That principle applied here, where all that was said was that certain individuals had abused their position as bank officials, for the purpose of helping themselves to bank money.

The pursuers pleaded;—That the bank was represented by the directors or committee of management, and it was no compensation to the individual partners of the bank that the directors individually got a solatium for injury done to them.

Lord President.—I do not feel much difficulty in coming to the conclusion that the bank have set forth a sufficient case to go to trial. I see the distinction taken by the defender that the slander was only against the individual members of the committee of management of the bank, who as such were alleged to have abused their trust by appropriating to themselves the funds of the bank, for the purpose of promoting another scheme in which they were personally concerned. That may be true, and the slander may involve all that. But the question we have to deal with is, whether this libel also involves slander against the bank. I see no incompatibility in that. I can understand that slander against the bank may also be slander against certain individuals, and that the injury sustained by the bank is over and above the injury sustained by these individuals, who may not be partners of the bank at all, but only office-bearers. But this action is to be viewed as an action for slander. Article 7 of the pursuers' condescendence, and their plea in law, express the meaning which they attach to the letter founded on. In cases of slander, except in very extravagant cases, we are as a general rule to take the pursuer's construction of the inuendo or libel. I can figure cases so extravagant that we would not. But in ordinary cases the pursuer is entitled to have an opportunity of establishing that the meaning of the libel is such as he alleges it to be. In a question of this kind, it is of importance to look to the nature of the body that pursues the action. Here it is a corporate body acting through certain office-bearers and its committee of management. That is the only way in which it does act; and when it is alleged that that committee of management conducts the business of the bank in the way that is said in article 7 to be meant in this letter, I cannot

1816, F. Coll.; and Sheerlock v. Beardsworth, 20th December 1816, 1 Mur. Rep. 176,—there seems to be sufficient authority for sustaining action by a corporate body, or the party properly representing the corporate body, for reparation of injury by slander affecting the corporation: And in England, the case of Cook v. Bachelor, 3 B. and P. 150; Forster v. Lawson, 11 Moore, 360; Haythorn v. Lawson, 3 Car. and P. 196; and Williams v. Beaumont, 10 Bing. 260,—support the same view."

[1] Forster v. Lawson, 21st April 1826, 11 More, 360; Williams v. Beaumont, 8th Nov. 1823, 10 Bing. 260.

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avoid the conclusion, that if the pursuers establish all that they here aver, they establish a case of slander against the bank. It is not necessary, in order to make out a case of slander against the bank, that it be alleged that all the partners concurred in the thing done. The question is, whether we are to allow the pursuers an opportunity of proving their allegations. They must make an inuendo which contains matter in its nature slanderous as against them. I think they have here done so, and I also think that they should have an opportunity of proving their allegations.

Lord Ivory.—I am substantially of the same opinion. I should have liked the inuendo to be set out in more precise terms; but upon the whole, I think that your Lordship has put the right construction upon it. "The committee" is a form of words for representing the body whose officers they are, and therefore I do not read the phrase as meaning the individual members of the committee, but the committee in its official capacity, which is in other words the bank itself. The four individuals named are not the whole members of the board; and therefore, when the generic word "committee" is used, it means more than the four members named. It is therefore plain that what is meant is the official body, and not merely the individual members of that body; and I am confirmed in this by the construction put on the matter by the defender himself in article 5 of his defence.

Lord Curriehill.—I concur. Although the alleged libel admits of different meanings, the pursuers, in article 7, put such a meaning upon it as I think entitles them to an opportunity of proving it.

Lord Deas.—The question here is one of novelty and difficulty, which I should have been glad to have had time to consider. But called upon as I am to give my opinion upon it now, I regret that I cannot concur with your Lordships. There are two classes of cases, which appear to me to be quite different,—cases in which the party slandered is the party seeking reparation, and cases in which reparation is sought by a party who says he is injured in consequence of another party having been slandered. In the former it is enough to prove that the slanderous words of and concerning the pursuer were uttered — the falsehood and malice being presumed. In the latter it is necessary, I think, to aver and to prove malice, or, what is substantially the same thing, an intent to injure the pursuer. It is quite easy to conceive that one party may be injured by a slander directed against another. For instance, if it were spread abroad that my factor or agent had defrauded me and absconded with all my funds, this might seriously injure my credit, but I could have no action of damages for the slander, without alleging that it had been uttered with intent to injure me. A slander against one member of a family may injure the other members—for instance, to attack the character of one daughter may deeply injure another daughter, but unless the latter alleges that the slander was intended to injure her she cannot claim damages. As it is with individuals so it is with a company or corporation, which is a separate person in law. I do not say a company or corporation may not be slandered so as to entitle the company or corporate body to demand reparation. If it be blazoned abroad that a bank is insolvent or bankrupt, or equivalent expressions used, as in the English case of Foster, or that the whole policy of a life assurance company is to elude their obligations by taking advantage of captious and unfair objections to void their policies, as in the English case of Williams, it may very well be that the bank and the insurance company can, respectively, sue for damages. But there the defamatory and injurious language is directed solely against the body, and not against individual members or office-bearers, so that if the body could not sue for damages no damages could be sued for at all. It may very well be, also, that the slander is so directed both against the body and individuals as to entitle both to damages. But, if the slander be directed solely and exclusively against the individuals, and consists in an accusation that they are cheating the body, this is not a slander of the body; and if the body can claim damages in respect of injury resulting from it, this must be precisely on the same footing that one individual can claim damages for a slander directed against another.

In the present case, the libel quoted in the record is directed solely against the members of the committee of management now in office, who are stated to be five in number—four of them being named, and the fifth, of course, just as well known, and equally entitled to complain, as if he had been named. The pursuers do not

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allege that the committee of management consists of more than these five members, nor that there was any other slander except the slander directed against the committee of management, which consisted of these five members. The only allegation as to the libel being applicable to the bank is that contained in article 7th of the condescendence, in which the usual words are inserted,—that the libel is "of and concerning the pursuers." But these words are immediately followed by an explanatory statement, that the defender did thereby falsely and calumniously represent "that, through the fraudulent, or at least reckless and improper, connivance of the committee of management of the bank, some of their number had been allowed to put their hands into the bank till," and to transfer money, without security, to the railway company in which they were interested, which was substantially a transfer to some of themselves, and a juggle like what had occurred in 1846, "thereby meaning and intending that it should be understood that the present committee of management indulged in the same description of malpractices which had caused so great loss to the bank shareholders" in 1846, and so on.

Now this article, which is said to contain the *inuendo*, does not set forth that the libel, although of and concerning the present members of the committee of management, was meant and intended to apply to, and to be of and concerning the bank. Still less does it intelligibly explain how it was or could have been so. No doubt the article commences by saying that the statements are of and concerning the pursuers, but in place of adding anything to make this either consistent or intelligible, the words which immediately follow bear, explicitly, that what the libel did was to calumniate the present committee of management,—that is to say, the members of that committee referred to in the libel;—and in place of winding up by saying that it was thereby meant and intended to slander and calumniate the bank, the only *inuendo* inserted, bears—"thereby meaning and intending that the present committee of management indulged in the same description of malpractices" which had caused the loss of 1846. It is impossible for me to take this as an *inuendo* which applies the slander to the bank. If it was meant to be so, it is extravagant, and inconsistent on the face of it. I think the true character of the wrong complained of (if wrong there was), is injury to the bank by slandering the individual members of the present committee; but, to support action on this ground, an intent to injure the bank ought to have been libelled. But the action is not maintained in this view. It is admitted to be laid and insisted in exclusively as an action for slandering the bank; and, taking it upon this footing, I am humbly of opinion that it is an action which cannot be maintained.

THE COURT pronounced the following interlocutor:—"Refuse the desire of the said reclaiming note, and adhere to the interlocutor reclaimed against: Find the defender liable to the pursuers in the expenses of process incurred by them since the date of the Lord Ordinary's interlocutor reclaimed against: Remit the whole process, including the proposed issue for the pursuers, to the Lord Ordinary, with power to his Lordship to decern for the expenses hereby found due, as the same shall be taxed by the Auditor."

MURRAY & BEITH, W.S.—RANKEN, WALKER, & JOHNSTON, W.S.—Agents.

No. 195. SIR JAMES E. ALEXANDER (Henderson's curator), Petitioner.—*Forman.*

Judicial factor—Curator bonis—Power to feu a lunatic's estate.—Authority granted to a *curator bonis* of a lunatic to complete feuing transactions which the ward had entered into, and also to grant new feus of the ward's estate, according to a plan which had been prepared by the ward, and already advantageously acted on, and where the agricultural value of the estate had been diminished by the feuing operations.

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1st Division.
Ld. Mackenzie
C.

THE petitioner was the only brother-german and heir-at-law of Major Henderson, now insane, to whom, in November 1856, he was appointed curator. He applied to the Court for special powers in the following cir-

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cumstances: — The village—now the watering-place of Bridge of Allan was situated chiefly on the estate of Westerton, which belonged to Major Henderson. From its attractions and popularity as a watering-place, the estate was capable of being feued to great advantage, and the proprietor devoted himself with great energy to that object. After some time, when he saw that his plans were progressing successfully, with the view of extending his feuing operations, and obtaining the command of very desirable ground, he purchased the adjoining small estate of Coneyhill at a large price. He prepared conditions of feu, under which he offered his lands to the public, and prescribed for his feuars certain modes of building and laying out their feus. He also got a plan for feuing out his lands, including the estate of Coneyhill.

The success which attended Major Henderson's operations induced a neighbouring proprietor to commence feuing, and this petition stated that he also, in the course of the last year or two, had disposed of various portions of his ground; and in the event of any interruption to the feuing on Westerton, he would be in a position to supply the demands for feus, to the manifest deterioration of the estate under the petitioner's charge.

Several transactions relating to feus had been entered into, but the necessary deeds had not been executed before Major Henderson's illness, and since the petitioner's appointment, he had received applications for feus from various parties. He now therefore prayed for special powers, (1), to complete the whole transactions entered into by Major Henderson before his incapacity to manage his own affairs commenced; and, (2), to grant feus of such portions of the estate as were laid out on Major Henderson's plan for feuing, and in terms of his conditions of feu, and to enter and receive vassals, their heirs and assignees.

The Lord Ordinary reported the case on 27th February 1857, expressing himself in favour of granting the first branch of the special powers craved; and stating farther, that it was expedient that the farther powers asked should also be granted, if the Court would interfere on mere ground of expediency.

Forman, for the petitioner.—There is no decision that it is incompetent to grant the powers craved. It is not here proposed to originate anything, but only to carry out what the proprietor himself had begun, and what promised great benefit to the estate, and as to which the whole expense has been already incurred, and would prove fruitless if the powers were not granted.

Lord President.—We are not told what is the extent of this estate, nor the effect which the operations already completed have had upon it. It is material to know whether this is a small property which might have made a good farm, but which, for agricultural purposes, is now destroyed, or whether this is a large estate upon a mere corner of which these feuing operations have been commenced, and which has not yet beeen deteriorated in its agricultural value. According to the view I take of it, this case stands in a middle position between what has been found competent and what has been found incompetent, and it may depend on all these considerations whether we can determine the propriety or legal competency of granting this petition. I see, however, no objection to granting the power of completing the transactions referred to in the first part of the prayer of the petition.

The rest of the Court concurred.

The powers first prayed for were accordingly granted.

The Lord Ordinary again reported the case of this date. It now appeared as the result of a remit by his Lordship to Mr Curror, that the whole lands of Westerton extended to 280 acres, of which 231 acres were laid out for feuing; that the ground already feued amounted to 36 acres; that the value of the estate was diminished for agricultural purposes, and that its future value

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"would be seriously affected if the feuing operations were suspended." It was suggested that a portion of the lawn and of the woods nearest the mansion-house, which were embraced in the feuing plan, ought to be reserved at present. The curator restricted his application in accordance with that suggestion, and, under this limitation, the Court granted the second branch of the prayer of the petition.

THE COURT pronounced the following interlocutor:—"Grant powers to the curator to grant new feus in the portions of the said lands and estates of Westerton and Coneyhill, mentioned in the note specified by Mr Curror in his report, and extending to 51.344 acres, and marked out by him on the plan in process by being coloured red, and to execute all deeds and writings, and do all acts necessary for carrying out the feuing of the said lands and estates to the extent foresaid, and also to enter vassals and grant renewals of the rights and titles in their favour, as craved in the Note, No. 26 of process, and decern."

JOHN N. FORMAN, W.S.—Agent.

No. 196. WILLIAM COLVIN, Pursuer and Respondent.—*Penney*—*N. C. Campbell.*
WILLIAM SHORT AND COMPANY, Defenders and Advocators.—*D. F. Inglis*—*Patton.*

Sale—Delivery—Breach of contract.—A contract of sale of iron was entered into in Glasgow. The purchaser had a place of business in London;—the seller had not. The terms of payment were—"Cash in London on 23d November, in exchange for storekeeper's warrants." On 22d November, the seller despatched from Glasgow, by a post which arrived in London during business hours on the 23d, storekeeper's warrants and drafts for the price on the purchasers, and intimated to the purchasers by same post that they would be presented through one or other of two banks. The drafts were presented early on the morning of the 24th, and the purchasers refused to honour them;—*Held*, that time was of the essence of the contract, and that presentment not having been made on the 23d November, the contract was not binding after that date.

June 26, 1857. — 1ST DIVISION. C. Sheriff-court of Lanarkshire.

WILLIAM SHORT and COMPANY dishonoured drafts for the price of iron purchased by them from William Colvin, on the ground that the storekeeper's warrants had not been tendered in due time. Colvin then applied to the Sheriff of Lanarkshire for a warrant to sell the iron,—alleging in his petition that "the iron market is at present in a very fluctuating state, with a downward inclination." The warrant was granted, and the iron sold at a loss of upwards of L.400.

Colvin now raised the present action, concluding to have Short and Company decerned to make payment, "1st, of the sum of L.454, 4s. 5d. sterling, being damages sustained by the pursuer in consequence of the defenders having violated a contract made by them with the pursuer for the purchase of 2000 tons of pig iron, on or about the 9th day of November 1853; and being also the difference or deficiency between the contract price of said 2000 tons of pig iron so bought by the defenders from the pursuer (but which price the defenders failed or refused to pay to the pursuer) and the price realised for the said 2000 tons of iron under a re-sale of the said iron, under and in terms of judicial authority; and, 2d, of the sum of L.42, 11s. 6d. sterling, being the amount of bank commission on the said transaction, and the expense of noting and protesting drafts for the amount of the contract price of said iron drawn by the pursuer upon and dishonoured by the defenders."

Short and Company denied all liability, in respect that (1) they were not

principals, but had acted as brokers for parties whose names they disclosed, and (2) that the pursuer had failed duly to implement his part of the contract.

A proof was allowed, the import of which, and the whole facts of the case, were thus stated in the interlocutor of this Court recalling the interlocutors pronounced in the inferior Court:—"Find it established as matter of fact that, on the 9th November 1853, the pursuer and defenders entered into a contract in Glasgow, by which the pursuer sold to the defenders 2000 tons of pig iron, at the price of 80s. 9d. per ton, to be paid by cash in London in exchange for storekeeper's warrants on the 23d November 1853; that no particular place in London was specified for making such exchange; and that the pursuer had no place of business in London, but that the defenders had a place of business at Newman's Court, Cornhill, London; 2d, That in this transaction the pursuer dealt with the defenders as principals, and that the defenders did not disclose to the pursuer that they were acting as agents for any third party; 3d, That the pursuer sent from Glasgow to London, through the Western Bank of Scotland, by the mail which left Glasgow on or about twenty minutes past seven o'clock on the evening of Tuesday the 22d November 1853, storekeeper's warrants for 2000 tons of pig iron, and also drafts upon the defenders for L.8075, being the price of said iron; 4th, That, at the same time, and by the same mail, the pursuer wrote the defenders' London house, advising them that he had sent said drafts, and that they would be presented either through the Union Bank of London or through Messers Jones, Lloyd, and Company, but probably the former; 5th, That said drafts, and also warrants for the said iron, arrived at the Union Bank of London about twenty or twenty-five minutes after three o'clock on the afternoon of Wednesday the 23d November 1853, and that the said letter of advice was received by the defenders' said London house about the same time; 6th, That neither the said drafts nor the said warrants were presented to the defenders, or at their place of business, on the 23d November, nor was any communication made to them on the subject thereof by the Union Bank of London on that day; 7th, That the warrants and drafts were presented to the defender's London house on Thursday the 24th November about half-past ten o'clock forenoon, by the Union Bank of London, but that the defenders refused to receive the warrants or pay the drafts, which were on the same day noted and protested as against the defenders for non-payment; 8th, Find that the present action has been brought by the seller against the defenders for loss, damages, and expenses said to have been incurred by the seller in consequence of alleged violation by the defenders of the said contract of sale."

The documents constituting the transaction were (1) a sale-note, as follows:—

"No. 352.

Sold to Messers William Short and Company, two thousand tons, $\frac{3}{5}$ No. 1, and $\frac{2}{5}$ No. 3, g. m. b. pig iron, at eighty shillings and ninepence sterling per ton. Terms of payment, cash in London on 23d instant, against storekeepers' warrants, f. o. b. here. WILLIAM COLVIN.

Glasgow, 9th November 1853, } 80/9
and 0/9 Brok^e.
——
81/6"

2. A bought-note, as follows:—

"No. 352. *Glasgow, 9th November* 1853.

Bought of William Colvin, Esq., two thousand tons, g. m. b. Scotch pig iron ($\frac{3}{5}$ths, No. 1, and $\frac{2}{5}$ths No. 3), at eighty-one shillings and sixpence per ton, f. o. b. here.

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"Said iron to be paid for in cash (*in London*) on Wednesday 23d instant, in exchange for storekeepers' warrants, f. o. b.

P. *pro* Wm. Short & Co.
Charles Wenman."

3. A letter from the pursuer to the defenders, as follows:—

"*Glasgow*, 22*d November* 1853.

"Dear Sirs,—I beg to annex invoice of 2000 tons m/n due in London to-morrow, for which I have passed orders on you per Western Bank, for L.4037, 10s. respectively, to which your attention will oblige. Am uncertain whether they shall be presented through the Union Bank, or Jones, Loyd, and Co., most probably the former.

"Our market has been inactive to-day, m/n warrants nominally 78/ cash. I am," &c. (Signed) "William Colvin."

4. Draft by the pursuer on the defenders, as follows:—

"*Messrs Wm. Short & Co., London.* *Glasgow*, 22*d November* 1853.

"Dear Sirs,—On demand please pay to order of Union Bank of London Four thousand and thirty-seven pounds ten shillings sterling, against warrants herewith for one thousand tons m/n g. m. b. pig iron, as advised by, dear sirs, yours truly, William Colvin."

"L.4037, 10s. sterling."

5. Letter of same date from the Western Bank of Scotland to the Union Bank of London, as follows:—

"We now transmit for our credit bills as described—value L.12,226, 13s. 3d., and we trouble you with six drafts for favour of acceptance and return." Amongst these were included the drafts above referred to.

In the course of his proof the pursuer sought to establish two points of usage of trade. 1. That in such contracts the custom of Glasgow merchants was to transmit to London the warrants by the evening post of the day before that fixed for the exchange. 2. That it was the usage for the party in London having notice that the storekeepers' warrants had been transmitted, to send for them, and not wait till they were presented.

The Sheriff-substitute (Smith) pronounced an interlocutor on 27th December 1854, in which, after several findings in point of fact, he "Finds that it is the practice of trade to send the storekeepers' warrants in implement of such a contract as that between the pursuer and defenders, from Glasgow to London through the medium of a bank, and that it is the duty of the party to whom they are sent, when he has received notice of their arrival, to call at said bank and take delivery of the warrants: Finds also that it is the practice of trade to send such warrants from Glasgow by the post which leaves that on the evening of the day before that on which they are deliverable in London: Finds, in point of law, that the storekeepers' warrants in question, accompanied by drafts for the price of the iron, having arrived in London during business hours of the day on which they were deliverable there, and the defenders having been advised of this by the pursuer's letter to them, which they received during business hours of that day, the defenders might have gone to the bank and received the warrants on that day: Finds, therefore, that the defenders have broken their contract with the pursuer, and are liable in damages accordingly: Therefore decerns against the defenders for the sum of L.421, 15s. 11d., with the legal interest thereof, in terms of the conclusions of the libel: Finds the pursuer entitled to expenses," &c.

On 27th February 1855, the Sheriff-depute (Alison) adhered. In a note he observed, that the "warrants having been presented by the Union Bank, London, at 10. 30 a.m., on the 24th November, the Sheriff holds that with the notice received by the defenders on the 23d, the presentation was duly made."

Both parties presented notes of advocation, which were conjoined.

The defenders pleaded;—That the sale was conditional on the warrants

being presented on the 23d November. That the seller's intention that they No. 196.
should be so presented, while it proved the condition, was insufficient to —
relieve him of the consequences of their not being so presented. He should June 26, 1857. Colvin v.
have despatched his communication by an earlier mail. The alleged usage Short.
was not established by the proof, and was irrelevant. If there was usage at all, it was local, and was not proved to have been known to the advocators, so as to affect the legal rights of parties. It was farther excluded, by the intimation that the warrants would be presented through one of two banks. But this letter not specifying at which of the two banks the warrants would be found, could not alter the legal position of parties. The advocators were not bound to have inquired as to this. On the assumption of the letters having been delivered on the 23d November, within business hours, the Union Bank failed to intimate to the advocators the arrival of the warrants, and to tender these for the price stipulated to be paid; and the advocators, even if otherwise liable in implement of the transaction, could not be bound, the notification and tender not having been made until a day too late.

The respondent (pursuer) pleaded;—That the defenders' objection was purely technical. It was not said that there was any change of circumstances between the 23d and 24th. The purchasers must make out that presentment at a certain counting-house in London on a certain day was a condition precedent to the bargain taking effect. If that was not an absolute condition precedent, then they were not entitled to object to the tender being on the 24th, especially as the seller was doing all that was in his power to give delivery.

Lord President.—The contract, out of which this litigation has arisen, was entered into in Glasgow. The price of the iron was to be paid in London, in exchange for storekeepers' warrants. There is no specification in any of the documents constituting the transaction of any particular place in London where that exchange was to take place. It appears from the evidence that the purchasers had a place of business in London, and that the seller had not.

Looking to the documents presented to us, the result which one would naturally have expected to follow from the terms of the contract would be, first, that upon the 23d November the drafts upon the purchasers would have been presented to them, and the cash paid in exchange for the storekeepers' warrants. If that had been done, no question could have arisen between the parties. If either party has failed to do what was incumbent on him, then arises the question, whether this contract can be founded on as an operative contract after the 23d of November.

On the one hand, the pursuer contends that he fulfilled his part of the contract, in respect that upon the 22d November, by the afternoon mail of that day, he despatched from Glasgow a letter addressed to the defenders, informing them that he had passed orders on them, per the Western Bank, which would be presented through the Union Bank, or Jones, Loyd, and Company, most probably the former; and in respect that of same date he sent these orders and warrants to the Union Bank of London, through the Western Bank of Scotland, where they arrived upon the 23d November, and that these letters were delivered in London about twenty minutes past three o'clock of the 23d November. The pursuer maintains that the essential condition of the contract was thus implemented, for he says that his letter to the defenders having been received by them, and the drafts and warrants duly transmitted to the Union Bank, it was the duty of the defenders to have gone to the bank and paid the money, and got up the warrants, which having failed to do, they cannot now get quit of this contract.

On the other hand, the defenders maintain that the contract contained the essential condition that the warrants should be given in exchange for the money upon the 23d November in London: That that did not take place, and that the failure was not attributable to them: That, in the first place, in order to effect that exchange, it was necessary that the warrants should be in London, and that the sending of them was the duty of the pursuer. The contract specified no place where the exchange was to take place, and in the absence of any such specification, they, the defenders, supposed that there was no place they could go to, but

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that their duty was to remain in their own counting-house. That a letter was written to them, to the effect that through the Union Bank, or Jones, Loyd, and Company, most probably the former, the orders would be presented, and that if the orders had been presented to them on the 23d November, they were ready to honour them, but that no presentation was made till the morning of the 24th, nor any communication made to them by the Union Bank, as being the holders of the orders—that this letter, therefore, could only mean that the orders would be presented to the defenders, on whom they were drawn, at their own place of business, which admittedly was not done on the 23d. It may be that the orders did not arrive in time to enable the bank to present them. But if so, the reason was that they had not been sent off in time. There was no detention of the mail by stress of weather. There was a daily post from Glasgow to London. The failure, therefore, to exchange the money for the warrants, was not the fault of the defenders, but of the parties who failed to present the orders to the defenders.

Looking to the documents, and without reference to anything else, except the fact that no presentment was made of the orders on the 23d November, nor intimation made by the Union Bank that they were in possession of the warrants to be exchanged for the price, I come to the conclusion without difficulty that the pursuer has failed in his duty. He failed to carry through the transaction on the 23d November. He failed to perform that essential condition of the contract, without the performing of which the other party could not be bound to abide by the contract. It might be very essential to carry through the transaction on the 23d. If there was a variation in the market, it might be very important to have it completed on that day. But it is not necessary to enquire into that, for I think it was of the essence of the contract that it should be done.

But the pursuer takes another position. He founds upon usage of trade, which, he says, gives a different construction and effect to the whole of this proceeding. He maintains that it entitles him to have this conclusion—which otherwise, I think, would have been the legal conclusion from these documents and facts—set aside, and to have an opposite conclusion drawn, rested on the usage of trade to which he refers. Now this usage of trade consists of two things. In the first place, the pursuer says there is usage in Glasgow to send off such warrants by the evening mail received in London on the day on which the exchange is to be made, and, in the second place, that there is usage of trade in London, not to go with the warrants to the purchaser, but to let the purchaser go to the warrants.

Now it would require very clear, consistent, and continued usage of trade to establish that a condition which is so much of the essence of a contract as presentment of delivery warrants on a particular day means that presentment need not be made till the following day;—that when the seller has it in his power to send the warrants by a post which would make their presentment certain on the 23d November, he is entitled to keep them back till a post which must make such presentment uncertain. But, moreover, I hold there is here no such usage proved. Upon that point I think that the pursuer's case has failed.

As to the other point, in regard to the purchaser going to the seller or his agent for the warrants, I think that the pursuer has failed in proving any such usage even more signally than he has failed in proving the other. There is no such usage at all applicable to circumstances like the present. But even if there were such an usage in the general case, in this case the pursuer writes that he has passed orders on the defenders per Western Bank—"Am uncertain whether they shall be presented through the Union Bank or Jones, Loyd, and Co.—most probably the former." Now that is very intelligible language of trade. It plainly implies that the orders are to be sent to the place of business of the purchaser, and presented to him there,—which takes this case out of what is said to be usage of trade. Accordingly, the bank protest these bills on the 24th November, not at the bank, but at the place of business of the purchasers. There is also mention in the pursuer's letter of two banks, which is another peculiarity in this case. We are not told whether there is usage of trade for the seller intimating that the warrants are in one or other of two banks, and thus imposing upon the purchaser the duty of finding out in which bank they really are. Upon that part of his case the pursuer has signally failed. I have come to the conclusion that he has failed to make out any part of his case, and, therefore, that the Sheriff's interlocutor should be recalled, and the defenders assoilzied.

Lord Ivory.—The case has presented itself to my mind entirely in the same point of view. The contract is express, and I cannot read it otherwise than as imposing an obligation on the pursuer to present these orders to the defenders on the 23d November. They were not so presented. It does not matter what the excuse was for non-presentment. Time, in a contract of this kind, where the value of the subject varies from day to day, is of the essence of the contract. The purchasers were not bound to go one step to the Union Bank, or anywhere else. And the usage which is averred is excluded, both by the pursuer's correspondence, and by the conduct of the bank in protesting at the defenders' place of business. There was in fact no presentment. As to usage in Glasgow, I put it aside. As to usage in London, the most pregnant evidence is that of the cashier of the bank, who in his own person felt obliged to go to the place of business of the defenders to protest the dishonoured bills. I quite agree with your Lordship on all points.

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Lord Curriehill.—Since the pursuer has resorted to the remedy of an action of damages for breach of contract, instead of an action to compel payment of the price, the action must be dealt rigidly with on the principles applicable to a claim for damages. In this contract of sale the time of payment was express. It was of the essence of the contract; and I think that the pursuer has entirely failed in his case.

Lord Deas.—This case appears to me to turn on the question, whether it was the duty of the advocators to call at the Union Bank in London after the post-office delivery, which took place between twenty minutes and half-past three o'clock on the afternoon of 23d November 1853, in order to get delivery of the iron warrants which arrived at that time and to pay the price, or whether the warrants and drafts for the price, or at all events the drafts accompanied by notice that the warrants had arrived, should have been on that day presented at the advocators' place of business?

We have it in evidence that there are great fluctuations in the iron trade, rendering punctuality in these matters material; and, indeed, it is set forth in the respondent's application for warrant of sale, presented within a few days after the stipulated day of delivery, that the iron market was then in a very fluctuating state, with a downward tendency, and it was the consequent apprehension of great loss unless the iron were immediately sold which was made the foundation of that application. If, therefore, the respondent did not duly tender delivery on the day stipulated, I cannot hold that he is entitled to damages (which is what he now seeks) for breach of bargain. On the other hand, if he did duly tender delivery, his claim of damages, which he estimates by the difference of price, would, I think, fall to be sustained.

Now, the contract is not explicit as to the place of payment and delivery, farther than that both are to be in London, and simultaneous with each other. I think it clear enough that, wherever payment was to be made delivery was to be given, and *vice versa*. The advocators had a place of business in London, which may raise some presumption in favour of the view they contend for; but, at the same time, the presumption is weak, and might easily have been overcome, for the contract, while it specifies a locality, namely London, does not specify the advocators' place of business in London, which might easily have been done if the parties meant it. But the parties themselves are the best interpreters of their own contract, when the contract itself is not explicit; and I think the whole facts and circumstances, along with the documentary evidence, shew that both parties understood timeous presentation of the drafts and warrants, or at all events of the drafts with notice of the arrival of the warrants, was necessary to be made at the advocators' place of business. The respondent's letter of the 22d bore that the warrants were to "be presented through the Union Bank, or Jones, Loyd, and Company, most probably the former." I do not go upon the mention of two banks, for the advocators inquired at neither. Nor do I look on the expression, presented through the bank, as necessarily inconsistent with the supposition that the advocators were to call at the bank, had this, otherwise, appeared to have been their duty. But the drafts for the price, addressed to the advocators, desired them to pay to the Union Bank "against warrants herewith;" and the bank's letter transmitted the drafts "for favour of acceptance and return;" and the bank, acting upon what they must have understood to be the nature of their instructions, did not attempt to protest the drafts

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and exonerate themselves by allowing the drafts and warrants to lie at their office, but presented both the drafts and warrants on the 24th, and again on the 25th, recording the tender of the warrants and the presentation of the drafts, in separate notarial instruments, as the foundation of the protest for non-acceptance and non-payment—keeping the respondent at the same time advised each day, through the medium of the bank in Glasgow, of the steps thus taken as the necessary preliminaries to protesting and returning the drafts; to all which accordingly the respondent stated no objection. On the contrary, while the advocators, in their letters and telegraphic message of the 23d and 24th, expressed their understanding that the warrants should have been presented with the drafts on the 23d, the respondent in his letter of the 24th, in place of repudiating this construction of the contract, rested his whole answer to the advocators' refusal of implement, on the ground that he had forwarded the documents in good time, under ordinary circumstances, "to be presented yesterday," and that he could not suppose any honourable house would avail themselves of the pretext of the mail having been late to repudiate the contract. This letter, when taken in connection with the conduct of parties, appears to me to amount to a distinct admission that the documents fell to have been presented at the advocators' place of business, and that the only excuse (of the weight of which it is for us to judge) for this not being done on the 23d was the mail being late. Now, if the documents had been actually presented on the 23d, I should have regarded it as of no consequence when they had been despatched. But I have no doubt at all that the respondent took the risk of the mail being late, and that the accident of its being so forms no valid reason for non-fulfilment of his contract. The Union Bank clerk examined, states that the usual hours of banking business in London, with the public, are from nine to four, and that even assuming the documents to have arrived at the bank about three, they were not in time, according to the usual course of business, to have been presented on that day for payment. Upon this point I see no counter evidence. But, be this as it may, the documents were not presented on the 23d; and any question whether they should have been so must lie between the respondent and the bank, and not between the respondent and the advocators.

As regards the parole proof of usage, I do not go into the details of it, but there really is nothing like satisfactory proof of usage of parties going to the bank, in place of the bank sending to the parties, even if this had been a case in which the parties themselves had not, by their conduct and writings, construed their own contract, which I think they have done; and it is upon this ground, mainly, I am disposed to rest my opinion, that the Sheriff-court interlocutors ought to be recalled, and the advocators assoilzied.

The Court pronounced the following interlocutor:—(After the findings in fact above quoted)—"Find, in point of law, 1st, That it was of the essence of the said contract that the exchange of cash for storekeepers' warrants should take place on 23d November in London; 2d, That the presentment of the drafts or warrants on that day to the defenders, or at their place of business, with a view to the exchange of cash for the warrants, was necessary to the due fulfilment of the contract on the part of the pursuer; 3d, That no such presentment having been made until the 24th November, the defenders cannot be held liable to the pursuer in damages as for violation of the contract, or for any expense or loss which the pursuer may have incurred by return of the drafts or resale of the iron: Find it not established that there is any usage of trade applicable to the circumstances which have occurred adverse to the above deductions in point of law: Therefore assoilzie the advocators from the whole conclusions and prayer of the summons and petition in the inferior court, and decern: Find the advocators entitled to the expenses of both processes in the inferior court, and also in both processes and in the conjoined process in this Court, and remit," &c.

Macbrair & Parker, W.S.—Ranken, Walker, & Johnston, W.S.—Agents.

Mrs Elizabeth Honyman Gillespie and Husband, Pursuers.—*D. F. Inglis—Macfarlane.* No. 197.

James Russel and Son, Defenders.—*Penney—Young.* June 26, 1857. Gillespie v. Russel.

Process—Res judicata—Relevancy.—A proprietor of minerals brought a reduction of a lease, on the ground of fraudulent concealment and misrepresentation by the lessees, who, it was averred, "had reason to believe" that there was in the proprietor's lands, unknown to him, a valuable gas coal, and by misrepresentation induced him, in ignorance, to grant a lease, on terms disproportioned to the value of the minerals contained in it. The Court assoilzied the lessees from the action "as laid." (1), In a second action of reduction laid on the same grounds, but averring actual, instead of speculative knowledge of the existence of the mineral,—plea of *res judicata* repelled (*aff.* judgment of Lord Ardmillan, *diss.* Lord Deas). (2), Case sent to trial to have the facts ascertained without an interlocutor of relevancy being pronounced.

See ante, vol. xvii. p. 1; and vol. xviii. p. 677.

The pursuer, Mrs Gillespie, was heiress of entail in possession of the lands of Torbanehill. On 30th March 1850, she and her husband entered into a missive of agreement with the defenders, James Russel and Son, coal-masters, by which they let the whole coal, ironstone, iron ore, limestone, and fire-clay (but not to comprehend copper, or any other minerals whatsoever, except those therein specified), in the lands of Torbanehill, for the period of twenty-five years from and after Candlemas 1850. In 1854 Mr and Mrs Gillespie brought an action of reduction and damages against Messrs Russel and Son, containing conclusions to the effect that they were not entitled as tenants to work a certain gas coal in the lands of Torbanehill, and that they were liable to the pursuers in damages for doing so. Judgment was pronounced in favour of the defenders. The pursuers then raised an action of reduction of the lease on the ground of fraud. Judgment was pronounced assoilzieing the defenders from the conclusions of that action "as laid." The grounds of action and of the judgment were fully reported ante, vol. xviii. p. 677. Mr and Mrs Gillespie now brought this action of reduction of the missive of agreement, on the narrative that it had been obtained "to their great hurt and prejudice;" and concluding to have the missive of agreement reduced, and declared "to have been from the beginning, to be now, and in all time coming, null and void, and of no avail, force, strength, or effect in judgment, or outwith the same in time coming, and the pursuers reponed and restored thereagainst *in integrum*, for the reasons and causes set forth in the condescendence and plea thereunto annexed;" and concluding also "for payment to the pursuers of one hundred and fifty thousand pounds sterling, or such other sum as our said Lords shall find to be the value of the said minerals so put out, worked, and sold by the defenders from the pursuers' foresaid lands of Torbanehill, under colour of said lease or missive of agreement, to the date of citation of this process; or alternatively, "to hold just count, reckoning, and payment with the pursuers, in respect of the same, and to exhibit and produce before our said Lords a full and particular state of accounts in relation to the premises, whereby the sum or balance due by the defenders to the pursuers may appear and be established by our said Lords." 1st Division. Ld. Ardmillan C.

The pursuers' averments in their condescendence were as follows:—

1. The defenders have been for many years very extensive workers of coal and other minerals, particularly in the counties of Linlithgow and Stirling; and in, and prior to, January 1850, they were lessees of the coal and other minerals in the lands of Boghead, which adjoin the pursuers' property of Torbanehill, which is situated in the neighbourhood, and to the south, of

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Bathgate, and in the county of Linlithgow. 2. There does exist in the mineral estates of Torbanehill and Boghead a stratum of a substance of the nature of gas coal, of a richer quality, and more valuable, than any gas coal known to exist prior to January 1850. 3. In and prior to the said month of January 1850, the defenders had, by careful investigation, made themselves aware of the nature and stratification of the coal and other minerals in the district of country around Bathgate; and, in particular, they had made themselves thoroughly acquainted with the nature, quality, and extent of the minerals in the pursuers' lands of Torbanehill. They had, by inquiry, experiment, skilful analysis, and otherwise, satisfied themselves, and they knew and had become perfectly aware, that there existed in these lands of Torbanehill a gas coal, or other mineral substance of the nature of coal, of the richest and most valuable quality,—richer and more valuable than any coal previously wrought or known, as specified in article 2. 4. The defenders had then recently found, in the adjoining lands of Boghead, the stratum of this gas coal or mineral substance; and they knew, as already mentioned, that it was in the lands of Torbanehill. But the existence of the mineral in question in Torbanehill and Boghead, and its character and qualities, were unknown except to the defenders. 5. The defenders had also, in and prior to the said month of January 1850, ascertained, and they knew, that not only was the said coal or mineral substance in itself of a much richer quality and higher value than any known coal, but also, that it was to be found in the pursuers' lands in great abundance, and could be wrought and turned out to immense advantage and profit. 6. On the other hand, the pursuers were, in January 1850, and for some time after the missive of agreement or lease under reduction had been granted, as after-mentioned, entirely ignorant of the existence of the said gas coal or mineral substance. The pursuer, Mr Gillespie, was also, during the time the negotiation for obtaining the said lease was going on, and until after the same was executed, as after-mentioned, in a very bad state of health, unable to give much attention to business, and was resident at some distance from Torbanehill, in a different county from that in which these lands are situated. 7. In or about the beginning of January 1850, the defenders proposed to the pursuers to take a lease of the minerals in Torbanehill. The object of the defenders in doing so was to obtain a right to the valuable gas coal or mineral substance which had been ascertained by them to be in the lands of Torbanehill, as above mentioned; but they did not disclose this to the pursuers. On the contrary, from the beginning, and throughout their negotiation with the pursuers, they not only designedly concealed what they had really in view, in order the better to accomplish their object, but also disguised their object by false and fraudulent representations; and thereby induced the pursuers, in ignorance of the nature and value of the subject with which they were dealing, to enter into the lease under reduction. 8. The defenders, in opening the negotiation with the pursuers for the lease in question, pretended and represented that their object was to work various minerals—specifying, in particular, the ironstone and iron ore in Torbanehill. They pretended, and falsely represented, that the coal in the lands was of little importance, and this they did for the purpose of fraudulently misleading and deceiving the pursuers as to the true nature and quality of the minerals in the lands of Torbanehill. 9. The defenders did further, in the course of their communications with the pursuers, in the months of January, February, and March 1850, falsely and fraudulently state and represent that no such gas coal as that above described, nor any similar mineral substance of value, existed in the lands of Torbanehill, while all the time they had satisfactorily ascertained, and perfectly well knew, that the foresaid most valuable gas coal or mineral substance existed in great quantities in said lands, and was capable of being worked and turned out to immense advantage and profit. These false and fraudulent statements

and representations were made for the purpose of deceiving and misleading the pursuers, and inducing them to grant the lease under reduction. 10. The pursuers were deceived and misled by the said false and fraudulent statements and representations made to them by the defenders; and, relying on these, the pursuers granted the missive of agreement or lease under challenge. They were induced to execute the said lease solely in consequence of the fraudulent concealment by the defenders of the existence and nature of the mineral above mentioned, and of the false and fraudulent statements and representations above set forth; which, at the time, they believed to be honestly and truly made by the defenders, who were persons of good and well known skill in such matters. Had it not been for the fraudulent concealment, and the false and fraudulent statements and representations of the defenders, the pursuers would not have entered into the missive of agreement or contract of lease in question."

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The pursuers then narrated the missive of agreement between them and the defenders, and stated, "art. 12. By this contract of lease, and particularly by the stipulation regarding the lordship on coal, the pursuers have been grossly defrauded, and have suffered great loss and damage—the lordship stipulated being an entirely inadequate equivalent or return for the abovementioned valuable gas coal or mineral substance which is found in the lands. It did not amount to one-fourth of the lordship or equivalent to which the pursuers were fairly and justly entitled, and which they would have readily obtained for the said gas coal or mineral substance. 13. The defenders, soon after the date of the said missive of agreement or lease, entered into possession of the mineral field thereby let, and they thereafter began to work the gas coal or valuable substance abovementioned. Though they also found in the lands of Torbanehill valuable ironstone, iron ore, and fireclay, as well as other minerals mentioned in the lease, it soon became apparent that all these had, as before stated, been referred to merely as a blind to conceal from the pursuers the true object the defenders had in view; and accordingly they confined their operations exclusively, or all but exclusively, to the working, putting out, and selling of the said gas-coal or valuable mineral substance, which they disposed of, and have since continued to sell, at very high prices, and in large quantities, to the damage and enorm lesion of the pursuers. The defenders found the said gas-coal or mineral substance in Torbanehill from the very first. They have found and worked it in every pit which they have yet opened in the lands of Torbanehill."

The pursuers concluded, by stating the extent to which the defenders had worked the gas coal, and its increased value or price in the market, which they said was owing to "its peculiar properties—those intrinsic properties, n virtue of which it is as to the categories of quantity and quality of certain roducts a mineral *sui generis*."

They pleaded;—"1. The pursuers having been induced to enter into the ontract in question by the fraudulent concealment, and false and fraudu-ent representations of the defenders, as condescended on, the pursuers are ntitled to decree as concluded for. 2. The former action, and the judg-ent of the Court therein, cannot support the defenders' plea of *res judi-ta*, in respect that the allegations of the pursuers, and the *media ncludendi*, were essentially different in the former action from what they e in the present."

The defenders referred to the previous actions, and pleaded;—"1. *Res dicata*, in respect of the judgments in the previous action of reduction, c. at the instance of the pursuers against the defenders. 2. The pursuers' atements in the summons and in the record are irrelevant, and insufficient support the conclusions of the action. 3. In particular, the summons d record contain no relevant allegation of facts to shew fraud on the part

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of the defenders, and to support the reductive conclusions upon that ground. 4. The action is irrelevant, and cannot be maintained, in respect, 1st, There was no duty of disclosure on the part of the defenders in regard to any of the matters which they are alleged to have concealed from the pursuers; and, 2d, The defenders had no peculiar knowledge, or peculiar means of knowledge, in regard to any of the matters which they are alleged either to have misrepresented to the pursuers, or concealed from them, and it is not relevantly alleged that they had. 5. The pursuers having had the means of ascertaining for themselves the value and capabilities of the mineral field in their estate, cannot reduce the lease thereof to the defenders upon any of the grounds set forth in their condescendence and pleas. 6. The pursuers are barred by their own conduct and proceedings from challenging the lease upon any ground whatever. 7. The action being altogether unfounded in fact, cannot be maintained."

The Lord Ordinary, on 3d July 1856, pronounced the following interlocutor:—" The Lord Ordinary having heard counsel for the parties on the plea of *res judicata*, being the first preliminary plea urged by the defenders, and having made avizandum, and considered the debate, productions, and whole process—Repels the said plea; and, in respect that the defenders have given notice of their intention to bring this judgment under review, finds the said defenders liable in expenses; allows an account thereof to be given in," &c. *

* " NOTE.—If this action is substantially and materially different from the preceding, the plea of *res judicata* cannot be sustained, for the rule of competent and omitted does not apply to a pursuer.—(Stair, 4, 40, 16; Ersk., 4, 3, 3; Kames' Eluc., art. 28; Paton, 22d June, 1681, M. 12,228; Kinloch, 27th December 1692, M. 12,233; Strachan, 6th December 1727, M. 12,239.) The application of the rule, in some cases, to suspenders, is a confirmation of the previous authorities, as in regard to this plea, suspenders are held to be in the position of defenders—(Napier v. Carson, 7th February 1828, 6 S. and D. 500; Barbour, 27th May 1828, 6 S. and D. 860); and in the more recent cases of Lord Strathmore, 24th May 1833 (11 S. and D. 644), and Lord Macdonald, 26th May 1840 (2 D. 889), it is quite settled that the plea of competent and omitted does not apply to the pursuer of a reduction on different *media concludendi*. Nor is the decision in the case of Campbell v. Stewart, 20th February 1838 (16 S. and D. 632), adverse to this principle, for in that case there had been a verdict on the facts by a jury, and a decree of absolvitor following on the verdict; and the Court were of opinion that there was no new *medium concludendi*, and that the pursuer, having only improved his record, was truly seeking 'to have the same cause retried.' Of course the retrying of the same cause, under colour of bringing a new action, cannot be permitted; and the important question is—whether this action is 'the same' as that already decided or not?

" Mere variation of words or elaboration of statement, will not, on the one hand, be sufficient to constitute a difference; and, on the other hand, the fact, that the parties, the subject, the conclusions, of the actions are the same, will not be sufficient to constitute identity. The substantive averments in the two actions must be compared, in order to ascertain whether there is substantial identity with colourable variation, or whether there are such new averments as to amount to new *media concludendi*.

" After careful comparison of the averments of the pursuers, in the former and in the present action, especially with reference to the opinions of the Court in the previous decision, the Lord Ordinary has arrived at the conclusion, that the actions are really distinguishable in substantial and important particulars, and that the plea of *res judicata* ought to be repelled.

" It is not necessary to allude to the first action raised by the pursuers, the object of which was to withdraw from the lease to the defenders the mineral in question, on the ground that it was not a coal, and was not within the scope of the lease. The result of that action was to settle conclusively, that the mineral, whatever may

Against this interlocutor the defenders reclaimed, and, on 26th November 856, the Court pronounced the following interlocutor:—" Recall, *in hoc* No. 196.

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: its mineralogical or geological character, was within the meaning of the descrip- m in the lease, and was actually let to the defenders.

"The second action, which is the one now founded on by the defenders, was ought to reduce the lease on the ground of fraud. The Court found that 'the rsuers have not averred facts relevant and sufficient to support the conclusions of e libel,' and therefore assoilzied the defenders 'from the action as laid.' These rds were advisedly introduced, in order that the pursuers, if they should bring iew action otherwise laid, might not be excluded by the plea of *res judicata*. The ion from which the defenders were thus assoilzied, was disposed of, in respect of ufficient averment of facts to support the charge of fraud; but the fraud was not estigated, and the validity of the lease was not judicially sustained. The plea e urged by the defenders, appears to the Lord Ordinary to be different from t urged to exclude a second action, brought after an absolvitor on a verdict or facts ascertained by proof on commission. In the case of absolvitor on a verdict n a proof, the ground of action is inquired into, and is negatived. In the case ' under consideration, the ground of action was not negatived, for inquiry was ped in consequence of the insufficiency of the allegations. All that was decided, , that the pursuers' averments in 'the action as laid,' were not such as to entitle a to try their conclusions of reduction.

When the allegations and conclusions of this summons are compared with those he preceding, especially with reference to the particular points mentioned in opinion of the Lord President, the difference is at once perceived. Whether verments now made are, or are not, relevant and sufficient, it is premature at nt to inquire. It is enough that they are different. This is not merely a nons in an amended form, with more specific averment of matters, of which : was general averment in the former action,—it is a summons with distinct averments not previously made, and the lack of which was noticed in the last n.

Besides a difference in the conclusions, which are no longer qualified in the ier noticed by the Lord President, and several minor differences in the state- s, which are generally more definite and precise, there is, in the first place, an rtant new averment of actual knowledge by the defenders that this valuable gas vas in the pursuers' lands of Torbanehill in abundance, and could be wrought to profit, and of entire ignorance of the existence of the mineral on the part of the iers. (Arts. 3, 4, 5, and 6, of the condescendence.) In the former action, a ' in the probable existence of this mineral in Torbanehill, reached inferentially knowledge of its existence in Boghead, was alleged; and the failure to dis- this belief was held not sufficient to support the charge of fraud. In the pre- iction, the pursuers aver knowledge by acertainment of the actual fact. The ient (Art. 3) is quite explicit, and the means by which the knowledge is said ve been obtained by the defenders, are specified as 'Enquiry, experiment, l analysis, and otherwise.' The effect of the defenders' actual knowledge of tistence, the quality, and the capability of profitable working of this mineral rbanehill, and of their obtaining from the pursuers a lease by concealing their 'edge of the fact, was not judicially disposed of in the last action. It could ., for it was not relevantly and sufficiently alleged. It is, however, now d in this action, and in that respect the action is distinct from the preceding. 1 the *second* place, there is, in the present summons (Art. 9 of Condescendence), averment of direct statements and misrepresentations of a false and fraudu- haracter made by the defenders to the pursuers, in regard to this mineral, in to obtain the lease, and made by the defenders in the knowledge that the ıents were contrary to the fact. The articles 3d and 9th of the condescend- :aken together, bring out this new *medium concludendi*.

he defenders maintain that these averments are not new, but that they were ntially made in the former action; and they refer particularly to articles 4, 21 of the former condescendence.* But in that former action the defenders different view of the record, and they succeeded in satisfying the Court that

, bodied in previous report. See also opinion of Lord Deas in former action.

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statu, the interlocutor of the Lord Ordinary reclaimed against; and remit to his Lordship to ordain the production to be satisfied, reserving the preliminary defences to be discussed along with the merits; and to appoint a record to be made up and closed, and to proceed with the cause."

A record was then made up and closed, and on 26th February 1857, the Lord Ordinary pronounced the following interlocutor:—" Repels the plea of *res judicata* stated for the defenders: Finds that the pursuers have alleged facts relevant to go to issue; and appoints the pursuers to lodge such issues as they propose within ten days from this date." *

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it was 'not relevant and sufficient to support the conclusions.' The defenders then read the averments in the former record, so as to confine them within the narrowest limits of the strictest construction. They now seek to read the same averments so as to extend them to the widest range of liberal construction. The Lord Ordinary has endeavoured to ascertain the true meaning of the pursuers' averments in both actions. On a reasonable construction of the words used, he thinks that there are averments in the present summons which are not within those in the former action, but are new; and particularly, that the averments in the 3d and 9th articles, taken together, are new, and, therefore, he is of opinion that this action is 'otherwise laid,' and is consequently not excluded by the absolvitor from the former action 'as laid.'

" On these grounds, and without at present indicating any opinion on the relevancy and sufficiency of the averments in this action, the plea of *res judicata* has been repelled."

* " NOTE.—This action, brought by the pursuers Mr and Mrs Gillespie, for reduction of the lease of the minerals of Torbanehill, on the head of fraudulent concealment and misrepresentation, has been resisted on two grounds, urged by the defenders as sufficient to dispose of it without inquiry into the facts. In the first place, the defenders plead *res judicata*, in respect of the judgment of the Court in the previous action. In the second place, they plead that the averments in the present action are not relevant to support its conclusions.

" In considering the plea of *res judicata*, it is necessary to attend to the circumstances in which it is stated.

" The former action was disposed of by a judgment on the relevancy, and the defenders were 'assoilzied from the action as laid,'—the interlocutor of the Lord Ordinary having been slightly varied by the Court, in order so to express the absolvitor. There was, of course, no investigation into the facts; and there was no decision on the relevancy of any averments except those made on that record. The argument of the defenders in the previous action was, that knowledge on their part, of the existence of this coal in Torbanehill as of an ascertained fact, apart from mere speculation or inference from its presence in Boghead, was not then alleged; and the decision of the Court rested mainly on this defect—this absence of averment of the defenders' actual knowledge. But now, the argument of the defenders is, that their actual knowledge of the existence of this coal in Torbanehill was really averred in the former action; and therefore, that it is not matter of new averment in the present action. The former case was decided on the first view of the averments which was then successfully maintained by the defenders. Actual knowledge as of an ascertained fact was held by the Court, on considering the record, not to be averred, and on that ground, taken in necessary connection with the manner in which misrepresentation was alleged, the defenders were assoilzied from 'the action as laid.' Can the defenders now succeed in throwing out this action on the ground (in direct opposition to their previous pleading), that such knowledge on their part was really averred in the former action? The Lord Ordinary, though much impressed by the legal difficulties so ably urged by the defenders, is yet of opinion that this ought not to be permitted.

" After a renewed and careful comparison of the averments in the two actions, the Lord Ordinary is still of opinion that there are such differences as to distinguish the present from the former action, to make it, in important respects, a new action, and so to save it from being excluded by the plea of *res judicata*, founded on the decree of absolvitor from the former action 'as laid.' If this action is laid on grounds

Against this interlocutor the defenders reclaimed, and pleaded;—That No. 197.
his and the former action were identical, in respect, (1), both related to — June 26, 1857.

airly and substantially different from those stated on the former record, then it is Gillespie v. Russel.
ot so laid as to be within the absolvitor from the former action 'as laid.' This
as the opinion of the Lord Ordinary, when, on 3d July 1856, he repelled the plea
f *res judicata*, as then urged. The record has since been closed on the revised
apers, the statements of fact and pleas in law have been completed and adjusted,
nd the plea of *res judicata* is now urged to exclude this action. The Lord Ordi-
ary having had the benefit of most ingenious and elaborate argument, in which
e whole subject of *res judicata* has been amply discussed, has not seen reason to
ange the opinions he formerly expressed, and to which he now refers.

"Two points have been especially pressed on his attention. The first is—that
the condescendence annexed to the summons in the former action, the pursuers
erred that the defenders 'were well aware' that the mineral substance found in
ghead was to be found in large quantity in the lands of Torbanehill; and that
e addition, made on revisal, to the words 'were well aware,' viz., 'or had suffi-
ent grounds for believing,' did not so derogate from the previous averment as to
event its being a proper averment of knowledge made in 'the action as laid,'
m which the defenders were assoilzied. This difference of expression between
e summons and the revised condescendence does not appear to have been brought
der the notice of the Court in the former action; and, as already explained, the
ase was decided on an analysis of the record, and on the footing of knowledge
t being alleged. But even taking the words as they stand in the summons, and
ding them in connection with the other statements there made, the question still
nains, Do they amount to an averment of knowledge of the existence of this coal
Torbanehill as a fact ascertained, and not merely as the result of speculation and
erence from the workings at Boghead? The Lord Ordinary thinks that, even
ding the summons by itself, there was no averment of such actual knowledge.
amounted only to this, that the defenders having worked and sold the Boghead
l, were, from the results of that working, aware, as matter of inference or deduc-
n, that the same mineral was likely to be found in Torbanehill. But the sum-
ns cannot be separated from the record: the whole record should be considered;
l it was carefully considered by the Court, and the result of that consideration
, that, not from the conclusions of the summons generally, but 'from the action
laid,' the defenders were assoilzied.

"The second point was—that the additional averments made in this action might
e been made in the former action under the summons, and therefore that they
not new, to the effect of being now competent.

"It is said that a new ground of action could not have been added;—these aver-
its could have been added;—therefore, these averments do not amount to a new
und of action. This argument is very plausible, and, when viewed with refer-
e to the opinion of Lord Corehouse in Campbell v. Stewart, 20th Feb. 1838, has
n felt by the Lord Ordinary to be forcible; and it is not without hesitation and
iculty that he has refused effect to it. The case of Campbell v. Stewart was a
of a new action after a verdict for the defender had been returned, and had
n applied by the Court. The defender had, after verdict, been assoilzied from
conclusions of the libel, under reservation only of the effect of a judicial minute,
ch did not include the point sought to be raised in the supplementary action.
pursuer's case had been put in issue, and decided on evidence. The only
its which the pursuer desired to keep open were reserved in the minute, and the
rt would not allow a different point, which had not been reserved, to be brought
vard in a new action. That is a very different case from the present, where the
h of the pursuers' allegations has never been investigated, and where the aver-
its now made have never been judicially considered.

"To say that the new averments might have been made in the former action,
must therefore be now excluded, is just to urge the plea of 'competent and
tted' against the pursuers. Take the case of Lord Strathmore, 24th May 1833.
argument now urged would have applied to that case;—the new matter might
e been there stated in the first action. The plea of vitiation, as a reason of re-
tion, was, according to common style, stated in the first action by Lord Strath-

No. 197. the same transaction; (2), In both the defenders were charged with fraudulent concealment and misrepresentation with reference to that transaction:

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more. It would, of course, have been competent to allege on record, as matter of fact, that the deed was actually vitiated *in substantialibus*. But, notwithstanding this, the Court sustained a new action, laid on the averment of actual vitiation, and adhered to Lord Moncreiff's interlocutor, repelling the plea of *res judicata*, on the ground, as stated by him, that 'there cannot be *res judicata* on any particular question or ground of action where that question or ground has never been truly or in plain reality raised and brought into discussion between the parties.' So also in the case of Lord Macdonald, 26th May 1840, a new action was sustained and the plea of *res judicata* was repelled, the exception of 'competent and omitted' being found not applicable to a pursuer under such circumstances. Although, therefore, the argument of the defenders has a syllogistic aspect, and although it derives some force from the rules of pleading recognised in our procedure under the Judicature Act, still it is only another and a very ingenious mode of applying the plea of competent and omitted, to a case where it is not appropriate.

"The case which the pursuers of this action now state, both as regards the alleged knowledge of the defenders, the mode by which they attained that knowledge, and the nature of their alleged misrepresentations made in that knowledge, is one on which hitherto there has been no judicial deliverance. If such a case were excluded without inquiry, on the plea of *res judicata*, the forms of law would operate to the exclusion of justice.

"Looking to the averments on this record, and especially to the 3d, 4th, 5th, 6th, 7th, and 9th articles in the revised condescendence, which must be considered together, the Lord Ordinary is of opinion that the pursuers have now made averments relevant to go to issue.

"They now allege—1st, That the defenders, when they entered into the lease, had ascertained, and knew as a fact, that this valuable gas coal was in the lands of Torbanehill in abundance, and was capable of being wrought to great advantage; 2d, That the pursuers were ignorant of that fact; 3d, That the defenders, being in the knowledge of that important fact by actual ascertainment thereof, not only concealed their knowledge, and disguised their object during the negotiations, but 'did falsely and fraudulently state and represent that no such gas coal existed in Torbanehill;' and, 4th, That by such false and fraudulent representations made knowingly contrary to the fact, they induced the pursuers to grant the lease.

"This is not now stated as a case of speculative conjecture or expectation, nor as a case of mere concealment of opinion, or even concealment of a certain kind of knowledge derived from experiments on Boghead coal. It is stated as a case of fraud—a case of wilful false statement, and misrepresentation of fact, made in order to deceive, and with the effect of deceiving, the pursuers.

"There may be great difficulty in establishing such a case by evidence, and there are many presumptions against it; but the Lord Ordinary is unable to see how the case, as now put, can be disposed of at once and without inquiry. It rests on averments of intentional deceit, of wilful falsehood, of *fraus dans causam contractui*. These are very strong statements. Their truth must be assumed, in the question of relevancy, for the pursuers undertake to prove them, and if they are all true, then there is no authority for supporting against challenge by reduction, a contract obtained by such fraud, to the great prejudice of the party deceived. The Lord Ordinary found the former action not relevant, but he feels compelled to take a different view of the action now before him, which is different in essential particulars; and he has been unable to discover in the opinions of the Judges of the First Division on the former case, anything opposed to the view now taken under altered circumstances.

"Where both parties are on an equality as to knowledge, mere superiority of skill or judgment is of no consequence. Where parties are not on an equality, but one party has acquired actual knowledge of an important fact not known to the other, and does not state that fact, they may still transact for a sale, or for a lease, because there is no duty of disclosure. But where one party has obtained knowledge of an important fact of which the other party is ignorant, and, in regard to the matter, wilfully misrepresents the fact, in order to deceive, and with the effect

3), In both the subject of the alleged fraudulent concealment and misre-resentation was the existence of the gas coal in question in Torbanehill, nd the quality of it; (4), In both the pursuers averred their own ignorance f the existence of this mineral, and of the quality of it; (5), In both it was lleged that the defenders' real object in negotiating for a lease and obtain-ig it, was to get possession of this coal, while they pretended as a blind iat they desired a variety of other minerals included in the lease. The resent action was said to differ from the former, in respect, (1), in the first :tion the defenders' actual knowledge, as distinguished from speculative)inion, or "having good reason to believe" in the existence of this mineral Torbanehill, and the quality of it, was not averred, while in this present :tion such actual knowledge was averred; (2), That in the present action ere was a more satisfactory statement by the pursuers of the cause of the fenders' knowledge than in the first; and (3), That in the first action the udulent concealment and misrepresentation by the defenders of the facts known to them, were not distinctly averred, while in this present action ey were distinctly averred. But comparing the two summonses, the aver-:nt of knowledge in the first action was as explicit as in the present action. the former it was, "you were well aware," or "had sufficient ground for lieving" that such a mineral existed. In this action it is, "you knew it it existed," "you were perfectly aware." There was therefore no dif-ence in the two actions in this respect. The words in the former action, iich prejudiced the case of the pursuers, were here omitted. In other pects, the summonses were identical.

2. As to the cause of knowledge: article 3 of the present action, which ne contained anything upon the subject, said that this knowledge was ned "by inquiry, experiment, skilful analysis, and otherwise." "Inquiry" s impossible, because the pursuers averred that the existence of the coal s only known to the defenders; therefore, that being left out of view, re remained only "experiment" and "skilful analysis." No particulars re given. The previous action stated what the experiment and skilful ilysis was. It could not be said, therefore, that the statement in this ion was more satisfactory than in the other. If it was meant to aver that ther mineral than what was set forth in the lease was the subject of eriment, that ought to have been stated. There was nothing in the ised condescendence in this case which could not have been introduced ler the original summons. That was a good test whether this was an ion on new grounds or not.

Again, by the Judicature Act, the pursuer was bound to set forth all the ts of the case. Therefore the previous judgment must be presumed to e proceeded on a statement of all the facts of the case, and being adverse he pursuer, that implied that there were no facts to support his case, t he had not got evidence sufficient to do so. The question came to be, there anything material or immaterial in this record which might not e been dealt with under the original record? In the view of the Lord linary, if the Court decide against the relevancy of this case, the pursuers ild bring another, and perhaps still another action more skilfully framed,

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ieceiving, so that the contract is induced by the false representation, such a con-t cannot stand. *Ex dolo non oritur contractus.* On the effect of direct decep-(as distinct from the mere use of the advantage of superior knowledge) under circumstances, reference has been made to Sugden on the Law of Vendors and chasers, p. 5; and to the case of Turner v. Harvey, 1 Jac. Rep. 169. That a case where one party to a transaction of sale had obtained knowledge of a rial fact of which the other party was ignorant. The remarks of Lord Eldon he effect of even the slightest attempt to mislead or deceive by false statement, r such circumstances, are very important."

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in endless repetition, and so reduce the question to one of expenses. When an action related to the same subject, had the same conclusions, and the same *medium concludendi* as a previous action, the plea of *res judicata* applied.

The pursuers pleaded;—That the ground of action alleged in this case was not speculative knowledge or belief on the part of the defenders, but positive knowledge that this mineral was in the lands of Torbanehill.[1]

This action was to be considered by itself and not by comparison with the previous action. It was sufficiently alleged (art. 3 and 4) that before and during the negotiations as to the lease, the defenders knew that there were seams of this mineral in Torbanehill.

Taking these statements in connection with articles 9 and 10, the question was, how far did such allegation, as between seller and purchaser, or lessor and lessee, operate to void the contract? If knowledge, as matter of fact, was averred, the means of acquiring that knowledge was of no consequence in a question of relevancy, for the knowledge may be proved, and yet it may be impossible to prove how that knowledge was acquired. The averments on that subject essentially distinguished this case from the previous one, and the previous judgment therefore could not be pleaded as *res judicata* in this action.

At advising,—

Lord President.—In this case we had an argument on the question of *res judicata* before the record was closed. We thought it desirable to close the record before disposing of that plea. We have now heard an argument on the whole matter, which leads us to inquire what was the judgment in the previous action betwixt the pursuers and the defenders. That judgment, as pronounced by the Lord Ordinary originally stood thus:—"Repels the first plea in law stated for the defenders, but finds the pursuers have not averred facts relevant and sufficient to support the conclusions of the libel, and, therefore, sustains the 2d and 3d pleas for the defenders, and assoilzies the defenders from the conclusions of the action," &c. The first plea in law for the defenders which was thus repelled, was a plea of *res judicata* in respect of the verdict and judgment in the previous action of declarator. It was out of the question to give effect to that plea. That interlocutor, it will be observed, after disposing of the plea of *res judicata*, finds that the pursuers had not averred facts relevant and sufficient to support the conclusions of the libel, and sustains the 2d and 3d pleas for the defenders. The 2d and 3d pleas for the defenders so sustained are thus stated in the record in that action:—"(2.) The statements in the condescendence are irrelevant, and insufficient to support the conclusions of the action, and, generally, the action is irrelevantly and insufficiently laid. (3.) In particular, the condescendence contains no relevant allegation of facts to shew fraud on the part of the defenders, and to support the reductive conclusions upon that ground." The Lord Ordinary did not dispose of the 4th plea, which was a plea of some importance in the case, and which also involved the question of relevancy. It was as follows:—"4. The action is irrelevant, and cannot be maintained, in respect 1st, there was no duty of disclosure on the part of the defenders in regard to any of the matters which they are alleged to have concealed from the pursuers; and 2d, the defenders had no peculiar knowledge, or peculiar means of knowledge, in regard to any of the matters which they are alleged to have either misrepresented to the pursuers, or concealed from them, and it is not relevantly alleged that they had."

The Court, in dealing with that interlocutor, made a variation upon it and pronounced this interlocutor:—"The Lords, having considered the reclaiming notes for the parties, and heard counsel, refuse the desire of the notes, and adhere to the interlocutor of the Lord Ordinary reclaimed against, with this variation, that instead of assoilzieing the defenders from the conclusion of the action, the Lords assoilzie the defenders from the action as laid." Now in introducing these words, "from the action as laid," I do not understand that it was the intention of the Court to decide anything in regard to the plea of *res judicata*, either that it should be

[1] St Leonard's Vendors, &c., p. 5 (Ed. 1846).

excluded, or that it should be kept open, but to leave that question for discussion No. 197.
in any future action. Such was the judgment pronounced. Now, what was the action from which the Court so assoilzied the defenders? The action was for June 26, 1857. reduction of this lease of the minerals in the lands of Torbanehill. It was an Gillespie v. Russel. action for reduction of the lease of these minerals, on the ground of fraud—and specially with reference to the mineral that has been the subject of so much discussion. The action was based on the ground of substantial error, as apart from fraud. In the condescendence, it is said:—"In entering into said lease or missive of agreement for a lease, the pursuers laboured under error *in substantialibus*; they were in entire ignorance of the nature and value of the mineral in question; and in place of being aware of its true nature and value, they were led by the defenders to believe that the only coal or substance in the lands of the nature of coal, or suitable for any one of the purposes for which coal was applied, was of inferior quality and value. Had they known or been aware of the true state of matters, they would not have consented to the terms of the foresaid missive of lease, nor entered into the same."

The conclusions of that former action were also peculiar. The judgment went very much on the ground of that peculiarity. The conclusions of that action deserve notice again. They were to this effect:—That for the reasons and causes set forth in the condescendence, the defenders should be ordained to exhibit the missive of lease to be seen and considered by our said Lords, and to hear and see the same, with all that has followed or may follow thereupon, in so far at least as it is or can be held to include a valuable mineral substance of an argillaceous or other nature, which the said defenders have been working, outputting, and selling under the name of gas, or parrot, or cannel coal, or Boghead, or Bathgate gas coal, reduced, &c.; and the pursuers reponed and restored thereagainst *in integrum*, at least to the extent and effect foresaid."

I have already stated that in that action fraud was alleged with reference to the defenders' knowledge of the existence of the mineral in Torbanehill, and one ground of reduction was applicable to such fraud. There was another and more general ground of reduction in respect of essential error. The pleas in law, as stated in the closed record in that action, were as follows:—"1. The object and *media concludendi* of the present action being entirely different from those of the previous action of declarator between the same parties, that previous action forms no bar to the present action. 2. So far as the said missive of agreement can be held to include the valuable mineral substance which is worked and sold by the defenders under the name of gas, parrot, or cannel coal, or Boghead or Bathgate gas, parrot, or cannel coal, the said lease, or missive of agreement for a lease, ought to be reduced and set aside on the ground of fraudulent misrepresentation by the defenders of material facts and circumstances as condescended on. 3. So far as the said missive can be held to include the said valuable mineral substance, it is reducible, in respect the pursuers were induced to enter into the lease, so far as the said mineral is concerned, by the fraudulent concealment by the defenders of essential facts, which, in the circumstances, they were bound not to conceal from the pursuers. 4. The lease or missive of agreement is, in the circumstances, reducible, on the ground of error *in substantialibus* on the part of the pursuers."

The action, therefore, so far as laid on the ground of fraud, concluded for reduction of the lease only in so far as it related to that mineral substance. The conclusions for total reduction of the lease were laid upon substantial error. The action was therefore altogether of a peculiar character. But the main point here is to consider whether the question raised in this action is or is not substantially and legally to be regarded as the same question that we dealt with in the former action, as in an action laid generally upon fraud. Fraud is a very general word. It does not follow that because two actions are laid on fraud they are the same; nor that, being so laid, for the purpose of arriving at the same result, they are the same. The general character of the fraud, and especially the grounds of fraud, must both be looked at; and for that purpose we must look to the summons, and also to the condescendence. Now the previous case may be described in general terms as a reduction of a lease on the ground of fraud, by misrepresentation and concealment in regard to the presence and quality of this mineral in the lands of

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Torbanehill. But that was not enough. We held that it was not enough merely to set forth misrepresentation or to aver concealment. We required that there should be an averment of the defenders' knowledge of the presence of the mineral within the lands of the pursuers, and not merely that the pursuers should state that the defenders had good ground to believe that the mineral was there. Upon that ground our judgment was mainly rested in disposing of the former case on the point of relevancy. The summons in that action was vague in its averments in regard to this particular transaction. It did not aver knowledge. It said that the defender "was aware." That was a very vague expression. It might have admitted of being explained in the record. But in that case the explanation given in the record was, that the defender "was aware," or "had cause to believe;" and we held that that amounted to no more than this, that, under the word "aware," the pursuer did not intend to assert more than that the defenders "had cause to believe," and so the case stood when we dismissed it.

The present action proceeds on the ground of positive knowledge as a matter of fact. I so read the record. I find it stated in article 3, that in particular the defenders had made themselves thoroughly acquainted with the nature, quality, and extent of the minerals in the pursuers' lands of Torbanehill.—(Reads articles 3, 4, 5, and 9.)

I read that as a statement that the defenders had ascertained and knew, as matter of fact, that that mineral was in the lands of Torbanehill. It cannot be read in any other sense. Now that ascertainment never was averred in the former action, neither in the summons nor record. I do not mean to say whether the equivocal expression in the summons in the former action might or might not have been explained to mean knowledge. But according to the explanation given of it, it was not meant to aver knowledge. I therefore hold that this action is laid upon the averment of actual knowledge, on the allegation that the defender had ascertained, and knew, as a matter of fact, that the mineral substance in question was within the pursuers' lands, and that they had falsely and fraudulently stated and represented that no such gas coal as this mineral substance was in the lands of Torbanehill, while they all the time knew "that the foresaid most valuable gas coal or mineral substance existed in great quantities in said lands, and was capable of being worked and turned out to immense advantage and profit. These false and fraudulent statements and representations were made for the purpose of deceiving and misleading the pursuers, and inducing them to grant the lease under reduction."

That being so, I think that this action is not substantially the same with the former action. I think, as regards the criticism upon the record—that kind of criticism which was raised under the second and third pleas of the former action, and which was discussed with reference to the fourth plea—that this summons and this record are essentially different from the summons and record in the former action. The word relevancy is used in two senses, either as a criticism on the record, or in a more general sense as involving questions of law, which may or may not be disposed of before trial, according to circumstances and the expediency of the case. We have had a discussion as to whether there are the same grounds of action, and whether the actions are laid on the same *media concludendi*, which led to a discussion on the nature of these things, and as to the meaning of *medium concludendi*, which last seemed to be the most difficult part of the discussion. I do not pretend to give a definition of these matters. "Ground of action" is a phrase used in various senses, and I do not think it necessary to solve the point whether "ground of action," and "*medium concludendi*," are the same things. "Ground of action" is a very general phrase. This action is laid on the same grounds as the previous action, inasmuch as both actions are laid on the ground of fraud in regard to a statement as to this mineral, but they are not both laid on the same *medium concludendi* in one sense, because the summonses are different. If I were to draw a distinction between these two things, I would say that the grounds of action more resemble the major proposition, and the *medium concludendi* the minor proposition. But the phrases are used loosely, and especially "ground of action." Here, if we are to look at the circumstances which are alleged as bringing out the general averment of fraud, and leading to the conclusion for reduction, I think that the circum-

nces averred are different from those averred in the former action. Therefore I of opinion that the plea of *res judicata* is here not well-founded. No. 197.

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There still remains the question of relevancy. I do not think it necessary to much upon that point. I had occasion to remark, when comparing the two ords in the two actions, that the word relevancy is used in two senses. It is d with reference to criticism on the record, which was very much the mean- in which it was used in regard to the second and third pleas sustained in the ner action. In that sense, I have no doubt that this action is relevant; that that it expressly sets forth these facts, that there was positive knowledge on part of the defenders of the existence of the mineral in Torbanehill, and fraudu- and intentional misrepresentation and concealment by them of that fact, with view of inducing a certain result. All that is distinctly averred; and therefore n of opinion that as regards any criticism of that kind, there is an essential erence between the two actions. But relevancy has another more general and ortant meaning; as regards the general aspect of the action, and involving it may sometimes be the whole matter of the action, whether the averments be 1 as to support the conclusion. In every case where there is not proof or inquiry the facts, the whole question is sometimes one of relevancy. There are some s which must go to proof on matters of fact, in which are involved questions w and relevancy. These questions of law or relevancy may afterwards be deter- ed. Again, these questions are sometimes settled before going to trial, but some- s it is expedient not to do so. Now, I think the fourth plea of law here is one of kind, but the Lord Ordinary has not disposed of it, and I am not inclined to ose of it at this stage of the case. It is not a question of law or relevancy that uires to be disposed of before going to trial, but which may be disposed of after- ds. I do not think that the Lord Ordinary, in his interlocutor, means to do e than deal with the criticism of the case. But his interlocutor, as it stands, ht tend to cut off the larger question of relevancy which remains behind, and efore I would be disposed to clear away that difficulty, by modifying the Lord inary's finding; at the same time that I see that the criticism on this record not preclude this case from going to trial.

ORD IVORY.—I substantially concur in the views of your Lordship; and as this is to go to trial, according to the result of the opinions of the Court, perhaps should be said at present. The question of relevancy may never occur for decision of the Court or of the jury at all. On the question of *res judicata*, I no difficulty in agreeing with your Lordship. There is considerable nicety delicacy in being called upon to lay down with precision the whole prin- s on which this doctrine of *res judicata* is founded. But the question comes his, is the judgment in the former action such a judgment as we would be called to pronounce in this action? When the case was formerly here, the reading he whole Court of the record on which the judgment was pronounced, was, that tever might have been the purpose or intention of the party, the case had not set forth as a case of alleged fraud on actual knowledge. It was rather a of alleged belief and speculation; and actual knowledge was a fact which was t strongly maintained by the defender as not coming within the case at all. I ld call attention to two passages in the argument, as I have it noted down, ch shows what was the view of the bar in supporting the defence. (His Lord- then read from his notes to the following effect:—Mr Young, for the defender, ntained there was no averment of a false statement which imported that any g had been said by the defender which came up to fraud *dans causam con- tui*. Such a case would require a most distinct and precise statement to come o that. Mr Penney, on the other hand, in supporting the same side, said, it is the record means that Mr Russel knew that the mineral was there, and that Gillespie did not. This is not in the record. If it was, it would fundamentally ge matters as there set forth; and, in going on to criticise the statements of the uer, he said, as to the condescendence, article 4, that it does not amount to verment of knowledge.)

he Lord Ordinary has made a very pertinent remark as to the reading of both s. He says that the defenders took the most rigorous construction of the rd in the previous action, and that now they are inclined to take the very rse. That is very natural. But when I read the judgment and opinions of

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all the Judges in construing the record, as it was formerly presented to the Court, the former judgment excluded the element which now makes the relevancy in the present case. It held the record defective as not averring knowledge. If the record had averred knowledge, the judgment would have been the same as we are now going to pronounce. But how the judgment we then pronounced upon a different averment of facts should be *res judicata* in this action, I cannot understand. The two cases are essentially different. It has been said that the ground of action, or *medium concludendi*, is the same in both actions. I shall not attempt to define the phrase "ground of action," or "*medium concludendi*." They are not well defined in the books; but the substantial question is the identity of the judgment formerly pronounced with that now asked for. If that identity does not occur, there is no room for the plea of *res judicata*. It is said that a pursuer when he brings his case is equally liable to the plea of "competent and omitted" with the defender. In some respects it is so, but in others it is not. Competent and omitted is not necessarily applied to matters that have been dealt with before. But in a question of *res judicata*, it is the question of identity alone that you have to deal with; and wherever identity is discovered in the cases, I do not see how competent and omitted can apply.

With regard to the relevancy, I should have been very well pleased if it had suited the views of the Court that we should now have pronounced a judgment upon it. But as it is thought expedient not to do so, I entirely acquiesce in the course proposed by your Lordship; for it lets the case go to a jury without being hampered with a judgment on the relevancy. And if it comes back to the Court, it will come in a better shape; for it will not be upon a hypothetical assumption of the facts, but upon a bill of exceptions, with reference to the notes of the Judge in point of fact, which will make it a matter of no difficulty in determining the relevancy.

Lord Curriehill—I am of opinion that this action is not barred by *res judicata*. In the first place, what was concluded for in the action, in which the judgment was pronounced upon which that plea is founded, is different from what is concluded for in the present action. In the former, the pursuer concluded that the lease in question, "*in so far* at least as it includes, or can be held to include, the foresaid valuable mineral substance of an argillaceous or other nature, which the defenders have been working, outputting, and selling under the name of gas, parrot, or cannel coal, or Boghead or Bathgate coal," ought and should be reduced "*to the extent and effect foresaid*;" that it should be found and declared "that the defenders have not, and never had, any right to work, output, and sell the said valuable mineral substance:" and that they should be decerned and ordained to pay such sum as should be found "to be the value of the said mineral substance so put out, worked, and sold by the defenders," or that they should hold count and reckoning "for the same," and be decerned to pay the balance on the said state of accounts. Although the rescissory conclusion was qualified with the words "at least," there was not in that summons any conclusion for reduction of the lease, except that part of it which included this particular substance, and the declaratory and petitory conclusions were expressly limited to that substance. *Quoad ultra* this lease, and the operations of the defenders under it, were left unchallenged; and it would have remained in full force and effect even had decree been pronounced upon all the conclusions in terms of the libel. And hence the practical effect of that action, if it had been successful, would have been, not to have extinguished the lease, but only to have remodelled it. And, accordingly, one of the grounds upon which I held, when the judgment in that action was pronounced, that the pursuers had not averred facts relevant and sufficient to support the conclusions of that libel was, that these conclusions were of such a peculiar and anomalous description.

What the present action concludes for is,—1st, that the lease should be wholly rescinded, and declared to be null and void; and, 2d, that the defenders should pay to the pursuers the value of the said minerals, (meaning, as appears from the antecedent context, all the coal, ironstone, iron ore, limestone, and fireclay) put out worked, and sold by the defenders from the pursuer's lands of Torbanehill, under colour of the lease, prior to the date of citation, or should count and reckon with the pursuer for the same, and pay the balance appearing on such accounting. These conclusions are essentially different in their nature and extent from those in the

ner action; and in that action no such decree as is now sued for could have No. 197.
n competently pronounced. And hence it does not follow that the defenders —
entitled to be assoilzied from the present action, merely because they were June 26, 1857.
ilzied from the former action as laid. Gillespie v. Russel.
'arther, the grounds of action as set forth in the two summonses and records are the same; for, although in both cases the grounds of challenge are stated erally to be fraudulent concealment, and fraudulent misrepresentation, yet the gs which are alleged to have been so concealed and misrepresented in the one on, are different from those which are alleged to have been so concealed and epresented in the other.

That in the former action (according to the true meaning of the record in it) defenders were accused of having fraudulently concealed was, that they knew the mineral which they had been working in Boghead was of unusually good lity and great value, and that they had reason to believe that the same mineral ht be found in Torbanehill. But what in the present action they are accused aving fraudulently concealed is, not that they had such a mere speculative ef that this valuable mineral might be found in Torbanehill, but that they had ain knowledge that it actually did exist, and might be wrought in these lands. nd the fraudulent misrepresentation of which the defenders were accused in the ner action, was said to have consisted in their asserting to the pursuer that the ity and the value of the mineral which was so found in Boghead, and believed e in Torbanehill, were less than the defenders knew them to be. But the dulent misrepresentation of which they are accused in the present action is said ave consisted in their having asserted that, *de facto*, no such mineral exists in banehill, although they were in actual knowledge of its existence there.

he things alleged to have been concealed and misrepresented in the two actions g thus so very different, a judgment as to the relevancy of the one set of sations is not *res judicata* as to the relevancy of the other; and the question as e relevancy of the accusations in the present action must be dealt with on its merits.

he question thus raised appears to me to be a very large and difficult one in law of mutual contracts; and, as we were told from the bar, it has never yet authoritatively decided. It involves the important inquiry,—how far the law tles a party, in contracting with another, in circumstances such as those in which lease under challenge was granted, to rely upon the statements made by that site party, without making inquiry as to their truth? If we are to determine this tion at this stage of the proceedings, I would require further argument upon it the bar. But I think that the Court, in the exercise of its discretion, should the facts of the case ascertained, before entering upon the discussion of such a e and important question of law; because it may eventually be found that the tion of law, in the aspect in which it now presents itself in the record, does not in the actual facts of the case, and may never require to be determined in this on, and that the actual facts may give rise to quite a different question of law. erefore entirely concur in the proposal to recal *in hoc statu* the Lord Ordinary's ing as to relevancy, and to have the case tried by jury, without at present ding any question of law.

ORD DEAS.—There are two questions decided by the Lord Ordinary,—the tion of *res judicata* and the question of relevancy. It was argued for the pur-s that if the one action be relevant and the other not, this of itself was a suffi-t difference to prevent the applicability of the plea of *res judicata*. I do not k any of your Lordships adopt this part of the argument, and I certainly cannot ur in it. We must go further, and inquire whether the nature and grounds of two actions be or be not the same; and it is upon the result of this inquiry the applicability of the plea of *res judicata* must depend.

ow, in inquiring into the nature and grounds of the two actions, I look, in the instance, at the summonses, including, of course, under that name the con-endences annexed thereto; and, from these, I find that both actions are actions eduction of the lease in dispute, having petitory conclusions consequent upon ess in the reduction,—with this distinction only, that, whereas the first action directed to reduction of the lease *in toto*, or, alternatively, to its reduction *ad* the particular substance in dispute, the second action omits this last alterna-

No. 197. *statu*, the interlocutor of the Lord Ordinary reclaimed against; and remit to his Lordship to ordain the production to be satisfied, reserving the preliminary defences to be discussed along with the merits; and to appoint a record to be made up and closed, and to proceed with the cause."

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A record was then made up and closed, and on 26th February 1857, the Lord Ordinary pronounced the following interlocutor:—"Repels the plea of *res judicata* stated for the defenders: Finds that the pursuers have alleged facts relevant to go to issue; and appoints the pursuers to lodge such issues as they propose within ten days from this date." *

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it was 'not relevant and sufficient to support the conclusions.' The defenders then read the averments in the former record, so as to confine them within the narrowest limits of the strictest construction. They now seek to read the same averments, so as to extend them to the widest range of liberal construction. The Lord Ordinary has endeavoured to ascertain the true meaning of the pursuers' averments in both actions. On a reasonable construction of the words used, he thinks that there are averments in the present summons which are not within those in the former action, but are new; and particularly, that the averments in the 8d and 9th articles, taken together, are new, and, therefore, he is of opinion that this action is 'otherwise laid,' and is consequently not excluded by the absolvitor from the former action 'as laid.'

"On these grounds, and without at present indicating any opinion on the relevancy and sufficiency of the averments in this action, the plea of *res judicata* has been repelled."

* "Note.—This action, brought by the pursuers Mr and Mrs Gillespie, for reduction of the lease of the minerals of Torbanehill, on the head of fraudulent concealment and misrepresentation, has been resisted on two grounds, urged by the defenders as sufficient to dispose of it without inquiry into the facts. In the first place, the defenders plead *res judicata*, in respect of the judgment of the Court in the previous action. In the second place, they plead that the averments in the present action are not relevant to support its conclusions.

"In considering the plea of *res judicata*, it is necessary to attend to the circumstances in which it is stated.

"The former action was disposed of by a judgment on the relevancy, and the defenders were 'assoilzied from the action as laid,'—the interlocutor of the Lord Ordinary having been slightly varied by the Court, in order so to express the absolvitor. There was, of course, no investigation into the facts; and there was no decision on the relevancy of any averments except those made on that record. The argument of the defenders in the previous action was, that knowledge on their part, of the existence of this coal in Torbanehill as of an ascertained fact, apart from mere speculation or inference from its presence in Boghead, was not then alleged: and the decision of the Court rested mainly on this defect—this absence of any averment of the defenders' actual knowledge. But now, the argument of the defenders is, that their actual knowledge of the existence of this coal in Torbanehill, was really averred in the former action; and therefore, that it is not matter of new averment in the present action. The former case was decided on the first view of the averments which was then successfully maintained by the defenders. Actual knowledge as of an ascertained fact was held by the Court, on considering the record, not to be averred, and on that ground, taken in necessary connection with the manner in which misrepresentation was alleged, the defenders were assoilzied from 'the action as laid.' Can the defenders now succeed in throwing out this action on the ground (in direct opposition to their previous pleading), that actual knowledge on their part was really averred in the former action? The Lord Ordinary, though much impressed by the legal difficulties so ably urged by the defenders, is yet of opinion that this ought not to be permitted.

"After a renewed and careful comparison of the averments in the two actions the Lord Ordinary is still of opinion that there are such differences as to distinguish the present from the former action, to make it, in important respects, a new action and so to save it from being excluded by the plea of *res judicata*, founded on the decree of absolvitor from the former action 'as laid.' If this action is laid on ground

Against this interlocutor the defenders reclaimed, and pleaded;—That this and the former action were identical, in respect, (1), both related to No. 197.

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fairly and substantially different from those stated on the former record, then it is not so laid as to be within the absolvitor from the former action 'as laid.' This was the opinion of the Lord Ordinary, when, on 3d July 1856, he repelled the plea of *res judicata*, as then urged. The record has since been closed on the revised papers, the statements of fact and pleas in law have been completed and adjusted, and the plea of *res judicata* is now urged to exclude this action. The Lord Ordinary having had the benefit of most ingenious and elaborate argument, in which the whole subject of *res judicata* has been amply discussed, has not seen reason to change the opinions he formerly expressed, and to which he now refers.

"Two points have been especially pressed on his attention. The first is—that in the condescendence annexed to the summons in the former action, the pursuers averred that the defenders 'were well aware' that the mineral substance found in Boghead was to be found in large quantity in the lands of Torbanehill; and that the addition, made on revisal, to the words 'were well aware,' viz., 'or had sufficient grounds for believing,' did not so derogate from the previous averment as to prevent its being a proper averment of knowledge made in 'the action as laid,' from which the defenders were assoilzied. This difference of expression between the summons and the revised condescendence does not appear to have been brought under the notice of the Court in the former action; and, as already explained, the cause was decided on an analysis of the record, and on the footing of knowledge not being alleged. But even taking the words as they stand in the summons, and reading them in connection with the other statements there made, the question still remains, Do they amount to an averment of knowledge of the existence of this coal in Torbanehill as a fact ascertained, and not merely as the result of speculation and inference from the workings at Boghead? The Lord Ordinary thinks that, even reading the summons by itself, there was no averment of such actual knowledge. It amounted only to this, that the defenders having worked and sold the Boghead coal, were, from the results of that working, aware, as matter of inference or deduction, that the same mineral was likely to be found in Torbanehill. But the summons cannot be separated from the record: the whole record should be considered; and it was carefully considered by the Court, and the result of that consideration was, that, not from the conclusions of the summons generally, but 'from the action as laid,' the defenders were assoilzied.

"The second point was—that the additional averments made in this action might have been made in the former action under the summons, and therefore that they are not new, to the effect of being now competent.

"It is said that a new ground of action could not have been added;—these averments could have been added;—therefore, these averments do not amount to a new ground of action. This argument is very plausible, and, when viewed with reference to the opinion of Lord Corehouse in Campbell v. Stewart, 20th Feb. 1838, has been felt by the Lord Ordinary to be forcible; and it is not without hesitation and difficulty that he has refused effect to it. The case of Campbell v. Stewart was a case of a new action after a verdict for the defender had been returned, and had been applied by the Court. The defender had, after verdict, been assoilzied from the conclusions of the libel, under reservation only of the effect of a judicial minute, which did not include the point sought to be raised in the supplementary action. The pursuer's case had been put in issue, and decided on evidence. The only points which the pursuer desired to keep open were reserved in the minute, and the Court would not allow a different point, which had not been reserved, to be brought forward in a new action. That is a very different case from the present, where the truth of the pursuers' allegations has never been investigated, and where the averments now made have never been judicially considered.

"To say that the new averments might have been made in the former action, and must therefore be now excluded, is just to urge the plea of 'competent and omitted' against the pursuers. Take the case of Lord Strathmore, 24th May 1833. The argument now urged would have applied to that case;—the new matter might have been there stated in the first action. The plea of vitiation, as a reason of reduction, was, according to common style, stated in the first action by Lord Strath-

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the same transaction; (2), In both the defenders were charged with fraudulent concealment and misrepresentation with reference to that transaction;

more. It would, of course, have been competent to allege on record, as matter of fact, that the deed was actually vitiated *in substantialibus*. But, notwithstanding this, the Court sustained a new action, laid on the averment of actual vitiation, and adhered to Lord Moncreiff's interlocutor, repelling the plea of *res judicata*, on the ground, as stated by him, that 'there cannot be *res judicata* on any particular question or ground of action where that question or ground has never been truly or in plain reality raised and brought into discussion between the parties.' So also in the case of Lord Macdonald, 26th May 1840, a new action was sustained and the plea of *res judicata* was repelled, the exception of 'competent and omitted' being found not applicable to a pursuer under such circumstances. Although, therefore, the argument of the defenders has a syllogistic aspect, and although it derives some force from the rules of pleading recognised in our procedure under the Judicature Act, still it is only another and a very ingenious mode of applying the plea of competent and omitted, to a case where it is not appropriate.

"The case which the pursuers of this action now state, both as regards the alleged knowledge of the defenders, the mode by which they attained that knowledge, and the nature of their alleged misrepresentations made in that knowledge, is one on which hitherto there has been no judicial deliverance. If such a case were excluded without inquiry, on the plea of *res judicata*, the forms of law would operate to the exclusion of justice.

"Looking to the averments on this record, and especially to the 3d, 4th, 5th, 6th, 7th, and 9th articles in the revised condescendence, which must be considered together, the Lord Ordinary is of opinion that the pursuers have now made averments relevant to go to issue.

"They now allege—1st, That the defenders, when they entered into the lease, had ascertained, and knew as a fact, that this valuable gas coal was in the lands of Torbanehill in abundance, and was capable of being wrought to great advantage; 2d, That the pursuers were ignorant of that fact; 3d, That the defenders, being in the knowledge of that important fact by actual ascertainment thereof, not only concealed their knowledge, and disguised their object during the negotiations, but 'did falsely and fraudulently state and represent that no such gas coal existed in Torbanehill;' and, 4th, That by such false and fraudulent representations made knowingly contrary to the fact, they induced the pursuers to grant the lease.

"This is not now stated as a case of speculative conjecture or expectation, nor as a case of mere concealment of opinion, or even concealment of a certain kind of knowledge derived from experiments on Boghead coal. It is stated as a case of fraud—a case of wilful false statement, and misrepresentation of fact, made in order to deceive, and with the effect of deceiving, the pursuers.

"There may be great difficulty in establishing such a case by evidence, and there are many presumptions against it; but the Lord Ordinary is unable to see how the case, as now put, can be disposed of at once and without inquiry. It rests on averments of intentional deceit, of wilful falsehood, of *fraus dans causam contractui*. These are very strong statements. Their truth must be assumed, in this question of relevancy, for the pursuers undertake to prove them, and if they are all true, then there is no authority for supporting against challenge by reduction, a contract obtained by such fraud, to the great prejudice of the party deceived. The Lord Ordinary found the former action not relevant, but he feels compelled to take a different view of the action now before him, which is different in essential particulars; and he has been unable to discover in the opinions of the Judges of the First Division on the former case, anything opposed to the view now taken under altered circumstances.

"Where both parties are on an equality as to knowledge, mere superiority of skill or judgment is of no consequence. Where parties are not on an equality, but one party has acquired actual knowledge of an important fact not known to the other, and does not state that fact, they may still transact for a sale, or for a lease, because there is no duty of disclosure. But where one party has obtained knowledge of an important fact of which the other party is ignorant, and, in regard to that matter, wilfully misrepresents the fact, in order to deceive, and with the effect

(3), In both the subject of the alleged fraudulent concealment and misrepresentation was the existence of the gas coal in question in Torbanehill, and the quality of it; (4), In both the pursuers averred their own ignorance of the existence of this mineral, and of the quality of it; (5), In both it was alleged that the defenders' real object in negotiating for a lease and obtaining it, was to get possession of this coal, while they pretended as a blind that they desired a variety of other minerals included in the lease. The present action was said to differ from the former, in respect, (1), in the first action the defenders' actual knowledge, as distinguished from speculative opinion, or "having good reason to believe" in the existence of this mineral in Torbanehill, and the quality of it, was not averred, while in this present action such actual knowledge was averred; (2), That in the present action there was a more satisfactory statement by the pursuers of the cause of the defenders' knowledge than in the first; and (3), That in the first action the fraudulent concealment and misrepresentation by the defenders of the facts as known to them, were not distinctly averred, while in this present action they were distinctly averred. But comparing the two summonses, the averment of knowledge in the first action was as explicit as in the present action. In the former it was, "you were well aware," or "had sufficient ground for believing" that such a mineral existed. In this action it is, "you knew that it existed," "you were perfectly aware." There was therefore no difference in the two actions in this respect. The words in the former action, which prejudiced the case of the pursuers, were here omitted. In other respects, the summonses were identical.

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2. As to the cause of knowledge: article 3 of the present action, which alone contained anything upon the subject, said that this knowledge was gained "by inquiry, experiment, skilful analysis, and otherwise." "Inquiry" was impossible, because the pursuers averred that the existence of the coal was only known to the defenders; therefore, that being left out of view, there remained only "experiment" and "skilful analysis." No particulars were given. The previous action stated what the experiment and skilful analysis was. It could not be said, therefore, that the statement in this action was more satisfactory than in the other. If it was meant to aver that another mineral than what was set forth in the lease was the subject of experiment, that ought to have been stated. There was nothing in the revised condescendence in this case which could not have been introduced under the original summons. That was a good test whether this was an action on new grounds or not.

Again, by the Judicature Act, the pursuer was bound to set forth all the facts of the case. Therefore the previous judgment must be presumed to have proceeded on a statement of all the facts of the case, and being adverse to the pursuer, that implied that there were no facts to support his case, that he had not got evidence sufficient to do so. The question came to be, was there anything material or immaterial in this record which might not have been dealt with under the original record? In the view of the Lord Ordinary, if the Court decide against the relevancy of this case, the pursuers would bring another, and perhaps still another action more skilfully framed,

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of deceiving, so that the contract is induced by the false representation, such a contract cannot stand. *Ex dolo non oritur contractus.* On the effect of direct deception (as distinct from the mere use of the advantage of superior knowledge) under such circumstances, reference has been made to Sugden on the Law of Vendors and Purchasers, p. 5; and to the case of Turner v. Harvey, 1 Jac. Rep. 169. That was a case where one party to a transaction of sale had obtained knowledge of a material fact of which the other party was ignorant. The remarks of Lord Eldon on the effect of even the slightest attempt to mislead or deceive by false statement, under such circumstances, are very important."

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in endless repetition, and so reduce the question to one of expenses. When an action related to the same subject, had the same conclusions, and the same *medium concludendi* as a previous action, the plea of *res judicata* applied.

The pursuers pleaded;—That the ground of action alleged in this case was not speculative knowledge or belief on the part of the defenders, but positive knowledge that this mineral was in the lands of Torbanehill.[1]

This action was to be considered by itself and not by comparison with the previous action. It was sufficiently alleged (art. 3 and 4) that before and during the negotiations as to the lease, the defenders knew that there were seams of this mineral in Torbanehill.

Taking these statements in connection with articles 9 and 10, the question was, how far did such allegation, as between seller and purchaser, or lessor and lessee, operate to void the contract? If knowledge, as matter of fact, was averred, the means of acquiring that knowledge was of no consequence in a question of relevancy, for the knowledge may be proved, and yet it may be impossible to prove how that knowledge was acquired. The averments on that subject essentially distinguished this case from the previous one, and the previous judgment therefore could not be pleaded as *res judicata* in this action.

At advising,—

Lord President.—In this case we had an argument on the question of *res judicata* before the record was closed. We thought it desirable to close the record before disposing of that plea. We have now heard an argument on the whole matter, which leads us to inquire what was the judgment in the previous action betwixt the pursuers and the defenders. That judgment, as pronounced by the Lord Ordinary, originally stood thus:—"Repels the first plea in law stated for the defenders, but finds the pursuers have not averred facts relevant and sufficient to support the conclusions of the libel, and, therefore, sustains the 2d and 3d pleas for the defenders, and assoilzies the defenders from the conclusions of the action," &c. The first plea in law for the defenders which was thus repelled, was a plea of *res judicata* in respect of the verdict and judgment in the previous action of declarator. It was out of the question to give effect to that plea. That interlocutor, it will be observed, after disposing of the plea of *res judicata*, finds that the pursuers had not averred facts relevant and sufficient to support the conclusions of the libel, and sustains the 2d and 3d pleas for the defenders. The 2d and 3d pleas for the defenders so sustained are thus stated in the record in that action:—"(2.) The statements in the condescendence are irrelevant, and insufficient to support the conclusions of the action, and, generally, the action is irrelevantly and insufficiently laid. (3.) In particular, the condescendence contains no relevant allegation of facts to shew fraud on the part of the defenders, and to support the reductive conclusions upon that ground." The Lord Ordinary did not dispose of the 4th plea, which was a plea of some importance in the case, and which also involved the question of relevancy. It was as follows:—"4. The action is irrelevant, and cannot be maintained, in respect, 1st, there was no duty of disclosure on the part of the defenders in regard to any of the matters which they are alleged to have concealed from the pursuers; and, 2d, the defenders had no peculiar knowledge, or peculiar means of knowledge, in regard to any of the matters which they are alleged to have either misrepresented to the pursuers, or concealed from them, and it is not relevantly alleged that they had."

The Court, in dealing with that interlocutor, made a variation upon it and pronounced this interlocutor:—"The Lords, having considered the reclaiming notes for the parties, and heard counsel, refuse the desire of the notes, and adhere to the interlocutor of the Lord Ordinary reclaimed against, with this variation, that instead of assoilzieing the defenders from the conclusion of the action, the Lords assoilzie the defenders from the action as laid." Now in introducing these words, "from the action as laid," I do not understand that it was the intention of the Court to decide anything in regard to the plea of *res judicata*, either that it should be

[1] St Leonard's Vendors, &c., p. 5 (Ed. 1846).

excluded, or that it should be kept open, but to leave that question for discussion in any future action. Such was the judgment pronounced. Now, what was the action from which the Court so assoilzied the defenders? The action was for reduction of this lease of the minerals in the lands of Torbanehill. It was an action for reduction of the lease of these minerals, on the ground of fraud—and specially with reference to the mineral that has been the subject of so much discussion. The action was based on the ground of substantial error, as apart from fraud. In the condescendence, it is said:—" In entering into said lease or missive of agreement for a lease, the pursuers laboured under error *in substantialibus*; they were in entire ignorance of the nature and value of the mineral in question; and in place of being aware of its true nature and value, they were led by the defenders to believe that the only coal or substance in the lands of the nature of coal, or suitable for any one of the purposes for which coal was applied, was of inferior quality and value. Had they known or been aware of the true state of matters, they would not have consented to the terms of the foresaid missive of lease, nor entered into the same."

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The conclusions of that former action were also peculiar. The judgment went very much on the ground of that peculiarity. The conclusions of that action deserve notice again. They were to this effect:—That for the reasons and causes set forth in the condescendence, the defenders should be ordained to exhibit the missive of lease " to be seen and considered by our said Lords, and to hear and see the same, with all that has followed or may follow thereupon, in so far at least as it is or can be held to include a valuable mineral substance of an argillaceous or other nature, which the said defenders have been working, outputting, and selling under the name of gas, or parrot, or cannel coal, or Boghead, or Bathgate gas coal, reduced, &c.; and the pursuers reponed and restored thereagainst *in integrum*, at least to the extent and effect foresaid."

I have already stated that in that action fraud was alleged with reference to the defenders' knowledge of the existence of the mineral in Torbanehill, and one ground of reduction was applicable to such fraud. There was another and more general ground of reduction in respect of essential error. The pleas in law, as stated in the closed record in that action, were as follows:—" 1. The object and *media concludendi* of the present action being entirely different from those of the previous action of declarator between the same parties, that previous action forms no bar to the present action. 2. So far as the said missive of agreement can be held to include the valuable mineral substance which is worked and sold by the defenders under the name of gas, parrot, or cannel coal, or Boghead or Bathgate gas, parrot, or cannel coal, the said lease, or missive of agreement for a lease, ought to be reduced and set aside on the ground of fraudulent misrepresentation by the defenders of material facts and circumstances as condescended on. 3. So far as the said missive can be held to include the said valuable mineral substance, it is reducible, in respect the pursuers were induced to enter into the lease, so far as the said mineral is concerned, by the fraudulent concealment by the defenders of essential facts, which, in the circumstances, they were bound not to conceal from the pursuers. 4. The lease or missive of agreement is, in the circumstances, reducible, on the ground of error *in substantialibus* on the part of the pursuers."

The action, therefore, so far as laid on the ground of fraud, concluded for reduction of the lease only in so far as it related to that mineral substance. The conclusions for total reduction of the lease were laid upon substantial error. The action was therefore altogether of a peculiar character. But the main point here is to consider whether the question raised in this action is or is not substantially and legally to be regarded as the same question that we dealt with in the former action, as in an action laid generally upon fraud. Fraud is a very general word. It does not follow that because two actions are laid on fraud they are the same; nor that, being so laid, for the purpose of arriving at the same result, they are the same. The general character of the fraud, and especially the grounds of fraud, must both be looked at; and for that purpose we must look to the summons, and also to the condescendence. Now the previous case may be described in general terms as a reduction of a lease on the ground of fraud, by misrepresentation and concealment in regard to the presence and quality of this mineral in the lands of

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Torbanehill. But that was not enough. We held that it was not enough merely to set forth misrepresentation or to aver concealment. We required that there should be an averment of the defenders' knowledge of the presence of the mineral within the lands of the pursuers, and not merely that the pursuers should state that the defenders had good ground to believe that the mineral was there. Upon that ground our judgment was mainly rested in disposing of the former case on the point of relevancy. The summons in that action was vague in its averments in regard to this particular transaction. It did not aver knowledge. It said that the defender "was aware." That was a very vague expression. It might have admitted of being explained in the record. But in that case the explanation given in the record was, that the defender "was aware," or "had cause to believe;" and we held that that amounted to no more than this, that, under the word "aware," the pursuer did not intend to assert more than that the defenders "had cause to believe," and so the case stood when we dismissed it.

The present action proceeds on the ground of positive knowledge as a matter of fact. I so read the record. I find it stated in article 3, that in particular the defenders had made themselves thoroughly acquainted with the nature, quality, and extent of the minerals in the pursuers' lands of Torbanehill.—(Reads articles 3, 4, 5, and 9.)

I read that as a statement that the defenders had ascertained and knew, as matter of fact, that that mineral was in the lands of Torbanehill. It cannot be read in any other sense. Now that ascertainment never was averred in the former action, neither in the summons nor record. I do not mean to say whether the equivocal expression in the summons in the former action might or might not have been explained to mean knowledge. But according to the explanation given of it, it was not meant to aver knowledge. I therefore hold that this action is laid upon the averment of actual knowledge, on the allegation that the defender had ascertained, and knew, as a matter of fact, that the mineral substance in question was within the pursuers' lands, and that they had falsely and fraudulently stated and represented that no such gas coal as this mineral substance was in the lands of Torbanehill, while they all the time knew "that the foresaid most valuable gas coal or mineral substance existed in great quantities in said lands, and was capable of being worked and turned out to immense advantage and profit. These false and fraudulent statements and representations were made for the purpose of deceiving and misleading the pursuers, and inducing them to grant the lease under reduction."

That being so, I think that this action is not substantially the same with the former action. I think, as regards the criticism upon the record—that kind of criticism which was raised under the second and third pleas of the former action, and which was discussed with reference to the fourth plea—that this summons and this record are essentially different from the summons and record in the former action. The word relevancy is used in two senses, either as a criticism on the record, or in a more general sense as involving questions of law, which may or may not be disposed of before trial, according to circumstances and the expediency of the case. We have had a discussion as to whether there are the same grounds of action, and whether the actions are laid on the same *media concludendi*, which led to a discussion on the nature of these things, and as to the meaning of *medium concludendi*, which last seemed to be the most difficult part of the discussion. I do not pretend to give a definition of these matters. "Ground of action" is a phrase used in various senses, and I do not think it necessary to solve the point whether "ground of action," and "*medium concludendi*," are the same things. "Ground of action" is a very general phrase. This action is laid on the same grounds as the previous action, inasmuch as both actions are laid on the ground of fraud in regard to a statement as to this mineral, but they are not both laid on the same *medium concludendi* in one sense, because the summonses are different. If I were to draw a distinction between these two things, I would say that the grounds of action more resemble the major proposition, and the *medium concludendi* the minor proposition. But the phrases are used loosely, and especially "ground of action." Here, if we are to look at the circumstances which are alleged as bringing out the general averment of fraud, and leading to the conclusion for reduction, I think that the circum-

stances averred are different from those averred in the former action. Therefore I am of opinion that the plea of *res judicata* is here not well-founded. No. 197.

There still remains the question of relevancy. I do not think it necessary to say much upon that point. I had occasion to remark, when comparing the two records in the two actions, that the word relevancy is used in two senses. It is used with reference to criticism on the record, which was very much the meaning in which it was used in regard to the second and third pleas sustained in the former action. In that sense, I have no doubt that this action is relevant; that is, that it expressly sets forth these facts, that there was positive knowledge on the part of the defenders of the existence of the mineral in Torbanehill, and fraudulent and intentional misrepresentation and concealment by them of that fact, with the view of inducing a certain result. All that is distinctly averred; and therefore I am of opinion that as regards any criticism of that kind, there is an essential difference between the two actions. But relevancy has another more general and important meaning; as regards the general aspect of the action, and involving what may sometimes be the whole matter of the action, whether the averments be such as to support the conclusion. In every case where there is not proof or inquiry into the facts, the whole question is sometimes one of relevancy. There are some cases which must go to proof on matters of fact, in which are involved questions of law and relevancy. These questions of law or relevancy may afterwards be determined. Again, these questions are sometimes settled before going to trial, but sometimes it is expedient not to do so. Now, I think the fourth plea of law here is one of that kind, but the Lord Ordinary has not disposed of it, and I am not inclined to dispose of it at this stage of the case. It is not a question of law or relevancy that requires to be disposed of before going to trial, but which may be disposed of afterwards. I do not think that the Lord Ordinary, in his interlocutor, means to do more than deal with the criticism of the case. But his interlocutor, as it stands, might tend to cut off the larger question of relevancy which remains behind, and therefore I would be disposed to clear away that difficulty, by modifying the Lord Ordinary's finding; at the same time that I see that the criticism on this record will not preclude this case from going to trial. June 26, 1857. Gillespie v. Russel.

Lord Ivory.—I substantially concur in the views of your Lordship; and as this case is to go to trial, according to the result of the opinions of the Court, perhaps little should be said at present. The question of relevancy may never occur for the decision of the Court or of the jury at all. On the question of *res judicata*, I have no difficulty in agreeing with your Lordship. There is considerable nicety and delicacy in being called upon to lay down with precision the whole principles on which this doctrine of *res judicata* is founded. But the question comes to this, is the judgment in the former action such a judgment as we would be called upon to pronounce in this action? When the case was formerly here, the reading by the whole Court of the record on which the judgment was pronounced, was, that whatever might have been the purpose or intention of the party, the case had not been set forth as a case of alleged fraud on actual knowledge. It was rather a case of alleged belief and speculation; and actual knowledge was a fact which was most strongly maintained by the defender as not coming within the case at all. I would call attention to two passages in the argument, as I have it noted down, which shows what was the view of the bar in supporting the defence. (His Lordship then read from his notes to the following effect:—Mr Young, for the defender, maintained there was no averment of a false statement which imported that any thing had been said by the defender which came up to fraud *dans causam contractui*. Such a case would require a most distinct and precise statement to come up to that. Mr Penney, on the other hand, in supporting the same side, said, it is said the record means that Mr Russel knew that the mineral was there, and that Mr Gillespie did not. This is not in the record. If it was, it would fundamentally change matters as there set forth; and, in going on to criticise the statements of the pursuer, he said, as to the condescendence, article 4, that it does not amount to an averment of knowledge.)

The Lord Ordinary has made a very pertinent remark as to the reading of both cases. He says that the defenders took the most rigorous construction of the record in the previous action, and that now they are inclined to take the very reverse. That is very natural. But when I read the judgment and opinions of

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all the Judges in construing the record, as it was formerly presented to the Court, the former judgment excluded the element which now makes the relevancy in the present case. It held the record defective as not averring knowledge. If the record had averred knowledge, the judgment would have been the same as we are now going to pronounce. But how the judgment we then pronounced upon a different averment of facts should be *res judicata* in this action, I cannot understand. The two cases are essentially different. It has been said that the ground of action, or *medium concludendi*, is the same in both actions. I shall not attempt to define the phrase "ground of action," or "*medium concludendi*." They are not well defined in the books; but the substantial question is the identity of the judgment formerly pronounced with that now asked for. If that identity does not occur, there is no room for the plea of *res judicata*. It is said that a pursuer when he brings his case is equally liable to the plea of "competent and omitted" with the defender. In some respects it is so, but in others it is not. Competent and omitted is not necessarily applied to matters that have been dealt with before. But in a question of *res judicata*, it is the question of identity alone that you have to deal with; and wherever identity is discovered in the cases, I do not see how competent and omitted can apply.

With regard to the relevancy, I should have been very well pleased if it had suited the views of the Court that we should now have pronounced a judgment upon it. But as it is thought expedient not to do so, I entirely acquiesce in the course proposed by your Lordship; for it lets the case go to a jury without being hampered with a judgment on the relevancy. And if it comes back to the Court, it will come in a better shape; for it will not be upon a hypothetical assumption of the facts, but upon a bill of exceptions, with reference to the notes of the Judge in point of fact, which will make it a matter of no difficulty in determining the relevancy.

Lord Curriehill—I am of opinion that this action is not barred by *res judicata*. In the first place, what was concluded for in the action, in which the judgment was pronounced upon which that plea is founded, is different from what is concluded for in the present action. In the former, the pursuer concluded that the lease in question, "*in so far* at least as it includes, or can be held to include, the foresaid valuable mineral substance of an argillaceous or other nature, which the defenders have been working, outputting, and selling under the name of gas, parrot, or cannel coal, or Boghead or Bathgate coal," ought and should be reduced "*to the extent and effect foresaid*;" that it should be found and declared "that the defenders have not, and never had, any right to work, output, and sell the said valuable mineral substance;" and that they should be decerned and ordained to pay such sum as should be found "to be the value of the said mineral substance so put out, worked, and sold by the defenders," or that they should hold count and reckoning "for the same," and be decerned to pay the balance on the said state of accounts. Although the rescissory conclusion was qualified with the words "at least," there was not in that summons any conclusion for reduction of the lease, except that part of it which included this particular substance, and the declaratory and petitory conclusions were expressly limited to that substance. *Quoad ultra* this lease, and the operations of the defenders under it, were left unchallenged; and it would have remained in full force and effect even had decree been pronounced upon all the conclusions in terms of the libel. And hence the practical effect of that action, if it had been successful, would have been, not to have extinguished the lease, but only to have remodelled it. And, accordingly, one of the grounds upon which I held, when the judgment in that action was pronounced, that the pursuers had not averred facts relevant and sufficient to support the conclusions of that libel was, that these conclusions were of such a peculiar and anomalous description.

What the present action concludes for is,—1st, that the lease should be wholly rescinded, and declared to be null and void; and, 2d, that the defenders should pay to the pursuers the value of the said minerals, (meaning, as appears from the antecedent context, all the coal, ironstone, iron ore, limestone, and fireclay) put out, worked, and sold by the defenders from the pursuer's lands of Torbanehill, under colour of the lease, prior to the date of citation, or should count and reckon with the pursuer for the same, and pay the balance appearing on such accounting. These conclusions are essentially different in their nature and extent from those in the

former action; and in that action no such decree as is now sued for could have been competently pronounced. And hence it does not follow that the defenders are entitled to be assoilzied from the present action, merely because they were assoilzied from the former action as laid.

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Farther, the grounds of action as set forth in the two summonses and records are not the same; for, although in both cases the grounds of challenge are stated generally to be fraudulent concealment, and fraudulent misrepresentation, yet the things which are alleged to have been so concealed and misrepresented in the one action, are different from those which are alleged to have been so concealed and misrepresented in the other.

What in the former action (according to the true meaning of the record in it) the defenders were accused of having fraudulently concealed was, that they knew that the mineral which they had been working in Boghead was of unusually good quality and great value, and that they had reason to believe that the same mineral might be found in Torbanehill. But what in the present action they are accused of having fraudulently concealed is, not that they had such a mere speculative belief that this valuable mineral might be found in Torbanehill, but that they had certain knowledge that it actually did exist, and might be wrought in these lands.

And the fraudulent misrepresentation of which the defenders were accused in the former action, was said to have consisted in their asserting to the pursuer that the quality and the value of the mineral which was so found in Boghead, and believed to be in Torbanehill, were less than the defenders knew them to be. But the fraudulent misrepresentation of which they are accused in the present action is said to have consisted in their having asserted that, *de facto*, no such mineral exists in Torbanehill, although they were in actual knowledge of its existence there.

The things alleged to have been concealed and misrepresented in the two actions being thus so very different, a judgment as to the relevancy of the one set of accusations is not *res judicata* as to the relevancy of the other; and the question as to the relevancy of the accusations in the present action must be dealt with on its own merits.

The question thus raised appears to me to be a very large and difficult one in the law of mutual contracts; and, as we were told from the bar, it has never yet been authoritatively decided. It involves the important inquiry,—how far the law entitles a party, in contracting with another, in circumstances such as those in which the lease under challenge was granted, to rely upon the statements made by that opposite party, without making inquiry as to their truth? If we are to determine this question at this stage of the proceedings, I would require further argument upon it from the bar. But I think that the Court, in the exercise of its discretion, should have the facts of the case ascertained, before entering upon the discussion of such a large and important question of law; because it may eventually be found that the question of law, in the aspect in which it now presents itself in the record, does not arise in the actual facts of the case, and may never require to be determined in this action, and that the actual facts may give rise to quite a different question of law. I therefore entirely concur in the proposal to recal *in hoc statu* the Lord Ordinary's finding as to relevancy, and to have the case tried by jury, without at present deciding any question of law.

Lord Deas.—There are two questions decided by the Lord Ordinary,—the question of *res judicata* and the question of relevancy. It was argued for the pursuers that if the one action be relevant and the other not, this of itself was a sufficient difference to prevent the applicability of the plea of *res judicata*. I do not think any of your Lordships adopt this part of the argument, and I certainly cannot concur in it. We must go further, and inquire whether the nature and grounds of the two actions be or be not the same; and it is upon the result of this inquiry that the applicability of the plea of *res judicata* must depend.

Now, in inquiring into the nature and grounds of the two actions, I look, in the first instance, at the summonses, including, of course, under that name the condescendences annexed thereto; and, from these, I find that both actions are actions of reduction of the lease in dispute, having petitory conclusions consequent upon success in the reduction,—with this distinction only, that, whereas the first action was directed to reduction of the lease *in toto*, or, alternatively, to its reduction *quoad* the particular substance in dispute, the second action omits this last alterna-

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tive, and is directed solely to a total reduction of the lease,—a distinction which plainly can make no difference as regards the present question. The alternative conclusion for partial reduction seems to me to have been introduced into the original summons, because the alleged fraudulent misrepresentation and concealment related solely to the particular substance alluded to, and one of the views intended to be covered by the summons seems to have been that, if the lease were reduced *quoad* this substance, it might, in consequence, be held void *quoad ultra*, on the ground of error *in essentialibus*, which last plea has been dropt out of the present action, as not being deemed necessary to the attainment of the object in view. But I cannot doubt that under the original summons, if otherwise unobjectionable, it would have been quite competent to have set aside the lease *in toto;* and to have demanded a general accounting under the conclusions which were, I doubt not, purposely introduced, requiring a state of accounts "in relation to the premises," in contradistinction to the first petitory conclusion, which was limited to the value of this particular substance. Accordingly, no objection was pleaded to the effect, nor was it made the ground of judgment, that the action was limited to a remedy which could not be given,—namely, partial reduction of the lease.

Both actions, therefore, must be regarded as actions of reduction of the lease. Such being their nature, I proceed next to inquire into the grounds upon which the actions respectively proceeded.

Now the ground of action in both cases, admittedly, was fraud. I do not say that this would be enough, because the frauds might be different. But it appears to me that the fraud averred in both cases,—I am still speaking with reference to the summonses and relative condescendences,—consisted in this, that the defenders knew of the existence in large quantity, in the lands of Torbanehill, of the same sort of valuable mineral (meaning coal of a particular description) they were working in Boghead,—that they concealed this from the pursuers, who were ignorant of it, and falsely represented to the pursuers, and led them to believe, that there was no such valuable mineral in Torbanehill, and that the only coal to be found there was of inferior quality, and, by this fraudulent concealment and fraudulent misrepresentation, induced the pursuers to enter into the lease. If this be a correct view of the import of the summonses, it seems clear enough that the nature of the fraud set forth in both cases was the same, and that the grounds of action are consequently the same.

That I have rightly stated the nature of the fraud averred in the *present* summons and record will not be disputed. That I have rightly stated the nature of the fraud averred in the *original* summons will, I think, be apparent on attending, in particular, to article 4 of the original condescendence, in connection with articles 9, 16, and subsequent articles of the same paper. After stating the nature and qualities of the mineral substance, as ascertained by the defenders, found by them in Boghead, the pursuers set forth in article 4 of their original condescendence:—"The defenders, when they opened their communication with the pursuers for a lease of the minerals in Torbanehill, as above mentioned, *were well aware* that the said valuable mineral substance which they had found in Boghead, and which they were then selling under the name of Boghead or Bathgate gas-coal, was to be found, in large quantity, in the lands of Torbanehill." The subsequent articles, which it is unnecessary to quote, set forth the pursuers' ignorance and the defenders' concealment and misrepresentation of what the defenders are thus said to have been well aware of,—namely, the valuable qualities of the mineral substance and its existence in Torbanehill.

In the condescendence annexed to the *present* summons, art. 3, 4, and 5, the pursuers set forth that the defenders "had by enquiry, experiment, skilful analysis," (it is not said of *what*) "and otherwise, satisfied themselves and become perfectly aware" of the existence, in Torbanehill, of the mineral substance in question, and had ascertained its valuable qualities. Between the import of these three articles and the import of art. 4 (in connection with the preceding articles) of the original condescendence, there is plainly no substantial difference. In the first condescendence it is said the defenders "*were well aware,*" and, in the second, that they had "become *perfectly aware,*" (by means somewhat ambiguously stated) of the existence, in Torbanehill, of the same valuable mineral which they had found in Boghead. It is true that in their revised condescendence, in the present action, the

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pursuers, in addition to saying that the defenders had "become perfectly aware," introduce the words "and they knew." But the allegation that the defenders knew is in no respect substantially different from the statement that they were perfectly aware; and, indeed, if the pursuers had thought them substantially different, they would not, I presume, have rested, as they do, upon the words "perfectly aware" in the condescendence which forms part of their present summons. Moreover, if both summonses are, in this respect, as I think they are, substantially the same, it is obvious that the words "they knew" might equally have been introduced, on revisal, in the one record as in the other. The point I draw attention to at present, however, is that, in so far as regards the defenders' knowledge,—without which the allegations of concealment and misrepresentation, set forth in both cases, would want their foundation,—the condescendences, which formed part of the original summonses, are not only substantially but almost identically the same, and that even the revised condescendence, in the present action, is, in this respect, substantially the same with the original condescendence in both actions. Laying, then, out of view any variation of phraseology (which I shall immediately notice) introduced into the revised condescendence in the *first* action, we have both actions describing the fraud whereby the lease was obtained, as consisting in the same sort of knowledge, coupled with concealment and misrepresentation of what was so known; and if this be not, in both cases, the same ground of action, I must confess myself unable to understand what the same ground of action is.

If, then, the matter would have stood thus but for the variation introduced on revisal into the 4th article of the condescendence in the original action, by saying that the defenders "were well aware, *or had sufficient grounds for believing*," in place of simply saying they "were well aware," I cannot hold that this variation, by the pursuers, of the words of their averment, will prevent the grounds of action, in the two cases, from being the same. In place of this variation the pursuers might, just as competently, have introduced the words "they knew," into their revised condescendence in the first action as into their revised condescendence in the second action; and they might, in like manner, have quite competently explained, if they had thought proper, in the revised condescendence in either case, the nature of the knowledge, or the means of knowledge, or anything else they thought necessary to make their meaning and the nature of the concealment and misrepresentation relied on by them clear. Parties who come into Court with an action calculated to try their cause are not entitled to harass their opponent with new actions (which might be endless) by frittering away their averments, upon revisal, which, in so far as it may have been done here, can only be accounted for, in the absence of any allegation of *res noviter*, by supposing that the pursuers had become satisfied that their modified averments were all they could expect to prove. If the modification was material, and happened by accident or mistake, and not by design, the pursuers' remedy was to have abandoned their action, which they might have done, even upon a closed record, under section 10 of the Judicature Act, so long as there was no judgment against them. But, after a record is closed, I pray your Lordships to observe that it is only when it appears that the parties have respectively admitted on record all the facts requisite for decision, so as to render a trial unnecessary, that your Lordships are authorised, by sect. 13 of the Judicature Act, to decide without probation; and that, when a case is decided against a pursuer upon relevancy, it is upon the footing of the facts averred by him being held to be all proved, and, consequently, the decision is a decision upon the merits, altogether different in its effects from a decision under sect. 6 of the statute, by which the Lord Ordinary is directed, after the dilatory defences are disposed of, to examine into the correctness of the summons and peremptory defences, and if it shall appear that the grounds of action, as set forth in the summons, are in terms not sufficiently positive and clear, or the conclusion not regularly or legally deduced, then, either to dismiss the action with expenses, reserving to the pursuer to bring a new action, or to order an amendment and decern *ad interim* for the expenses thereby occasioned. The judgment, in the first action, did not proceed under this latter enactment, but was pronounced upon a closed record, in which, it must be assumed, the pursuers had stated all the facts they knew in support of their ground of action, just as it must have been assumed,

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had they been allowed to go to trial, under that record, that they had proved all the facts relied on by them, in so far as these were capable of being proved. It is of little moment whether the facts are proved, or held and assumed to have been proved. The merits of the cause, on which the pursuer joins issue with his opponent, are, in either case, decided; and, in this point of view, I am not prepared to say that the plea of *res judicata* would not have been applicable, although, in the condescendence which formed part of the first summons, the words "were well aware" had been coupled, as they were on revisal, with the words "or had sufficient grounds for believing." Or, *vice versa*, although these last mentioned words had not been in the revised condescendence any more than in the summons in that first action. The grounds of action in both suits, would still, I think, have been substantially the same. The only effect of adding the words "or had sufficient grounds for believing" was to make it somewhat more obvious, than it otherwise might have been, that the action was calculated and intended to cover a case of knowledge as matter of belief resting upon inference and skill, and was not directed and limited to a case of knowledge as matter of ascertained fact. But this I think would have been clear enough, as regarded the original action, although the words "or had sufficient grounds for believing" had not been introduced on revisal, and is clear enough as regards the present action although these words are not used in it. I shall immediately have occasion to state the grounds on which I think the words "they knew," in the present record, do not necessarily or even naturally, any more than the words "were well aware" in the original record, mean that the defenders knew as matter of ascertained fact. But if the words "they knew" did and do import something more than was imported by the words "were well aware, or had sufficient grounds for believing," then it was incumbent on the pursuers, in their original action, to have used the words "they knew," or some equivalent words. They do not pretend to have ascertained that the defenders "knew" since the record was closed in the first action. They do not rest their right to bring a second action, to any extent, on the plea *res noviter veniens ad notitiam*. And this being so, the fact that they might, quite competently, have used, in the first record, the same words which they have used in the second, is of itself sufficient to exclude the present action. It is no answer to say that until judgment was delivered in the first action the pursuers supposed their case to be relevantly and sufficiently averred. If the pursuers have mistaken the law in this respect they must take the consequences. In this sense, and to this effect, the plea of competent and omitted (as was stated in the argument) is undoubtedly applicable to a pursuer as well as to a defender. But, although this view would, of itself, be sufficient, it is not necessary to rest upon it. For here the plea of the defenders is much stronger than the plea of competent and omitted. It is a plea to the effect that the very thing now relied on was, in the first action, competent,—pleaded,—and departed from. On these grounds, in connection with some further explanations which will appear when I come to speak of the relevancy of the present action, I am humbly of opinion that the plea of *res judicata* ought to be sustained.

As regards the relevancy, my opinion is adverse to the pursuers in the present action, as it was in the former action. The substance of the view I take upon this point may be stated without much detail. If the pursuers had distinctly and unequivocally averred knowledge, peculiar to the defenders, as matter of ascertained fact, of the existence, in considerable quantity, in the lands of Torbanehill of the mineral substance in dispute:—for instance, if they had averred that the defenders had ascertained this by secret workings through the march, from the adjoining lands of Boghead, and analysing the substance found in Torbanehill, I am not prepared to say that concealment and misrepresentation of the facts thus ascertained might not have been relevant to void the lease. Nor do I say what might have been the effect of misrepresentation as well as concealment of what had been actually found in workings along the Boghead side of the Torbanehill march. Upon such questions, till they arise, it is unnecessary to form an opinion. On the other hand, assuming the knowledge averred of the minerals in Torbanehill to be merely that sort of knowledge which rests upon inference and skill, from acquaintance with the general strata in that part of the country, and finding the disputed mineral in some part (it is not said what part) of the adjoining estate, I have no difficulty in holding that concealment and misrepresentation in regard to expecta-

tions thus formed would not be of themselves sufficient to void the lease. Now, what I desiderate in this record is the use of language which should make it clear that the alleged knowledge, on the part of the defenders, of the Torbanehill minerals was of the first of these kinds, and not of the second. The expression, "they knew" is ambiguous. These words are familiarly used in many different senses. We are said to know many things in geology, geography, and so on, which are more properly only matters of belief. Now, in cases of fraud, the rule of pleading is, that it must be distinctly set forth in what the alleged fraud consists, so as to satisfy the Court, before they send the case to a jury, that, if the averments be true, they really amount to fraud. In order to do this the words used to explain in what the fraud consists must not, themselves, be ambiguous. Here I think they are so. For to say that the defenders knew that the mineral substance in dispute existed, in great abundance, in Torbanehill would be correct enough language to use, although it was intended to prove no other knowledge on their part than the knowledge possessed by any skilful mining engineer, acquainted with the strata in the district, who, from finding a mineral in one estate, infers that it will be found in another. I see nothing set forth in this record incompatible with the pursuers, if the case goes to a jury, asking a verdict in their favour, although they prove no other knowledge than such knowledge as I have just mentioned. If they meant knowledge as matter of ascertained fact, it was easy to have said so. I see no reason to think they did mean it. At all events they have not said it in the unequivocal language necessary to give to the averment the only meaning in which it could legally form the foundation of a charge of fraud to void the lease.

On the contrary, the whole concomitant language points at a kind of knowledge derived merely from skill and inference equally open to the pursuers and others as to the defenders. The leading averment, in connection with which all that follows must be read, is to be found in the commencement of article 3d of the revised condescendence, which bears that the defenders had, by careful investigation, made themselves aware of the nature of the mineral strata in the district, and, in particular, of the nature, quality, and extent of the minerals in Torbanehill. This is, obviously, an averment that the minerals in Torbanehill were known to the defenders in the same way with the strata in the district; and, indeed, their *extent* could only have been known in that way. Then follows the averment that "they had by enquiry, experiment, skilful analysis, and otherwise, satisfied themselves, and they knew and had become perfectly aware, that there existed in these lands of Torbanehill a gas coal" of the kind mentioned in article 2d as forming a *stratum* in both estates. If the pursuers had here meant that the gas coal analysed was gas coal found in Torbanehill, they would of course have said so. The fact would have been far too important for them (especially looking to the fate of their first action) not to have been distinctly stated. But there is no statement of the kind throughout this record. The pursuers go on to say, in article 4th, that the defenders had found the *stratum* of this gas coal in Boghead, and "they knew, as already mentioned, that it was in the lands of Torbanehill,"—that is to say, they knew, by careful investigation of the strata in the district, and by experiment, analysis, &c., as mentioned in article 3d. In like manner, the natural meaning of the words "they knew," and "had satisfactorily ascertained," in articles 5th and 9th, where alone they again occur, is that they knew and had ascertained in the way set forth in the previous articles; and, indeed, this appears clearly enough to be the meaning, from the statement in article 5th, that they knew not only the quality and value of the coal, but also that it was to be found of such quality and value in the pursuer's lands *in great abundance*—a matter which, unless the defenders had bored or penetrated into the pursuer's lands (which is nowhere alleged) could not possibly have been known to them except by inference, any more than what immediately follows, that it "could be wrought and turned out to immense advantage and profit." The language of art. 9 is precisely similar to that of art. 5, and the same remarks apply to it.

The only averment that the defenders' knowledge, such as it was, was peculiar or exclusive, is that contained in the concluding words of art. 4:—"But the existence of the mineral in question in Torbanehill and Boghead, and its character and qualities, were unknown except to the defenders." Now, shutting ones eyes to the averments in the first record about the Boghead mineral and its value being publicly

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known in the market, and taking this averment literally as it stands, it is obvious to remark that if the knowledge averred to have been possessed by the defenders of the Torbanehill minerals, be (as I think it is) merely knowledge derived from investigation into the nature of the strata in the district, inclusive of Boghead, this was knowledge, so far as regarded the general strata, equally accessible to the pursuers as to the defenders, and knowledge, so far as regarded Boghead, which the defenders were not bound to communicate to the pursuers. What might have been the effect of a denial that the mineral substance had been found, or existed in *Boghead*, or of misrepresentation as to the qualities and value of the minerals actually found there, it is needless to inquire; for nothing of this kind is alleged. The misrepresentation averred and relied on relates exclusively and throughout to the minerals in Torbanehill. But this allusion to "the existence" of the mineral in the lands leads me to remark, that while, for brevity, I have occasionally spoken, as the pursuers do, of the "mineral" or "mineral substance" in dispute, I do not lose sight of the fact, the importance of which I had occasion to point out in the opinion I delivered in the former action, that this question has arisen, not from any different species of mineral from what had been let being found in the lands, but from a portion of that mineral—that is to say, a portion of the coal—being found to possess higher qualities, and to be greatly more valuable than the pursuers had anticipated. The existence, in the lands, of coal which might be wrought to profit, was admittedly known to both parties, and the coal accordingly was the subject let, and the only subject let. It is fixed by the verdict of a jury that the substance in dispute is coal; and the fraud averred and relied on, equally in both actions, consequently, consisted, and could only have consisted, in concealment and misrepresentation of the qualities and value of a portion or portions of this coal. Concealment of the existence of the mineral let,—namely coal,—and false representations to the effect that it did not exist in the lands, are not, and could not have been the foundation of either action. Concealment and false representations as to the *qualities* and *value* of large portions of the mineral let,—that is to say, of large portions of the coal in Torbanehill,—are equally the foundation of both actions;—an observation the importance of which, both as bearing on the plea of *res judicata*, and on the present question of relevancy, is too obvious to require illustration.

When the pursuers say, somewhat loosely, in the passage just quoted from art. 4, that the existence of the mineral in question in Torbanehill and Boghead, and its character and qualities, were unknown except to the defenders, they obviously do not mean, and could not possibly mean, that the existence of coal in the lands was unknown except to the defenders. They merely mean that the qualties and value of those portions of the coal which, even now, they are reluctant to speak of otherwise than as a different mineral, were unknown except to the defenders. Depreciation by the purchaser (for the lessee of coal is virtually a purchaser) of the qualities and value of the article purchased, is thus equally at the root of both actions. In both the depreciation is no doubt said to have gone the length of fraudulent misrepresentation as well as concealment. But these general words will not sustain this action, unless sufficiently explained, and something stated which can be said to warrant the sellers in trusting for their information, as to the value and qualities of their own coal, to the purchaser's representations, in place of ascertaining these for themselves, which it is not said there was anything here to prevent them from having done.

I have only to add that, while I adhere to the views I expressed the other day upon the inexpediency of deciding, in the ordinary run of cases, nice questions of law and relevancy before the facts are ascertained, I think a great distinction is to be made in regard to cases of fraud. For upon the same principle on which we require, in this last description of cases, a very different specification of facts from what we do in ordinary cases, we have also been in the habit of requiring that the relevancy of these facts shall be clear before a charge so gravely affecting character shall go to a jury; and I see no sufficient grounds for following a different course, in this case, from that which we have usually followed in cases of fraud.

The Court pronounced the following interlocutor:—" Adhere to the interlocutor reclaimed against, in so far as it repels the plea of *res*

judicata; but as regards the finding upon relevancy, in respect that in this stage it is not necessary, and in the circumstances of the case it is not expedient that any question of relevancy should be determined or disposed of before going to trial, Recall the said finding in *hoc statu;* and with this variation, remit the cause to the Lord Ordinary, that the same may be proceeded in as accords of law, in order to trial: Find the defenders liable to the pursuers in the expenses of process incurred by the pursuers since the date of the Lord Ordinary's interlocutor reclaimed against, and remit," &c. No. 197. — June 26, 1857. Mathieson.

D. M. & H. Black, W.S.—James Burn, W.S.—Agents.

No. 198.

John Anderson Mathieson, Petitioner.—*A. B. Shand.*

Judicial Factor—Curator Bonis—Special Powers—Procedure where necessary to realise moveable estate in England of a lunatic, and invest the proceeds in heritable security in Scotland.—The Lords Justices in England having refused to direct transfers by a *curator bonis* of shares of the stock of an English company belonging to his ward, in part in respect there was no suggestion from the Scotch courts as to realising the shares, the Court, on the application of the curator, "authorised" him to take all necessary steps for selling and transferring the shares, and investing the proceeds in heritable security in Scotland.

The petitioner, John Anderson Mathieson, was *curator bonis* to John Astley Anderson, a lunatic, who, in June 1850, previous to his insanity, had acquired nine shares of the stock of the Birmingham Canal Navigation Company. These the petitioner sold on the suggestion of the Accountant of Court. He received payment of the price in February 1856, but the Company refused to register the transfers, on the ground that the petitioner had not been specially empowered by the Court to sell the shares. In these circumstances, the petitioner was obliged to refund the price of the shares to the purchaser, which still stand registered in the lunatic's name. June 26, 1857. — 1st Division. C.

The statute 16 & 17 Victoria, cap. 70, provides for the transference of shares to the name of a curator in circumstances similar to those of this case, and provides that the curator (or other party wishing the transfer of the stock), shall lay before the Master in Lunacy in England a statement of facts shewing the whole circumstances of the lunacy, the appointment of the curator, and the nature of the stock proposed to be dealt with. That upon this the Master makes a report, which report is confirmed by petition presented formerly to the Lord Chancellor, now to the Lords Justices, who, by a subsequent Act, are empowered to act in lunacy for the Lord Chancellor.

The petitioner stated, that he had laid the necessary statement before the Master in Lunacy, and that it was in usual form submitted to the Lords Justices, who, after considering it, stated, that they did not "see sufficient cause" for directing a transfer of the shares, which accordingly they did not consent to, giving as their reason that there had been "no suggestion *in this case* from the Court of Session for realising the shares." That, in these circumstances, on a recommendation by the Accountant of Court, the curator presented the present petition, praying the Court, after intimation in ordinary form, to direct and authorise the petitioner, or at least to direct the petitioner, to effect and conclude the sale, transfer, and registration of the said shares, and to take all necessary steps in England for that purpose, and thereafter to invest the proceeds of said shares upon good heritable security in this country," &c.

The Lord Ordinary, to whom the case had been remitted, expressed himself favourable to the expediency of selling the shares; but suggested that, as a "direction" to sell might interfere with the discretion of the curator, the Court should grant "authority" to do so.

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The Court pronounced the following interlocutor:—"Authorise the petitioner to take all steps necessary for selling and transferring the nine shares of the stock of the Birmingham Canal Navigation Company, mentioned in the petition, and for realising the proceeds of the said shares, and investing these proceeds on heritable security in Scotland, as prayed for in the petition, and decern."

James Somerville, S.S.C.—Agent.

No. 199.

The Provost and Magistrates of Dundee and Others, Pursuers.—*Patton—Thoms.*
John Morris and Others, Defenders.—*D. F. Inglis—Penney.*

Testament—Legacy—Vitiation.—In a holograph writing containing no words of conveyance, a party said, "I wish to establish in the town of Dundee an hospital" on the plan of Heriot's Hospital. The word "hospital," and the direction following, were deleted. A subsequent holograph writing said, "I wish 100 boys to be admitted in the hospital at Dundee." A third writing, neither holograph nor tested, contained directions as to the management of the hospital;—*Held*, that the Court could not replace the word "hospital," which had been deleted by the testator, and that no valid legacy for the endowment of an hospital had been constituted.

Question, Whether the mere expression of a wish to found an hospital would suffice to oblige the next of kin taking as *ab intestato* to erect an hospital.

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See ante, p. 168.

This action, raised by the Provost and Magistrates, and the Nine Incorporated Trades of Dundee, against Mr Lindsay, the judicial factor on the estate of the late Mr Morgan, to whom he was also decerned executor-dative; and the parties who had made out their claim to be next of kin, after protracted litigation—(see ante, vol. xvi. p. 82; vol. xviii. House of Lords report, p. 46; Court of Session, p. 798 and 817)—came into the Inner-House on a reclaiming note against a judgment of the Lord Ordinary repelling preliminary pleas, which judgment was adhered to on 14th December 1856. A record was then made up as between the pursuers and the next of kin, and the case now came before the Court for judgment on the merits.

The pursuers concluded for declarator, that the testamentary writings left by Mr Morgan contained a valid legacy and bequest of the whole of the residue of his moveable means and estate, after paying legacies, &c., or at least of so much thereof as might be necessary for the purpose of erecting and establishing, in the town of Dundee, an hospital to accommodate 100 boys, and that the same were valid and effectual as testamentary deeds of the deceased to that effect: And to have it further found and declared, that the succession of the deceased was burdened with the said bequest, and that the defender, the said Donald Lindsay, as executor, or the parties who might be found entitled to succeed to the deceased's moveable estate, were bound to hold and retain the residue, or at least so much thereof as might be necessary for the purpose of erecting and establishing, in the town of Dundee, an hospital to accommodate 100 boys, in fulfilment of the testamentary bequest, subject to the orders of the Court, in order to its application for the purpose of founding an hospital; or otherwise were bound to pay over the same to the pursuers, or to such persons as might be appointed for the purpose of superintending the erection and establishment of the said hospital, or for carrying such testamentary purpose into effect: And that the defenders should be decerned to pay to the pursuers, in order to the same being applied by them to the erection and establishment of an hospital, or to such persons as might be appointed therefor, the sum of L.100,000 sterling, or such other sum as should be fixed as the amount of the residue of the moveable means and estate of the said John Morgan, or as the amount necessary for erecting

and establishing in the town of Dundee an hospital to accommodate 100 boys: And that a scheme for the application and disposal of the funds bequeathed as aforesaid, should be prepared, in order that a scheme might be made and fixed for the application and disposal of the said funds.

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Mr Morgan left ten holograph testamentary writings. Three, of various dates prior to 10th October 1842, conferred a liferent of his whole estate on his sister, and contained apparently other provisions, but were so much deleted as to be to some extent illegible. They were written on two leaves, which appeared at one time to have formed a single sheet; both sides of one leaf, and one side of the other were written upon. The subscriptions to these writings were scored, and they were revoked by a fourth writing in the following terms:—"Edinburgh, 10th October 1842.—I hereby annual all hitherto written on the first, second, and third pages of this, and wish to establish in the town of Dundee, in the shire of Forfar, an [*an hospital strictly in size, the management of the interior of said hospital in every way as Heriot's Hospital in Edinburgh is conducted*],* the inhabitants born and educated in Dundee to have the preference of the towns of Forfar, Arbroath, and Montrose, but inhabitants of any other county or town are excluded. Jno. Morgan." The fifth writing conferred a liferent on Miss Morgan, but was cancelled. The sixth was as follows:—"I hereby wish only one hundred boys to be admitted in the hospital at Dundee, [*and the structure of the house to be less than that of Heriot's Hospital*],* and to contain one hundred boys in place of one hundred and eighty boys. Jno. Morgan. Edinburgh, 20th October 1842."

The seventh, eighth, ninth, and tenth writings were of various dates between 23d October 1842 and 25th August 1846. They contained bequests of legacies, and other matters, but made no reference to the hospital. The whole of these ten writings were holograph of Mr Morgan, and that dated 10th October 1842, and those of subsequent dates, were written on the same leaf of paper.

Another writing, which was produced, dated 6th September 1846, was on a separate paper, and in the handwriting of Miss Morgan. By it Mr Morgan bequeathed to her the liferent of all his property. It contained the following clause:—"I beg and request the Honourable Court of Session to nominate a judicial factor for the management of my property, whether real or personal; that is, by laying it out to the best advantage after my death, and my sister Agnes Morgan, to accumulate for ten years, to erect an hospital in Dundee to educate the poor children of the nine trades—the name of Morgan to be preferred, although they do not belong to Dundee. I wish that the hospital may not be very expensive, as it is for poor children. The judicial factor is not to take place until the death of my sister Agnes Morgan. If my sister's death was to take place before mine, I wish at my death my house in 17 Coates Crescent and furniture to be sold, likewise my house and grounds in Calcutta, the money to go to the fund for the hospital in Dundee to educate the poor children of the nine trades of Dundee—the name of Morgan be preferred." This writing contained also bequests of legacies to servants and various other parties, and was dated and signed by Mr Morgan, but was not tested. The pursuers however alleged, what was not admitted, that the following words which occurred in it were also holograph of Morgan, "the legacy duty to be paid for my servants;" and it was stated that the legacies to some of the deceased's friends and servants had been paid.

The defenders stated the following as their second and third pleas:—(2d.) The writing of 6th September 1846 not being holograph of John

* The words printed in italics within brackets [ ], though still legible, had been scored out.

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Morgan, and not being tested, was invalid; and the writings of 10th and 20th October 1842 were not valid or effectual as testamentary instruments. (3d.) The writings libelled did not constitute or contain an effectual legacy or bequest; and, at all events, they did not constitute or contain the alleged legacy or bequest of the whole or of any part of Mr Morgan's funds for the erection and establishment of an hospital in the town of Dundee, and none for the erection and establishment there of an hospital to accommodate 100 boys.

These pleas were sustained by the Lord Ordinary in the following interlocutor:—"Sustains the second and third pleas in law for the defenders: Assoilzies them from the conclusions of the action, and decerns: Finds the pursuers liable in expenses, allows an account," &c. *

* "NOTE.—This case is of importance from the magnitude of the succession which is at stake, the whole of which, saving trifling legacies, is claimed by the pursuers, to satisfy the purpose of a charitable bequest pleaded to have been made by the deceased. The case was elaborately argued on the part of the pursuers, with a copious reference to cases, particularly in the English Courts. The Lord Ordinary has given full consideration to all that was urged in support of the claim, but he has been unable to discover any satisfactory legal ground on which he could recognise the writings founded on as containing a sufficient expression of the deceased's will, entitled to have effect given to them as a will, and this independently of objections to the contents of the writings as incapable of being acted on by reason of uncertainty and indefiniteness in the objects supposed to have been contemplated.

"Referring to the lithographed *fac simile* of the writings found in the repositories of the deceased or of his sister, who lived in family with him, both having departed this life within a short period of each other, and Mr Morgan being under curatory previous to his sister's death, it is to be observed that the first of these writings, dated in January 1836, which may possibly have contained a disposition or settlement of his estate, is not only so obliterated in all material passages which may have given it that character, so as to prevent its being referred to and used as the expression of purpose and will at the period of its execution, but this writing, with the memorandum attached, is expressly annulled by the writing of 10th October 1842. It is plain, therefore, that any writing preceding that last date must be cast aside altogether, and only it and those of subsequent dates are to be taken as expressive of the last will of the deceased. Then, as to the writing of 6th September 1846—the latest of all those found—as it is not holograph of the deceased, and is otherwise improbative, it cannot be available by reason of improbativeness, if the deceased have not by previous writings attempted to provide for its authenticity being supplied and ascertained by some marks fixed upon by himself, and which law would, with whatever difficulty, recognise as sufficient to obviate the general objection of improbativeness. But there is no special provision in the earlier writings to dispense, as regards this last one, with the recognised rule of law. The only writings, then, which can be put forward as being of a testamentary character are those holograph of the deceased, and bearing his signature unobliterated, of date 10th October 1842 and subsequent dates. Those founded on by the pursuers as constituting the bequest, which they seek in the summons to be declared in their favour, are the writings of 10th and 20th October 1842. The question is, whether singly or together they constitute a valid bequest containing a sufficient expression of the deceased's will to be entitled to receive effect.

"The writing of 10th October is first to be considered. It became the leading testamentary writing of the deceased, for it annuls all previously written by him on previous pages. Now, it is to be observed that this writing contains no words of conveyance or bequest either of the *universitas* of the estate, or of any portion thereof, or of any particular sum of money; nor is there any appointment of executors or of trustees, or a nomination of a legatee or beneficiary. The only thing is, after annulling all hitherto written on the preceding pages of the paper, the expression of—'I wish to establish in the town of Dundee,' &c. How this wish is to be carried out, who are to do so, what fund is to be appropriated for it—none of these things are to be provided for, or mentioned. The whole of the

The pursuers reclaimed, and pleaded; — That Mr Morgan's holograph writings were testamentary: because the circumstances connected with them No. 199.

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writer's expression of his will or desire is contained in the words—'I wish to establish.' Throwing aside any consideration of the effect to be allowed to the word 'establish'—a subject which falls under the objection of uncertainty raised against the terms of the bequest—the sufficiency of the word 'wish,' as expressing a bequest in terms apt and sufficient, is to be determined. Had there been a conveyance in trust by the deceased of his estate, it is conceived there could be no doubt that such an expression of wish as to an object would have been tantamount to express words of bequest or direction. Crichton v. Grierson, July 1828, 3 W. and S. 331. Or if there had been a nomination of executors to take and administer the estate, such words would have been efficacious. Even if there were an omission to name executors, yet the next of kin confirming would have been bound to give effect to a legacy as sufficiently constituted under such an expression of desire in the deceased's will.—See per Lord Fullerton, in Dundas v. Dundas, January 27, 1837. The peculiarity, and thence the difficulty perhaps, in this case is, that there is a bare wish, unconnected with any words of disposal or appropriation of the estate of the writer, and that the accomplishment of the wish is to be inferred as having been intended to be fulfilled by appropriation out of the estate of what was necessary to attain the end. There is probably difficulty in thus applying the words which it may be supposed were in the writer's mind—namely, 'with my whole estate,' or 'with what is requisite from my estate for the purpose'—so as to give perfect intelligibility to the wish as it is expressed. Still the Lord Ordinary is not prepared to hold that the word 'wish' is in itself, and by the want of other words, so feeble and defective, that it is not entitled to be taken as an expression of will, and introductory to a bequest, if that otherwise be sufficiently explicit.—See Report by Lord Stair of Nasmyth v. Jaffray, July 25, 1662; Mor. p. 5483.

"It is on reaching the next step in this writing that the fatal defect in it appears. It does not bear what it is that the writer wished to establish in the town of Dundee. The writing must be taken and read with the deletions appearing on its face when found. It wants then the essential word, indeed sentence, to make it intelligible and effective. It is a perfect blank as to what is to be established. Without the deleted sentence, the later and concluding one, which remains unobliterated, has no meaning whatever—it depends wholly on the expunged sentence for intelligible application. The Lord Ordinary is unable to see any mode by which this writing can be set up as an expression of will. It appears to him that it must be wholly discarded and laid aside as being *in essentialibus* imperfect.

"The pursuers represented the deletion as being intentional only as regarded the sentence following 'hospital,' and suggested that the word 'hospital' had been deleted *per incuriam*. The Lord Ordinary cannot countenance such a suggestion as fitted for legal consideration. For the Court to reinstate the word which the deceased had struck out—which they would be doing by holding it to have been unintentionally deleted, of which there can be no evidence—would be wholly unwarrantable, and involve a stretch of power, under the guise of drawing inferences of the writer's mind and intention, contrary to the apparent fact shewn by an act which speaks to the eye itself.

"The Lord Ordinary thinks that the writing of 10th October must be taken exactly as it stands; and so the only operative part of it was annulling previous writings on the same sheet of paper, but which become of no moment, as the only unobliterated parts of such writings had reference to a life interest to his sister in his estate, but which was evacuated by her predeceasing him.

"The second writing, of 20th October, is now to be considered. The pursuers contend they are entitled to make use of it to supply the defect in the former writing by the deletion of the word 'hospital,' and taking both writings together they argued that thereby the will of Mr Morgan is sufficiently demonstrated, and his intention explained, so as to entitle the pursuers to have declarator pronounced as concluded for.

"This second writing does undoubtedly imply the execution and existence of a former writing by which Mr Morgan had made some provision, or declaration, or expressed some wish, regarding an hospital in Dundee, which he describes as 'the

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entitled them to be considered such;[1]—they bore to be so.—They dealt with his "property" "at" and "after my death," and were declared to be "my settlement." If there could be doubt as to this, reference was quite competent to the first writing, for which those of 10th October 1842 and posterior dates were substituted. The use of the word "annul" did not exclude this reference.[2] Then, if these writings were to be considered testamentary, there was a valid expression of wish to establish an hospital in Dundee for 100 boys. These writings were to be construed as if forming one settlement. Writings such as Mr Morgan left were always so construed.[3] The writings of 10th and 20th October 1842, taken together, contained an expression of intention which the Court must recognise. What effect was to be given to that expression was not now in question. The pursuers in this argument assumed it would be effectual. The expression of wish to establish an hospital did exist; although there was to be a *hiatus* in the place of the word "hospital" deleted in the writing of 10th October—the sense supplied it.[4] There was enough to give rise to a presumption as to intention, and the presumed will of the testator must be given effect to.[5] The word "hospital" could not, however, be treated as a blank. It existed, and the Court were entitled to read it. This was the distinction between erasures

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hospital at Dundee,' and to which he had wished to be admitted 180 boys; and the change which he makes is by now expressing his wish that only 100 boys be admitted into the hospital, and that it should contain 100 in place of 180. But where is this previous writing to be found? The former writing is a blank as to hospital, and equally a blank as to boys. Unless the deleted sentence, which is not so obliterated but its words may still be read, is by that circumstance to be reared up so as to be read, and what has legally become a blank by deletion is notwithstanding to be treated as something which may notwithstanding be judicially read, it is plain that the second writing expresses a wish to alter or change something which has gone before, but evidence of which is legally non-existent. The second writing, standing alone, is insufficient in its terms to form a bequest, and the contrary was not attempted to be maintained. It is dependent on the existence of a former valid writing constituting a bequest, and which is to be altered in one respect by this second writing. But if there be no former writing in regard to an hospital at Dundee, and to which reference is explicitly made by mentioning 'the hospital at Dundee,' the later writing becomes nugatory.

"The Lord Ordinary conceives there is insuperable difficulty in connecting the one writing with the other. Reading the first, as according to the rules of law it must be read, by holding the part deleted as *pro non scripto*, it is radically defective, and so must be denied legal effect. Reading the second as referring to a prior writing—where is that prior writing regarding the hospital to be found? The two writings are not to be pieced together in order that a word or sentence in the one is to be transposed to the fitting place in the other, so as to make sense out of both when neither is intelligible in itself. But this is what the pursuers would have to do; for without transposition, but adding merely the latter to the first, and combining the two in their order, the writings would not be intelligible as a whole.

"Entertaining these views of the character of the two writings, the Lord Ordinary has felt no real hesitation in coming to the conclusion that they cannot be supported as valid testamentary writings. If this conclusion be correct, it is unnecessary to enter into consideration of the objection to the effectiveness of these writings on the ground of uncertainty. The Lord Ordinary has, accordingly, limited his ground of judgment to sustaining the second and third pleas of the defenders, as being sufficient, in his opinion, for the disposal of the case."

[1] Stoddart v. Grant, in House of Lords, 28th June 1832, 1 Macqueen, 163.

[2] Attorney-General v. Smith, 1st March 1852, 14 D. 585.

[3] Stoddart v. Grant, *ut supra*, and Baird v. Jaap and Others, 15th July 1856, ante, vol. xviii. p. 1246.

[4] Stair, iv. 42, 19.

[5] Ersk. iii. 9, 14.

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and deletions.[1] Erasures could not, in the general case, be supplied because the words there before were not extant. But, where the words used by the testator still existed, though cancelled, the Court looked at them; and would, where there was an evidently unintentional omission or deletion, remedy the mistake. They had even disregarded the express words used in giving effect to intention.[2] In England, it had been decided that to render a will intelligible it would be read with an addition[3] where a legatee's name was deleted, but she was afterwards referred to as the "said E B." The Court held expunged words as existing.[4] This was just what the pursuers asked to be done here; and that Mr Morgan intended the word "hospital" to remain was shewn by his leaving the article "an" undeleted before it, and referring afterwards to it as pre-existing, "the hospital at Dundee." The rest of the deletion had an object, but the deletion of this word had not. Undoubtedly, this writing was at one time a good expression of intention; and, though altered, there was no appearance of an intention to revoke displayed. Wherever the deceased revoked any writing which he had signed, the signature was deleted, and the signature of this writing had been allowed to stand. The deletions were done carefully. They were verbal alterations, and not revocations of the whole document. Even erasures could be supplied if written evidence existed of what the testator intended to be on the parts erased. In one case a duplicate deed afforded this evidence.[5] Mr Morgan had, in fact, left duplicate writings, — those of 10th and 20th October. They referred to each other, and a blank—had such existed—in the one was to be supplied from the other. In another case,[6] eight inoperative wills were the materials from which the Court had extracted intention. The deed by Mr Morgan of 6th September 1846 might be viewed as testamentary, if the words "the legacy duty to be paid for my servants" were holograph of Mr Morgan. It was signed and dated by him, confessedly, but these words were not admitted to be holograph. The pursuers appealed to occular demonstration, which shewed them to be holograph. It had been held that a holograph addition such as this had set up a will otherwise inoperative.[7] If so, there could be no doubt as to the effectual expression of a wish to establish an hospital. If these writings were not given effect to, Mr Morgan must be held to have died almost intestate. All the presumptions of law were against intestacy;[8] more especially where the expression had reference to a charitable bequest.[9]

Senior counsel for the defenders was not called on to reply.[10]

Lord Justice-Clerk.—The Court does not think it necessary to call for any reply from the counsel for the defenders,—being quite satisfied that the interlocutor of the Lord Ordinary is well founded. I have not had time to prepare any written opinion; but the matter is so simple that it may be expressed in very few words. I am not prepared to admit that any portion of the writings, prior to the one of

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[1] Stair, *supra*.

[2] Wedderspoon v. Thomson's Trustees, 15th December 1824, 3 S. and D. 396; Keiller v. Thomson's Trustees, 16th June 1826, 4 S. and D. p. 730.

[3] Leach v. Meeklem, 27th May 1805 (King's Bench), 6 East. 486.

[4] Martins v. Gardiner, 1st June 1836, 8 Simon, 73.

[5] Earl of Strathmore v. Earl of Strathmore's Trustees, 30th July 1840, 1 Rob. App. 189.

[6] Wedderspoon, *ut supra*.

[7] M'Intyre, 1st March 1821, F. C.

[8] Ersk. iii. 2, 23.

[9] Hill v. Burns, 14th April 1826, 2 W. and S. 80, per Lord Gifford, p. 86.

[10] The defenders cited Rankine v. Reid, 7th February 1849, ante, vol. xi. p. 543; Grants (Leith's Trustees) v. Shepherd, 21st July 1847, in House of Lords, vi. Bell's App. p. 153.

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10th October 1842, remain operative to any extent, or can be at all looked at, because that latter writing expressly annuls and sets them aside, or demonstrates that the writer no longer entertained any such purposes as he had previously expressed. I apprehend, therefore, that these must be laid aside entirely.

The notion, which was pressed upon us, of there being one general settlement, and that all the writings are to be clubbed together, so as to form something like a will, must also be laid aside as entirely inadmissible.

With regard to the writing of 10th October 1842, which is the first of the two writings chiefly founded on by the pursuers, we find the words, "I wish to establish in the town of Dundee, in the shire of Forfar," &c. What would be the effect of such words as burdening the next of kin, if followed out by anything to which the wish might be applied, it is not necessary to consider; for there follows nothing to which the wish can now possibly apply. The words which follow, so far as they could imply the object of the testator, have been struck out. In the other cases referred to, no question similar to the present arose. In the case of Martins v. Gairdner, it is true that the testator struck out in one place the Christian name of his sister, but he left it standing *twice* in other parts of the deed; and as he could not have two sisters married to the same man at the same time, the Court treated the case as one so clear and plain that they had no difficulty in supplying the name in the place where it was deleted. In the other case referred to,—the Scotch case,—there were clear subsequent authoritative words, sufficient to effect the wish of the testator. The present case seems altogether unprecedented. The whole object of the testator, supposing such an object to have been sufficiently expressed by the deleted words, is struck out; and the pursuers propose to restore it by conjectures, from something in the subsequent writing of 20th October 1842, which is in itself imperfect. They argue that from the words in the latter writing, "I hereby wish only 100 boys to be admitted in the hospital at Dundee," coupled with the words which still exist in the prior writing, it must be inferred that the testator then believed that the former writing existed entire,—that it was a valid operative writing,—and that we can therefore now supply the defect in that writing of which they say he must be held to have been unconscious. Now, this will never do. What are we to supply? Mr Patton argued that the only thing wanting to give significance to the writing of 10th October was the word "hospital;" and we are asked to restore that word,—to restore the very word which the testator had struck out, and without which the writing has no meaning; in short, we are asked to give meaning to a writing which the testator himself had deprived of all meaning.

A conjecture is made as to when the deletion in the first writing took place. If one were to form any conjecture on the subject, I suppose it was when the testator contemplated an hospital of a different description—viz. the one described in the improbative writing of 6th September 1846; and upon such a supposition as this, it is plain that the argument founded upon the terms of the writing of 20th October, or of any of the subsequent holograph writings, completely falls to the ground. But it is said that we are to take all these writings together, including even the writing of 6th September 1846, and that we are even to look at that which is not holograph, as proving the continuance of an intention to establish this hospital. Well, if we are to look at the writing of 6th September, it is clear that Mr Morgan's intention in regard to the hospital, as expressed in the writing of 10th October, did not continue and subsist. We can never, however, allow, on any conjecture or supposition, the words cancelled in the writing of the 10th of October to be re-inserted, in order to give meaning and effect to it, or to any of the other writings.

I confess my notion of the whole case is, that these papers must be taken as mere scrolls or jottings, from which the deceased intended at some time or another to have a settlement made up; but I think there is no valid or effectual writing that the Court can recognise. If they did, it would be the strongest case of making a will that was ever attempted.

Lord Murray.—I have never been able to take any other view of this case than that which has just been expressed by your Lordship. No doubt this Court, in a great many cases, has sustained bequests or legacies on an infinite variety of grounds. These grounds cannot, however, be transferred from one case to

another, so as to make one an authority for the rest; and it is quite absurd to treat such cases as governed by any general rule. Each case must be decided with reference to its own circumstances. Now, what I ask in this case is,—Have we any fair indication of a completed intention on the part of the testator to found an hospital at Dundee? For my part, I can see nothing more in these writings than a variety of jottings, shewing that various ideas had been passing through Mr Morgan's head about an hospital,—about the number of boys to be admitted into it, and so forth. I quite agree with Mr Patton that if we could take a word from one writing and put it in the place of a word scratched out in another, it might help to explain the obliterated writings, and make them more intelligible than they are now. On any such principle, however, we would have a great deal to do here; for indeed the great proportion of the writings are scratched out. They are almost all scratches,—the words left being *rari nantes in gurgite vasto*. Yet of these scratched-out writings, we are seriously asked to make a will to constitute an hospital. One cannot constitute an hospital without a great deal of reflection and consideration; and it requires the skill of a practised conveyancer to bring all the things together which are requisite for that purpose. I see nothing in these writings to induce me to believe that the testator ever came to any final purpose about this hospital. I have no evidence before me,—I do not say of a legal nature, —but even of anything approaching to final intention to that effect; and I cannot therefore see any ground for disturbing the interlocutor of the Lord Ordinary, or for doubting that the pursuers have not established their case. In short, taking these writings, with their double and single scratchings, I cannot make a will out of them.

Lord Wood.—There can be no doubt of the soundness of the rule of construction, that the intention of the testator is to be given effect to, and that it is to be gathered from the whole testamentary writings left by him. They are to be viewed as one settlement, although they may be several in number. But while, in a general way, all writings having reference to, or purporting to deal with, the disposal of a testator's estate may be called testamentary, still, in its more strict and correct meaning, *that* only can be said to be a testamentary writing which is of such a description as to be capable of affecting the distribution of the estate. In that view, the writings must be probative, unless the defect be supplied by some special declaration by the testator, and in circumstances to which the present case has not a vestige of resemblance. Further, they must contain an expression in apt and intelligible language of the testator's intention. It is to such writings that the rule of construction applies.

In the present case, the testator, the late Mr Morgan, left no general settlement for the regulation of the succession to his property, and in connection with which any other writings might require to be considered in determining their effect. He only left several writings, whereby, it is said, he bequeathed or disposed of portions of his estate, and the efficacy of which can derive no aid from any reference to a general settlement by the testator,—none such existing.

Now, as regards these writings themselves, I shall first advert to the last in date, viz., that of the 6th September 1846. In the first place, I think, that, looking to the summons as laid, it is not in the case. The conclusions apply to an alleged bequest entirely different from the one supposed to be contained in that writing. In the second place, granting that the writing were within the summons, it does not appear to me that it is of any validity, even if the words alleged at the bar to be holograph were so, which, however, is not averred in the record, and is now denied. The case of M'Intyre, cited to support the validity, was one of circumstances essentially different. In the third place, I may observe, that if there were anything of efficacy in the writing, it would be entirely destructive of the pursuers' case, as founded on the earlier testamentary writings:—And even if (as seemed to be Mr Patton's view) it is only to be looked to as indicating intention, still it is not the intention said to be expressed in the other writings.

Then, with regard to these other writings, Mr Patton, to some extent, founded on that of 4th January 1836, which is cancelled or revoked by the writing of 10th October 1842. But referring to what your Lordship has already said, it does not occur to me that anything was submitted with respect to it which requires observation. Therefore I pass at once to the writing of 10th October 1842. A portion

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of it is deleted, which confessedly was done by Mr Morgan; and I must hold that it was purposely and deliberately so deleted. It is impossible to listen to any contrary suggestion. The deleted portion therefore forms no part of the writing. But if the writing is read *minus* this no longer existing portion, it is unintelligible. Supposing,—although by no means admitting, for it is a point on which I avoid giving any opinion, as being unnecessary,—but supposing that the form of expression used, "I wish," might have been sufficient, if the writing of the 10th October had remained entire to constitute *per se*, or, together with that of the 20th, a bequest which would be a burden on the representatives taking the testator's estate, still, as it actually stands, it is only the intimation that he had a wish, but what that wish was is not stated. Whatever it was, it has not pleased the testator to express it. Nay, it is even worse, for although deleted, the deleted part can be read, (and which, for the purposes of seeing whether it is *in substantialibus*, may competently be done), and when read, we see from it that the deletion is a deletion *in substantialibus*, inasmuch as it is one in the whole substance and body of the supposed intended bequest, so that in truth it is a recall of what the testator had expressed as his wish. It may have been his wish, but when the deletion was made, it ceased to be so; or, at all events, that writing absolutely ceased to be the exponent of any wish on the part of the testator in the matter. It is the same as if the deleted portion had never been inserted in it. What then is the consequence? Unavoidably this,—that the writing of 10th October is no longer a testamentary writing in the proper sense, as being capable of affecting the distribution of the testator's estate by any bequest therein made, although it may be good as a revocation of former wills, which portion of it remains. As respects the alleged bequest, and which may, at one time, have stood part of the deed, so as to be effectual (but upon which point I give no opinion), the deed is not a probative instrument, and cannot be restored. If it had consisted of distinct parts,—and so far as regards the revoking or cancelling portion of it, it does contain a separate and independent part,—it may remain probative as to them; but as respects the cancelled part—the part taken out of it by deletion, and all that follows, which is inseparably connected with, and dependent on, the deleted portion,—it is improbative. The deletion is fatal to it. It is not a legal or effectual instrument. It is in fact,—so far as that part of it is concerned,—in the same condition as if it had never been made or did not exist. That portion of it cannot be restored or replaced by supplementing it from without by something extrinsic of the writing. This is the doctrine laid down both here and in the House of Lords in the case of Grant v. Spepherd, where the erasure was in a part of the dispositive clause of the deed there in question, upon which all the rest of the deed hung.

Well, then, if that be the state of the case as respects the writing of 10th October 1842, what is to be said as to the one of the 20th October of the same year? I shall assume that the deletion in the former was made prior to the latter being written,—a fact, however, of which there is no evidence, and of which, I apprehend, none can be competently adduced, so that it is impossible to say at what date it was made. Now, it is not contended that, *per se*, the writing of the 20th is a testamentary writing, which can affect the distribution of the testator's estate. How, then, is it to operate, to raise a valid bequest? The suggestion was, that as it makes mention of an hospital at Dundee, and as you can still read the word "hospital" in the deleted part of the writing of the 10th October, with the rest of the words deleted, you are to replace in it these words, or at least the word "hospital," and then, having done so, you are to read the writing of the 20th as having reference to that of the 10th, as so restored or renovated. The writing itself confessedly will not do. It is necessary to have the prior one,—which, of itself, also is inoperative; but the last in date is to help out the first, and so make an effectual bequest by a valid instrument. This is a most singular proposal. Because the word "hospital" is found in a subsequent writing, it is to be inserted in another, from which it was of purpose deleted; and the invalid deed is thus to be converted into a valid one. In short, the Court is to undo that which the testator deliberately did,—for so it must be held. You are to put into an instrument that which the testator deliberately took out of it; and this upon some conjectural view, derived from the writing of the 20th October, that he must have supposed it still remained part of the writing of 10th October, although that writing was before his

eyes when he wrote the one of the 20th October. I cannot imagine anything more extravagant. But, in truth, it is suggested with a total forgetfulness of the legal state and character of the writing of 10th October, which, as respected any bequest it might have contained, had—as I have already remarked—become a legal nullity. So far it had been rendered an improbative, invalid, and ineffectual instrument, and was incapable of being brought to life again by any process of resuscitation. Nothing remained in which any words can be inserted. Legally, there is no writing in which to insert them. To place them in the blank said to be made by the deletion, would be to apply the signature of the testator to that to which he has not applied it, or rather, to that which he withdrew from it. This would be to falsify the writing as left by the testator himself.

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All that can be said of the writing of 20th October (if even that), is, that it may shew that the testator imagined he had done something he had not done, and which he proposed to alter. But how can that raise into existence the thing which has not been done, or which was undone? The testator was in error, and by his error, it may be, his intentions, whatever they were, have become of none effect, and so it has happened in many cases.

I agree with the Lord Ordinary that "there is insuperable difficulty in connecting the one writing with the other." Reading the first, as according to the rules of law it must be read, by holding the part deleted as *pro non scripto*,—it is radically defective, and so must be denied legal effect. Reading the second, as referring to a prior writing,—where is that prior writing regarding the hospital to be found? The two writings are not to be placed together, in order that a word or sentence in the one is to be transposed to the fitting place in the other, so as to make sense out of both, when neither is intelligible in itself. But this is what the pursuers would have to do; for without transposition, but adding merely the latter to the first, and combining the two in their order, the writings would not be intelligible as a whole.

The pursuers say all the writings must be read as if forming one continuous instrument. I do not admit that; but if they were, it would not, I think, avail them. Even then, the deletion in the writing of 10th October would be fatal. Nothing could be introduced to supply the part deleted, and without it, all that remained would not be sufficient (apart from any objection on the ground of uncertainty) to constitute a valid legacy. There would be nothing from which the intention of the testator could be legitimately collected.

I shall only add, that upon the assumption that the deletion in the writing of 10th October was not made till a date subsequent to the writing of the 20th, or it may equally be, subsequent to that of the 16th June 1843, containing the legacy to Lord Fullerton, and the request to him, which was so anxiously pressed upon us as a material feature in the case,—but to which I cannot attach the slightest importance,—the whole argument of the pursuers becomes, if possible, even more untenable than upon the assumption of the deletion having been made prior to the 20th of October. And for anything that has been submitted to us, I can see no ground on which it can be held to be established that the deletion was not made after June 1843, nor am I aware, how, in conformity to decided cases, the reverse could be proved, or how it can be instructed at what date it was made. That is a matter which must remain uncertain; and being so, the case of the pursuers is, in my opinion, surrounded by insuperable difficulties.

Lord Cowan.—I have little to add to the observations that have been made by your Lordships.

The summons concludes to have it declared that "the testamentary writings left by the said John Morgan, and mentioned in the said condescendence, contain a valid legacy and bequest of the whole of the residue of his moveable means and estate, after paying legacies, debts, and charges of administration, or at least of so much thereof as may be necessary for the purpose of erecting and establishing in the town of Dundee, an hospital to accommodate 100 boys, and that the same are valid and effectual as testamentary deeds of the deceased to that effect;"—and the question is, whether these writings are effectual in law to constitute such a legacy as that claimed in the summons?

In considering this question, it is of importance to carry along with us the fact, that no general settlement or trust-disposition of the whole of this gentleman's

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estate has been left by him. Questions have occurred as to testamentary writings, and letters even, which have been executed with reference to powers reserved in a general settlement of the testator's affairs, or under the implied power of alteration competent at common law. We have no such case to deal with in disposing of the claim by the pursuers under the alleged testamentary writings found in the repositories of the deceased.

After considering the case with all the attention in my power, I must, in the first place, refuse to look at the writing of 6th September 1846. It is true that all the testamentary papers found in the repositories of a deceased are to be looked at; but we must first of all be satisfied that papers alleged to be so, truly are testamentary writings. The principle was never recognised, that because we are to look at all the testamentary writings left by a deceased party, to ascertain his will as to his succession, we are therefore to look at every scrap of paper found in his repositories, whether it is probative or not, or holograph or not. The writings must be such as to permit of their being read as containing an authentic expression of the testator's intention; and if they are neither tested nor holograph, they cannot be looked at. But the paper of 6th September is admitted to be in the handwriting of the sister, and to have been found in her, and not in the deceased's repositories. I must, therefore, put out of the case altogether this writing of September 1846.

The sole question is, whether, under the writings of 10th and 20th October 1842, such a legacy has been bequeathed as is concluded for in the summons? Now, as has been said, there has been left no general settlement. The deceased must be taken as having died intestate generally; but, no doubt, there may be a valid specific legacy by one who, otherwise, may have died intestate. That is an acknowledged principle in the law of Scotland; and we have recognised such bequests or legacies, where the next of kin has succeeded to the general estate on account of intestacy. The question is, whether these writings are of that character? None of the other writings have respect to the particular bequest sought to be enforced, except those of 10th and 20th October; and it is out of these that this specific bequest must be brought.

It is an admitted fact that the writings come under our consideration in the precise state in which they were left by the testator, and found in his repositories. I take that as the admitted state of the facts upon the record; and it was not disputed in the argument of parties. Therefore, we have to deal with these two documents as standing in the precise state and condition in which the deceased left them. That being the case, the legal presumption is, that the altered condition in which these papers have been found must have been done by the testator himself.—*Vide* case of Naismyth, House of Lords, 27th July 1821. Nothing was shewn or alleged to the contrary.

Now the writings are deleted in most important respects; and that raises two questions of law as to the effect of deletions like these. I don't know any other principle ever recognised in the law of Scotland than that contained in the passage quoted from Lord Stair. In that passage, when dealing with deletions, he says that they are fatal when they are made *in substantialibus*,—that when the words are altogether obliterated, so as to be incapable of being read, they are to be taken as deletions *in substantialibus*, invalidating the deed in which they occur; but that if the deleted words can be read, then they are to be read for the purpose of seeing whether they are *in substantialibus* or not. Accordingly, that was acted upon in the case of Shepherd v. Grant, both in this Court and in the House of Lords, although not in the extreme way contended for by Mr Penney, viz., that the deed in all its parts is rendered inoperative and void. It was not necessary to go that length; and in reading the Lord Chancellor's opinion, you will find that he guarded himself against any such extreme conclusion. What was held was, that the essential vitiation destroyed that provision of the deed in which it occurred, and whatever depended on it; that the deed was to that extent to be held a bad deed.

Taking this principle, what have we here? In the deed of 10th October, we have the word "hospital," and certain words which follow it, deleted. I think that deletion blotted out all that was there with reference to the hospital. Then we come to the deed of 20th October. This deed seems to me entirely an ancillary or auxiliary deed. It was intended to supplement something which the writer

intended to make as a provision of the will and settlement of his estate after his death; but if it is an ancillary deed, and if the main deed is rendered void by reason of the deletions in it, does not the ancillary deed become null too? It is plain upon its terms that it cannot of itself be taken as giving a legacy. It merely wishes so and so, in reference to something already declared; but if the primary bequest has been altogether expunged or blotted out, how can this ancillary deed stand? No. 199. — June 27, 1857. Halliday v. Morison.

The Court has never recognised the principle that obliterations like these may be read in order to ascertain the intention of the testator. No authority was referred to for that; and, indeed, in the argument the pursuers did not contend for any such view; but merely, that the two writings taken together, so far as not deleted, were enough to support their demand. I concur with Lord Wood, and on the same grounds, in thinking it impossible so to combine the two writings as to hold them to contain an effectual declaration of the testator's will.

One word more. It is to guard myself against being held committed to the opinion indicated by the Lord Ordinary in his note, that supposing these two writings of 10th and 20th October were otherwise unexceptionable, they are so expressed as to constitute a valid legacy or will. I am not at all satisfied on that point. The Lord Ordinary refers to the case of Dundas; but that is a case where there was a complete testamentary deed; and the question had reference to a supplementary codicil to that deed. I beg, therefore, to be understood as giving no opinion on the question whether these writings, though undeleted, would be sufficient to establish the legacy to the effect concluded for in the summons. I think it is somewhat problematical whether there ever was anything in the testator's mind beyond a vague wish to make a settlement of the kind pointed at, but which he never carried into effect by the execution of a valid deed.

The Court adhered, and found the pursuer liable in additional expenses.

John Rogers, S.S.C.—Webster & Renny, W.S.—Adam & Kirk, W.S.—Agents.

No. 200.

Mrs Isabella Graham or Halliday, Pursuer.—*Logan.*
Mrs Jean Carruthers or Morison, Defender.—*Pattison—F. W. Clark.*

Reduction—Imbecility—Fraud.—In a reduction of a disposition, averments which —(*aff.* judgment of Lord Ardmillan)—*Held* sufficient to entitle the pursuer to an issue, on the ground of mental incapacity, but not of fraud and circumvention.

Process—Jury Trial—Notice—Time of Trial—Act 13 & 14 *Vict. cap.* 36, *sect.* 40. —A reclaiming note for the pursuer was refused. He then, on 23d June, moved the Lord Ordinary to fix a day for trial before himself, and the defender gave notice of trial for the sittings;—*Held* (1), that the defender could not thus deprive the pursuer of the lead, and notice accordingly discharged; but (2), that by trying a desperate point the pursuer had created delay, which entitled the defender to indulgence in preparing for the trial, as he was not bound to be preparing for trial during the dependence of the reclaiming note; and therefore the trial postponed to the sittings, although the fact that the Lord Ordinary could only fix a day just at the end of the session was not a ground for such postponement.

The pursuer, Mrs Isabella Graham or Halliday, was the natural daughter of Anne Palmer, to whom and her sister Elizabeth Palmer, jointly, and to the longest liver of them, certain trust-subjects were conveyed by their brother, now deceased; whom failing, to the pursuer. Elizabeth Palmer, having survived her sister, disponed these subjects in 1839 to the late Alexander Morison. The pursuer now brought a reduction of that disposition on the ground of facility, fraud, and circumvention, which action was directed against Mr Morison's widow, who now occupied the property. June 27, 1857. — 1st Division. Ld. Ardmillan. C.

The pursuer alleged that "the said Elizabeth Palmer, besides being blind, and labouring under other physical defects, was a person of great mental imbecility, utterly incapable of transacting or understanding business of the simplest description, and was unable, in any way, to take the management

No. 200. — June 27, 1857. Halliday v. Morison.

of her own affairs. She was, indeed, generally regarded by her friends and acquaintances as little, if at all, removed from idiocy. Anne Palmer, on the other hand, her sister, and the pursuer's mother, was a person of shrewdness and ability, and, while she lived, took the management of the subjects which the sisters jointly possessed between them. On her death, which occurred on or about 7th March 1833, Elizabeth was left without any one to look after, or attend properly to her interest; and, in consequence of this, Thomas Jardine, writer in Moffat, appears to have assumed the entire management of her affairs; that he, without authority from, and without even the knowledge of, the said Elizabeth Palmer, obtained her infeft in the subjects conveyed to her and her deceased sister;" that the rents were sufficient for her wants, but that "notwithstanding of this, Mr Jardine, to serve purposes in which Elizabeth Palmer had no interest, prepared a bond for L.200 over the property; the money was to be lent by his own clients, and no other agent, so far as the pursuer knows, was employed." That without instructions from Elizabeth Palmer, or making her aware of what was proposed to be done, he prepared a bond, and having brought it to her for execution, he went through the formality of taking her by the hand, and making her touch his own pen, he acting as notary on the occasion; that Elizabeth Palmer never understood what took place; that the creditors in the bond being afterwards desirous of getting the loan paid up, Jardine brought the subjects to sale, at first unsuccessfully, but that "at length, on or about the 4th of February 1839, Jardine contrived to prevail upon Archibald Morison, mason in Moffat, late husband of the defender, Jean Carruthers or Morison, and now deceased, to purchase the subjects in question for the sum of L.411, being about one-third of their value. The said Archibald Morison was well aware of the mental imbecility under which Elizabeth Palmer laboured, of her utter inability to understand or transact business, and that any deed executed by her must, if brought under challenge, be found altogether null and void. Nevertheless, as the price asked was extremely small, he agreed with Jardine to become the purchaser, and take any risk of challenge which might afterwards arise." The pursuer then stated that the disposition to Morison was not understood by Elizabeth Palmer, and was not read over to her; that she had never received payment of the price; that she the pursuer had refused to homologate the transaction; that on the death of Elizabeth Palmer, the pursuer was entitled to succeed to the subjects; that "the pretended sale and disposition of these subjects brought under reduction, were fraudulently carried through and obtained by the said Thomas Jardine and Archibald Morison; they were not the act and deed of the said Elizabeth Palmer. She was not at the time of sound disposing mind; granted no authority to Jardine, or any other person, to effect and execute the same for her; was not at the time aware of what was being done, and remained ever afterwards in ignorance thereof. The said sale was a transaction into which no persons capable of managing their own affairs would have entered."

The pursuer proposed to take the following issues:—

"1. Whether the disposition No. 10 of process, bearing to be made and granted by the deceased Elizabeth Palmer, on the 4th day of February 1839, is not the deed of the said Elizabeth Palmer? and,

"2. Whether, on or about the said 4th day of February 1839, the said Elizabeth Palmer, being of a weak and facile state of mind, the late Thomas Jardine, writer in Moffat, taking advantage of her said facility, did, by fraud or circumvention, impetrate or obtain the said deed from the said Elizabeth Palmer? and whether the defender's author, the late Archibald Morison, carter, Moffat, accepted of the said deed in the knowledge of the weakness and facility of the granter, and the fraud and circumvention by which the same was obtained?"

The defender pleaded;—That the pursuer had not set forth title or interest to insist in the action, and had made no relevant statement to support the grounds of reduction maintained. "3. Separately, there is no relevant statement to support the reduction on the ground of fraud and circumvention, or of defect in the solemnities required by law." No. 200. — June 27, 1857. Halliday v. Morison.

The Lord Ordinary, on 4th June 1857, pronounced the following interlocutor:—"Finds that the pursuer's averments on record are sufficient to entitle her to prove that the deed sought to be reduced is not the deed of Elizabeth Palmer, and approves of the first issue proposed by the pursuer: Finds that the pursuer has not relevantly and sufficiently alleged against Archibald Morison fraud and circumvention, as actor or participant in the act of Jardine, in procuring from Elizabeth Palmer the deed sought to be reduced: Finds that the pursuer has not relevantly and sufficiently alleged that Archibald Morison was in the knowledge that the said deed was procured by Jardine from Elizabeth Palmer by fraud and circumvention: Finds that no special defect in the solemnities required by law has been alleged: Therefore sustains the third plea in law for the defenders; and appoints the cause to be enrolled for further procedure, reserving all questions of expenses." *

The pursuer reclaimed; but the Court, without hearing the respondent, refused the note, and remitted to the Lord Ordinary to proceed with the cause.

On 24th June, the case again came before the Court as to fixing a time and place of trial. The issues having been adjusted on Saturday the 20th June, the pursuer, on Tuesday the 23d, moved the Lord Ordinary, under sect. 40 of the Court of Session Act, to fix a day for trial before himself. His Lordship continued the cause till the following Saturday, for the purpose of doing so; but, in the meantime, the defenders gave notice of trial for the sittings, thereby depriving the pursuer of the lead. The case now came before the Court on the pursuer's motion to discharge the notice of trial by the defender.

Clark, for the pursuer, maintained that such notice was altogether irregular. Besides interfering with the pursuer's lead, it would also have the effect of taking the case from the Lord Ordinary.

Pattison, for the defender;—This notice is only in accordance with the practice hitherto observed.

Lord President.—It is fixed that a pursuer cannot be deprived of his lead in this way. This notice must be discharged.

The defender's notice having been accordingly discharged, the pursuer then moved the Lord Ordinary to fix the day of trial for the 15th July.

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* "Note.—The deed sought to be reduced is a disposition of property, not a testamentary deed. The pursuer alleges that the price was very inadequate. The averments of mental incapacity appear sufficient, if proved, to support the conclusion for reduction on this ground; and the facts must be investigated.

"But the deed is dated in February 1839, and this action is raised in November 1856, after the death of Mr Jardine, the agent of Elizabeth Palmer, who is alleged to have acted on her behalf, and to have carried through the transaction of sale. He was not the agent of Morison, and for his acts Morison is not responsible. The pursuer does not represent Elizabeth Palmer; and it is the condition of the question in regard to fraud and circumvention, that Elizabeth Palmer, if not circumvented and induced by fraud to grant the deed, was capable of doing so. In such circumstances, distinct and specific averments of fraud are necessary, and the defender's author, Morison, must be distinctly alleged to have been participant in, or cognizant of, the particular fraud set forth. This has not been done; everything here is vague, loose, and indefinite on these important points; so much so, that action cannot be sustained, except to the effect and extent involved in the first issue."

No. 200. The defender objected; and the Lord Ordinary, of this date, reported the cause.

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Pattison, for the defender;—The trial ought to be fixed for the sittings. By the pursuer's own conduct in reclaiming much time has been wasted, and during a valuable period of the session, from the 3d to the 20th June. She is not now, therefore, entitled to hurry on the trial for the third last day of the session. The Court is not bound to grant this motion, and it is only just to the defender to fix the trial for the sittings.

Logan, for the pursuer;—No reasonable cause has been shown for refusing this motion. During the currency of the reclaiming note, the defender ought to have been preparing for the trial, because it was fixed that the pursuer was entitled to at least one of the issues proposed by her. The objection to the pursuer's motion practically is, that the defender would prefer having the case tried at the sittings. That was not an objection which the Court would sustain.[1]

LORD PRESIDENT.—This objection is put on two grounds—1st, the period of the session; and, 2d, the limited time for preparation since the judgment of the Court on the issues. I do not feel disposed to give effect to the first ground; but in regard to the second, I think it is in the circumstances reasonable. There has been apparently no great hurry on the part of the pursuer. The issues were adjusted by the Lord Ordinary on grounds which were very plain. We were quite clear upon the matter too, but by trying that desperate point, the pursuer delayed the case, and therefore I think it is reasonable that the parties should have a few more days to prepare for the trial. The defender was not bound to be preparing for trial during the currency of the reclaiming note. The pursuer is to blame for this delay; and when the only delay asked is for a week or so, I think it is a very reasonable request.

The rest of the Court concurred.

TRIAL fixed for the sittings.

WILLIAM MACKERSY, W.S.—JOHN M'CRAKEN, S.S.C.—Agents.

No. 201. THE CARRON COMPANY, Pursuers.—*Penney—Moir—Mackenzie.* HENRY TIBBATS STAINTON AND OTHERS (Stainton's Trustees), Defenders.—*D. F. Inglis—Young.*

Process—Jury Trial—Remit to an Accountant before answer.—In an action of accounting, which the pursuer desired to have sent to a jury at once, the Lord Ordinary, before farther procedure, remitted certain points to an Accountant, thinking his report might supersede the necessity of a jury trial, and would be useful in any view. The pursuer reclaimed, but the Court adhered, making the remit "before answer."

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SEE supra, p. 318.

The point to which the attention of the Court was now directed was thus stated by the Lord Ordinary in a note:—

"This is an action of great importance to the parties, from the magnitude of the sums involved, the amount of principal and interest concluded for, as at 31st December 1851, being L.108,490, 19s. 4d.

"The pursuers contend that the case should be sent at once for trial by jury, but this is opposed by the defenders; and the Lord Ordinary thinks that the most expedient course, in the first instance, is to obtain a report from an Accountant on the special points referred to in the interlocutor, leaving it to be afterwards determined, if any further inquiry shall be found necessary, what course of investigation should be adopted.

[1] Mushet v. Duke of Buccleuch, 2d Feb. 1856, ante, vol. xviii. p. 486.

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"This is not one of the enumerated causes which it is imperative to try by a jury. It was originally brought as a simple action of accounting, as will be seen from the summons raised on 17th July 1855, which concludes against the defenders for L.69,617, 1s. 6d. of principal, and L.38,873, 17s. 10d. of interest, said to be due upon Mr Stainton's accounts at 31st December 1851,—all conform to a particular state of debt produced, No. 6 of process. Against this action the defences of settled account and *mora* were pleaded. With the view of obviating these defences, the pursuers raised a supplementary summons on 29th January 1856, concluding to have it found and declared that the accounts rendered by Mr Stainton from 1825 to 1851, 'are false and fraudulent, and that the sums therein stated as charges against the pursuers were, to the amount of L.69,617, 1s. 6d., fraudulently appropriated by the said deceased Henry Stainton to his own use out of the funds of the pursuers in his hands;' and this is followed by petitory conclusions similar to those in the original summons. The supplementary summons having been conjoined with the original one, a record was made up and closed, and the two leading pleas maintained by the pursuers are, '1st, the defenders, the trustees and representatives of the late Henry Stainton, are bound to hold just count and reckoning with the pursuers for his intromissions with their funds and effects while acting as their agent in London, and to make payment to the pursuers of such sum as may be found to be due to them upon the accounts, with interest as libelled;' and '2d, the said deceased Henry Stainton having fraudulently appropriated to his own use the funds of the pursuers to the extent stated in the condescendence, the pursuers are entitled to recover the amount with interest from the defenders, as his trustees and representatives.'

"In accordance with these pleas, the pursuers at first submitted two issues for trial by a jury, one of simple accounting, and the other raising the question as to the alleged fraudulent appropriation of their funds by Mr Stainton to the extent of L.69,617, 1s. 6d. of principal, as specified in the state of debt, No. 6 of process. They have since given up the first issue, and they propose to go to trial on the second. After deliberate consideration, however, the Lord Ordinary is satisfied that to send the case in its present shape to be tried by a jury, would be extremely inconvenient and unsatisfactory, and expose the parties to the greatest hazard of injustice and miscarriage.

"Laying aside the defences founded on settled account and *mora*, it will be seen from the record that the main question upon which the parties are at issue relates to the remuneration to which Mr Stainton was entitled for conducting the business of the London agency from 1825 till his death in December 1851. He had acted as agent of the Carron Company in London from the year 1808 till he died, and the business was very extensive. Prior to 30th June 1825, Mr Stainton appears to have been remunerated for his services as agent by a commission of five per cent on ready money sales, and on open accounts for sales on credit, exclusive of military stores; a commission of two and a half per cent on military stores sold by him to merchants, and a salary for conducting business with the Board of Ordnance and other public boards, and with foreign powers, at the rate of L.250 a-year during war, and L.100 a-year in the time of peace. He was also allowed the expenses of his journeys to and from Woolwich, and the sums disbursed by him while there for himself, and with the yard and board officers. It is averred by the pursuers that after 30th June 1825, this mode of remuneration was discontinued by a resolution of the Company, and that from that date to the close of his agency in 1851, Mr Stainton was to be restricted to a fixed salary of L.2000 per annum, with a free house, and allowances for coal, candle, and taxes. This is denied by the defenders, who put a different

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construction on the resolution of the Company, and contend that it only refers to one year, from 30th June 1825 to 30th June 1826.

"According to the view the Lord Ordinary takes of the case, this point will be found to be at the root of the whole controversy between the parties, and it appears to him to be one peculiarly adapted for investigation by an Accountant:—Was Mr Stainton entitled to a commission upon the sales from 1825 to 1851, or was he restricted to a fixed salary of L.2000 a-year during that period? If the accounts be still open for investigation, it is obvious that the ultimate balance to be brought out in December 1851 will be most deeply affected according as the one view or the other is adopted.

"On the record the pursuers have distinctly explained the mode in which they have made up the state of debt, No. 6 of process, bringing out the principal sum of L.69,617, 1s. 6d., and L.38,873, 17s. 10d. of periodical interest, as due by the defenders in December 1851. They state, that in the half-yearly accounts rendered by Mr Stainton from 30th June 1825 till his death in December 1851, there are no charges entered either for commission or salary *eo nomine;* that there are general entries in these accounts under the heads 'sundry charges and expenses,' and the like, which are placed to the debit of the Company, and to the credit of Mr Stainton, in his private books; that these entries are unvouched, and that there never were any vouchers applicable to them; that all entries of this description, from June 1825 to December 1851, have been brought together in the state, No. 6 of process, and that the sundries thus unvouched and improperly charged amount to L.122,617, 1s. 6d., exclusive of interest. From this the pursuers deduct L.2000 per annum as Mr Stainton's salary, from 1825 to 1851, and thus bring out the sum of L.108,490, 19s. 4d. of principal and interest due by the defenders at 31st December 1851.

"That these general entries of 'sundry charges and expenses' were brought under the notice of the Carron Company, in these terms, in the half-yearly accounts which Mr Stainton rendered to them from 1825 to 1851, is not disputed. And the defenders maintain that the Company and its managers, when they received these accounts periodically, must have known what these entries were intended to comprehend, and must have satisfied themselves of their accuracy; and that, at all events, if any explanations or vouchers were required, it was their duty to call for them at the time when the transactions were of recent date, and admitted of being easily cleared up. As to the general allegations, that the entries are false and fraudulent, and that Mr Stainton fraudulently appropriated the funds of the Company to his own use, the defenders contend that they are mere random averments, made in bad faith, which ought to be disregarded, and that the case on its merits must be dealt with substantially as an action of accounting.

"Whatever opinion may be formed on these points, the Lord Ordinary thinks it of essential importance, as the case now stands, to obtain a report from an Accountant, with the view of ascertaining, 1st, Whether the accounts periodically rendered by Mr Stainton, from 1825 to 1851, were settled, approved of, or passed by the Company; and, 2d, Whether the general entries in the pursuers' state of debt, No. 6 of process, consist of commission charges on sales instructed by the transactions recorded in the books and accounts, and of travelling expenses, or other disbursements connected with the London agency, for which it is not usual to take or preserve vouchers.

"In a certain result of that investigation no further proceedings may be necessary. But, even if the case should ultimately go to trial before a jury, it is thought the greatest advantage will be derived from the report of the Accountant on the special points embraced in the remit."

The Lord Ordinary, on 20th March 1857, pronounced the following interlocutor:—"Having heard counsel for the parties, and considered the closed

record, before further procedure, remits to Mr Archibald Borthwick, Accountant in Edinburgh, to examine the books of the Carron Company, and the accounts and documents produced, with reference to the averments of the parties contained in the record, and to report,—1st, What was the mode in which the late Mr Henry Stainton kept the books and accounts applicable to the business carried on by him as agent for the Carron Company in London: 2d, Whether the accounts which were transmitted by Mr Stainton half-yearly to the Company, from 30th June 1825 till his death in December 1851, appear to have been examined periodically by the Company, or those acting for them; and, if so, to state the nature of the examination which took place, to what extent vouchers were exhibited or called for, and how far explanations were asked or given by correspondence or otherwise, and whether the accounts so rendered appear to have been settled or approved of, adopted and passed by the Company: 3d, What were the charges allowed to Mr Stainton in name of commission, or otherwise, for conducting the business of the London agency prior to 30th June 1825, and in what manner these charges were entered in the accounts periodically rendered by him to the Company: 4th, What charges appear to have been made by Mr Stainton as remuneration for conducting the London agency from 30th June 1825 till December 1851, and in what manner these charges were entered in the accounts periodically rendered by him as aforesaid: 5th, Whether there are any entries in the books and accounts of the Carron Company, or of the London agency, shewing that after 30th June 1825, Mr Stainton was to be remunerated, not by charging the commission and other allowances previously made to him, but by a fixed salary of L.2000 a-year, with a free house, and certain allowances for coal, candle, and taxes: 6th, Whether the general entries and charges in the state, No. 6 of process, which are objected to by the Carron Company as unvouched, appear to consist of charges by Mr Stainton for conducting the business of the London agency from 30th June 1825 till December 1851, and whether the charges made by him for conducting the London agency after 30th June 1825—having regard to the extent of the business and other circumstances—appears to correspond with the commission and allowances made to him prior to that date; and whether there are means for ascertaining the particulars of which the general entries in the said state are composed, to what extent they relate to charges for commission or remuneration which are instructed by the business transactions recorded in the books and accounts, and how far they appear to consist of charges for outlay in travelling or other expenses connected with the London agency, for which it is not usual to take or preserve vouchers, or for which vouchers cannot now be reasonably required, keeping in view the length of time that has elapsed since the accounts were rendered, and the death of Mr Stainton and Mr Dawson, the manager at Carron, before the present action was raised: And, generally, to report upon any other points that may appear to the Accountant to be material for the information of the Court, with reference to the transactions in the state, No. 6 of process, founded on by the pursuers: With power to the Accountant to hear parties, and call for such books and documents as he may think necessary."

The pursuers reclaimed, and pleaded;—That the interlocutor remitted matters to which they objected, and ought therefore to be recalled. The proper course was at once to adjust issues for trial.

The defenders pleaded;—That the only object of the remit was to narrow the points for discussion. Upon the points embraced in it, both parties had made averments.

Lord President.—It is not necessary to make many observations upon this case. I shall only say that there are points proposed to be investigated, which it would be very desirable to have ascertained before going farther; and there are none of

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them which, I think, would be unsuitable. But it is right to guard against it being supposed that this is taking evidence which will prevent parties going farther; and therefore I would suggest, that instead of the words "before farther procedure," the interlocutor should be "before answer."

LORDS IVORY and CURRIEHILL concurred.

LORD DEAS.—I concur in the course suggested by your Lordship. I do not say that there may not be, ultimately, a jury trial here. The case may turn out to be entirely one of accounting, or it may not. I think the report of an Accountant necessary, even though it were for no other purpose than to enable us to judge whether there ought to be a jury trial or not.

THE COURT pronounced the following interlocutor:—"Adhere to the interlocutor of the Lord Ordinary reclaimed against, with this variation, that the words 'before farther procedure' shall be deleted, and the following words inserted in their room, viz. 'before answer, and without prejudice to any course of investigation that may hereafter be thought proper:' Find the reclaimers liable in expenses since the date of the interlocutor reclaimed against; and remit to the Auditor to tax the same, and to report to the Lord Ordinary; and remit to his Lordship to decern therefor, and to proceed farther in the cause as shall be just."

GIBSON-CRAIG, DALZIEL, & BRODIE, W.S.—MACKENZIE & BAILLIE, W.S.—Agents.

No. 202.

THOMAS M'EWAN, Petitioner.—*Cook.*
MRS MARGARET DRUMMOND, Respondent.—*A. B. Shand.*

Judicial factor—Statute 12 & 13 *Vict. cap.* 51, (*Pupils Protection Act*) *sect.* 27.—A factor *loco tutoris* to pupils within a few years of minority allowed to withdraw on the statement that his cautioner had died, and he was unable to find new caution in consequence of the annoyance his former cautioner had experienced from litigations at the instance of the pupils' mother.

Question, Whether a factor *loco tutoris* can only get quit of his office on cause shewn to the satisfaction of the Court?

June 27, 1857. — 1ST DIVISION. L.

THE petitioner was appointed factor *loco tutoris* to the pupil children of the late John Comrie in 1849. He now presented this petition for recall of his appointment, and for the appointment of a new factor. He stated that the management of the estate of the pupils, which consisted mainly of their interest in a farm, had for some time been intrusted to their mother, but that she had married again, and had thereafter raised an action against the petitioner for aliment of the pupils, and for wages to herself as a servant during the period she had managed the estate, which claims were ultimately adjusted;—that the petitioner's cautioner died on 26th day of January last, "and on his death being intimated to the Accountant of the Court of Session, the Accountant has called upon the petitioner, in terms of the 11th sect. of the statute 12th and 13th Vict. cap. 51, to find and lodge new caution. The petitioner has been unable to find caution, his friends having refused to become cautioners for him in this factory, from the risk and annoyance which his previous cautioner experienced, in consequence of the litigations before mentioned, and he therefore makes the present application to have the factory granted in his favour recalled, and to have his accounts audited and adjusted, with a view to the discharge of himself and the executor or representatives of the said deceased Thomas M'Ewan, senior, his late cautioner, and the appointment of a new factor to take charge of the pupils' affairs."

The pupils' mother and another party upon whose application the petitioner was appointed, lodged objections to the petition, on the ground that a change in the factory would be inexpedient, as the pupils would soon

arrive at the age of minority, the one being twelve and the other ten years old. They had now no fault to find with the petitioner's management. His alleged difficulty in finding caution was a mere device to relieve himself of his office. He was a wealthy man; and, even if true, " he could readily avail himself of the provisions of section 27 of the Pupils Protection Act, by which caution might be limited, and the bond of a guarantee association accepted as sufficient." They therefore submitted that the present application should be refused.

No. 202.
—
June 27, 1857.
M'Ewan v.
Drummond.

The case was called on 20th June 1857.—

Cook, for the petitioner.—The Court are not in use to compel a person to remain in such an office when he is anxious to get out of it. It is not expedient to do so. The petitioner is also willing to pay the expense of this petition.

Lord Ivory.—I have very considerable doubt on principle as to recalling this appointment, and all the more if the application is to be dealt with on the footing of the factor not finding caution. If he refuses to find caution without assigning any good reason, it would be a most dangerous thing to allow him, in these circumstances, to withdraw from the factory. It has been said, in a case reported by Lord Hailes,[1] that "trustees must not imagine that whenever they are tired of their office they can slip their necks out of the collar and leave the trust to be extricated by the Court;" and it is an old principle, that if once a trustee accepts office, he cannot get rid of it by mere caprice. Now, a judicial factor is just a trustee, and if he accepts office he must assign reasonable cause for resigning. The Pupils Protection Act points out this general principle in all its enactments. A judicial factor cannot, as of right, ask for exoneration except at the termination of his office. Such I hold to be the general principle applicable to his resignation.

Then, with reference to caution, the question comes to be, whether the factor can really find caution or not? If he cannot, that is a good cause for accepting his resignation, for caution enters deeply into the safety of the estate, and it is the factor's duty, in these circumstances, to tender his resignation. But it is said that this factor is a wealthy man. I do not think we can take the estate off his hand at once; for, although he may not be in a position to get caution, he may be in a position to take advantage of section 27 of the Pupils Protection Act. Therefore the case turns entirely on this, whether reasonable cause has been assigned for this factor's resignation? Nothing now remains to be done but a very slight executorial duty, which will come to an end in two or three years. Shall the factor, now that he has been paid for all the trouble he has taken, put the estate to the additional expense of a new appointment, when he has it in his power to continue till the natural expiration of his office? It is not alleged that the trouble of the office does not suit his advanced age. It is only said that his actings had not been approved of by the pupils' mother. But all that is past; nothing now remains to be done but administrative duty; and therefore I think it dangerous to lay down a general principle that a factor is entitled, in these circumstances, to withdraw; and, so far as I can see, there is no admitted or proved reasonable cause in this case for doing so.

The case was continued. Of this date it was again called,—

Lord President.—I have again considered the point, whether a factor must shew some reason for thus withdrawing from his office. I give no opinion upon that general question. But I am of opinion that sufficient reason has been shewn for this party not continuing in office. This is not the bare case of a party proposing to withdraw without finding caution, but of caution having fallen by reason of the death of the cautioner. It is necessary for this party to find new caution. He says that his friends have refused to become caution, in consequence of the annoyance his former cautioner received. It is not always pleasant to ask one's friends to be cautioners, and not surprising that they should refuse. Therefore I think

[1] Carstairs, 20th January, 1776, 2 Hailes, 678.

No. 202. the petitioner has stated sufficient reason why he should not be prevented withdrawing, assuming such withdrawal competent. I also think that the proper course is to allow the factor to withdraw, and to appoint a new factor in his place.

June 30, 1857. Pilling v. Drake.

LORD CURRIEHILL.—I agree.

LORD DEAS.—I also concur.

LORD IVORY. — What I stated the other day rested on the abstract question rather than on a mature consideration of the present case. I was rather under the impression that there was not sufficient reason here for granting this application, but it is quite sufficient for me that it seems otherwise to your Lordships.

THE COURT pronounced the following interlocutor: — "Recall the appointment of the said Thomas M'Ewan as factor *loco tutoris* to the said Helen and Margaret Comrie, and appoint Mr Robert Spottiswood, accountant in Edinburgh, to be factor *loco tutoris* to them, with the usual powers, he finding caution before extract, and decern *ad interim*; and *quoad ultra* remit to the junior Lord Ordinary to enquire into the facts, and to report."

JAMES BUCHANAN, S.S.C.—PATERSON & ROMANES, W.S.—Agents.

No. 203. THOMAS PILLING, Appellant.—*Fraser—D. M. Smith.*
GEORGE DRAKE, Respondent.—*Napier—A. Mure.*

Bankruptcy—Process—Appeal—Proof—Stamp—Statutes 2 *&* 3 *Vict.* c. 41, *sect.* 128; 16 *&* 17 *Vict.* c. 53, *sect.* 7; *and* 19 *&* 20 *Vict.* c. 79.—A claim on a bankrupt estate was rejected by the trustee, as being vouched by an unstamped promissory-note. The Sheriff, by one interlocutor, allowed production of further evidence, consisting of the bankrupt's books, &c., then in the trustee's hands; and, on consideration of the productions made, he sustained the claim. This last judgment the trustee appealed against;—*Held* (*abs.* Lord Justice-Clerk), (1) that under this appeal it was competent to review the first interlocutor; (2) that that interlocutor was right, though granted within two months of the date of payment of the first dividend; (3) that the debt claimed being entered in the state of their affairs given in by the bankrupts, which was corroborated by entries in their books, it was the duty of the trustee to have called for further evidence, instead of rejecting the claim; and (4) that, in the circumstances, the claim was good.

Question, Whether a promissory-note, not properly stamped, may be looked at as evidence of a loan transaction.

June 30, 1857. 2D DIVISION. Sheriff-substitute of Forfarshire. I.

GEORGE DRAKE claimed as a creditor on the sequestrated estate of Reid and Saunders, leather merchants in Dundee, for the sum of L.166, 14s. The trustee rejected "this claim, because the vouchers produced are promissory-notes, and being unstamped as promissory-notes, are therefore illegal." In an appeal against this deliverance, the Sheriff-substitute of Forfar (Henderson), within two months of the payment of the first dividend, allowed the appellant to produce in proof of his claim "the bankrupt's books, and any other documents relating to the subject-matter of this appeal in the trustee's hands." After hearing parties on the productions made, he pronounced the following interlocutor, in which, and in the note, are stated the particulars of the claim and evidence:— "Finds that the appellant in his affidavit claims to be ranked on the sequestrated estate of the bankrupts for two different sums—viz. L.106, 14s., being for cash advanced in loan, as per acknowledgment therefor, dated 11th March 1856; and for the sum of L.60, being likewise for cash advanced in loan, as per acknowledgment, dated 26th March 1856, making together the sum of L.166, 14s.: Finds that the trustee by his deliverance rejected these claims, because the vouchers produced are alleged to be promissory-notes, and being unstamped as promissory-notes, that the claims therefor are illegal: Finds that this is the sole ground assigned by the trustee for rejecting the claims; and the deliverance sets forth, that if the claims had been admitted, the dividend would have been L.31, 5s. 1d., or thereby: Finds that the evidence rejected by the trustee with reference

to the first mentioned sum of L.106, 14s., is written upon a penny-stamp, and bears the signature of the firm of the bankrupts, and is thus expressed: 'Received from Mr George Drake' (the appellant) 'the sum of one hundred and six pounds fourteen shillings sterling, in loan, to be repaid one month after date, interest at the rate of 8 per cent (to be added) from 26th February.' And the other voucher granted for the L.60 is, in like manner, written upon a penny-stamp, and is also signed by the firm of the bankrupts, and is in these terms: 'Received from Mr George Drake the sum of sixty pounds sterling, in loan, to be repaid in two days:' Finds that, besides this last mentioned receipt or voucher, there is also produced a cheque by the appellant of the same date (26th March 1856), upon his account with the Dundee Banking Company, payable to the bankrupt Peter Saunders, or bearer, for L.60, and upon which cheque his name is indorsed, on receiving the money from the bank: Finds that, during the discussion of the appeal, and additional appeal remitted thereto, sundry excerpts had been recovered from the books of the bankrupts, and which excerpts are authenticated and produced: Finds that the evidence produced in support of the appellant's claim, to be ranked as a *bona fide* creditor upon the estates of the bankrupts, is sufficient to entitle the appellant to be ranked as claimed by him, and that the sole cause assigned by the trustee in his deliverance—viz. that the vouchers produced are promissory-notes, and being unstamped as promissory-notes, are illegal, is not a good ground for rejecting the claim of a *bona fide* creditor to be ranked upon the sequestrated estate, when such debt is supported by evidence: Finds that the trustee's objection, founded solely on the stamp-laws, may be a good objection to deprive a promissory-note of the privileges which belong to bills of that description as to legal diligence, but that the technical objection does not destroy the claim to be ranked, where the debt or loan is proved to have been made *bona fide*. In such circumstances, sustains the appeal, alters the trustee's deliverance, and remits to him to rank the appellant upon the sequestrated estate, in terms of his claim, and decerns: Finds the appellant entitled to expenses, allows an account thereof," &c. *

Against this judgment the trustee appealed. Parties were first heard as to the evidence relating to the item of L.106, 14s.

It was pleaded for the trustee;—The terms of the only voucher had been

* "NOTE.—There are certain discrepancies as to dates, between the evidence founded upon by the appellant and the certified excerpts from the bankrupt's books produced. The entry in the books with reference to the L.106, 14s., bears to be dated 25th February 1856, whereas the receipt written on the penny-stamp founded on, is dated 11th March following; but it is proper to notice that this receipt bears these words, 'interest at the rate of 8 per cent to be added from 26th February,' that is the day after the date of the entry in the excerpt of the cash-book. The interest being made to run from 26th February (the date of the advance), is evidence of the advance having been then made, although the receipt for that advance was not written out till 11th March following. This explanation shews that there is no discrepancy between the time the advance was made and the date of the acknowledgment, although that acknowledgment was not written out for some time after the advance.

"Again, with regard to the L.60, the excerpt entry from the appellant's cash-book bears date 17th March 1856, whereas both the receipt on the penny-stamp and the cheque upon the Dundee Bank bear date the 26th March 1856. The receipt and bank-cheque are both consistent, and afford evidence of the advance of the money on the 26th March, and the prior entry in the cash-book of the 17th March cannot be reconciled with the subsequent advance, although it may be explained as relating to some temporary advance for the like sum, not connected with the advance of the 26th of March. If so, that temporary advance may have been paid, but of this there is no evidence."

No. 203. — June 30, 1857. Pilling v. Drake.

held to constitute a promissory-note,[1] and not being written upon a bill or note-stamp of the proper value, could not be received even as evidence, so he had therefore no course open but to reject the claim.[2] The creditor still had his remedy in getting an equalising payment on establishing the debt, and the rejection of his claim to rank for the first dividend was the appropriate punishment for his neglect to have his claim properly vouched. The documents produced before the Sheriff in support of the claim, were insufficient. The bankrupt's books, the bill, and the excerpts from the books of the bank, did not tally. Moreover, they ought not to be looked at, for the date of the Sheriff's interlocutor allowing them to be produced being within two months of the date of payment of the first dividend, it was incompetent to have produced them to the trustee, and equally so in a question as to ranking for that dividend to produce them to the Sheriff. The interlocutor allowing them to be produced could be reviewed without a special appeal against it, the whole case being brought up by the appeal against his final judgment under the summary mode of procedure provided by the Bankrupt Act.

It was answered for the creditor;—The interlocutor of the Sheriff-substitute admitting the vouchers to be produced was final, not having been appealed against.[3] The trustee being in possession of the bankrupt's books, &c., which sufficiently vouched the debt claimed, it could not be objected that the creditor had failed to produce the vouchers necessary; and supposing these vouchers did not sufficiently prove the claim, it was the duty of the trustee to have called on the creditor to amend his claim.[4] The claim being to a certain extent vouched by the document produced, and the other evidence being the books in his own hands, the most expedient course would have been for the trustee to have called for further evidence;[5] and the Sheriff-substitute properly ordered further evidence.

Lord Wood.—I am of opinion that the Sheriff was right in allowing the production of further evidence. No doubt by sect. 102 the creditor is required to produce the vouchers of his claim along with his affidavit two months before the date at which the dividend is payable. But under the statute it was in the discretion of the trustee to call for further evidence if he thought proper; and if the trustee has not exercised a sound discretion, the Court before which an appeal comes may correct the error.

In this case, the oath and the vouchers produced would have been sufficient, but for the technical objection to the stamp. At the time this claim was rejected, the trustee had no reason to doubt that it was a good claim, and he has so stated. He had the bankrupts' books, and also a state of their affairs in his possession, which last he considered so accurate as to supersede his making out another; in both of them the sums claimed were entered as due by the bankrupts. It was in these circumstances that the trustee at once, and without calling for further evidence, rejected the claim. I do not think that this was a reasonable proceeding. On the contrary, I am of opinion that it was eminently a case in which the trustee—before disposing of the claim—ought, in the exercise of the powers conferred upon him under sect. 104, to have called upon, and allowed the creditor to produce any farther evidence he had in support of it. And the trustee having been in error in failing to do so, I hold that the Sheriff-substitute did right in correcting the error, by permitting the production of further evidence.

Lord Cowan.—I am of the same opinion.

The power given to the trustee of calling for further evidence in support of a

[1] Stephen v. M'Cubbin, 9th July 1856, ante, vol. xviii. p. 1224.

[2] Stat. 2 & 3 Vict. c. 41, sects. 11, 102, 104, Wright v. Corrie, 19th Nov. 1842, ante, vol. v. p. 164; Ker v. M'Ewan, 8th Feb. 1845, ante, vol. vii. p. 400; Forbes v. Manson, 2d July 1851 (Lord Fullerton's op.) ante, vol. xiii. p. 1272.

[3] Balderston v. Richardson, 20th Feb. 1841, ante, vol. iii. p. 597.

[4] Stat. 16 & 17 Vict. c. 53, sect. 17.

[5] Douglas and Co. v. Sanderson, 29th Feb. 1848, ante, vol. x. p. 819.

claim, or at once rejecting it, is conferred by sect. 104, and his exercise of his discretion as to calling for evidence, is as much subject to review as his judgment admitting or rejecting a claim; and I consider that it was just in such a case as this that the trustee ought to have exercised the discretionary power of calling for further evidence. His refusal to do so was open to review. And I do not think there is any thing in the objection that the deliverance is not specially appealed against. It is not at all necessary for a party who brings up for review the final deliverance to appeal specially against an interlocutory order, in order to make it likewise subject to review. It is only one of the steps of the procedure issuing in the final judgment against which the appeal is taken. I say nothing as to the effect of the documents themselves, but I think the Sheriff rightly asked for farther evidence of the alleged loan; and when the bankrupt's books are compared with the notes, there is really no discrepancy between them.

Lord Murray.—I agree with your Lordships. This case does not seem to me to be attended with any difficulty. This seems to be a true debt; and as there was plenty proof of its verity in the hands of the trustee, I think it was his duty, in the administration of his office of trustee, to have done justice to the respondent by ranking him for his claim. I am of opinion that the judgment of the Sheriff-substitute was right, and in a case of such perverse litigation, I have no hesitation in finding the appellant liable in expenses.

As to the item of L.60, it was also pleaded;—That the entries in the bankrupt's books being different from the date of the promissory-note, the debt was not sufficiently vouched.

It was replied for the claimant, that the discrepancy in dates founded on was a mere accidental mistake which had occurred in transfering the entry of this loan to the bankrupt's books from the jotting-books. This being explained, the books afforded sufficient evidence of the debt, even without the unstamped promissory-note, which however it was contended that the Court was entitled to look at.

Lord Wood.—I am of opinion that the documentary evidence sufficiently proves this part of the claim. This sum of L.60, and another of L.106, are contained in two promissory-notes, which are not legal vouchers, not being duly stamped as such. But then both sums are entered in the bankrupt's books as cash borrowed from Drake, and also in the state of his affairs made up by him, which was adopted by the trustee. Now it does not appear to me that there is any such distinction between the sum of L.106—which has been admitted at the bar to be sufficiently vouched—and that of L.60, still disputed, as should lead to the claim for the latter being rejected.

The documents produced—the bank cheque, the bill, and the entry in the bankrupt's books—instruct how the sum of L.60 was advanced by Drake to the bankrupts. They shew the source from which it was supplied, and the way in which it came into their hands. And the discrepancy between the date at which it is entered in the bankrupt's books and the date in the affidavit, and in the promissory-note and claim to which it refers, is truly unimportant. It may be easily accounted for, and is entitled to no weight against the evidence, when fairly dealt with, by which the verity of the claim is supported.

Lord Cowan concurred.

Lord Murray.—I will not go into the decision of points not clearly before us here. A bill unstamped, or not properly stamped, is not in the eye of the law a bill or a promissory-note, and is not entitled to any of the privileges of such documents; but are they not good evidence of transactions that have passed between parties? That is a point I should like to be solemnly decided.

Your Lordships think this part of the claim has also been proved, and in that opinion I concur.

The Lord Justice-Clerk was absent.

The Court affirmed the deliverance of the Sheriff-substitute, and found the respondent entitled to the expenses of the appeal.

John Walls, S.S.C.—William Steele, S.S.C.—Agents.

No. 203. — June 30, 1857. Pilling v. Drake.

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The documents produced—the bank cheque, the bill, and the entry in the bankrupt's books—instruct how the sum of L.60 was advanced by Drake to the bankrupts. They shew the source from which it was supplied, and the way in which it came into their hands. And the discrepancy between the date at which it is entered in the bankrupt's books and the date in the affidavit, and in the promissory-note and claim to which it refers, is truly unimportant. It may be easily accounted for, and is entitled to no weight against the evidence, when fairly dealt with, by which the verity of the claim is supported.

LORD COWAN concurred.

LORD MURRAY.—I will not go into the decision of points not clearly before us here. A bill unstamped, or not properly stamped, is not in the eye of the law a bill or a promissory-note, and is not entitled to any of the privileges of such documents; but are they not good evidence of transactions that have passed between parties? That is a point I should like to be solemnly decided.

Your Lordships think this part of the claim has also been proved, and in that opinion I concur.

The LORD JUSTICE-CLERK was absent.

THE COURT affirmed the deliverance of the Sheriff-substitute, and found the respondent entitled to the expenses of the appeal.

JOHN WALLS, S.S.C.—WILLIAM STEELE, S.S.C.—Agents.

No. 204. — July 1, 1857. Mann v. Dickson.

ALEXANDER MANN, Appellant.—*Penney—Clark.*
JAMES ANDERSON DICKSON, Respondent.—*Macfarlane—Wood.*

Bankruptcy—Sequestration—Election of trustee—Corruption.—The party elected to the office of trustee in a sequestration had procured the vote and influence of a creditor by a promise to give him remunerative employment in the course of the sequestration.—*Held* (*abs.* Lord Justice-Clerk) that he had been guilty of corruption, in respect of which the election was set aside, and he was declared to be disqualified from again becoming a candidate.

Process—19 & 20 *Vict.*, c. 79 *sect.* 74.—When the election of a trustee was set aside as illegal, the creditors were appointed to meet to elect a new one, and the meeting to be advertised by the creditors who had objected to the previous election.

2D DIVISION. Sheriff of Forfarshire. Bill-Chamber.

AT a meeting of the creditors of Charles Anderson, manufacturer in Arbroath, for the election of a trustee on his sequestrated estate, Alexander Mann and James Anderson Dickson were proposed as candidates. Mann obtained the majority of votes. Dickson lodged a note of objections to the eligibility of Mann, and to the votes given for him, on the ground that he had entered into an agreement or understanding with Thomas Anderson Ogilvy, a partner of the firm of John Ogilvy & Son, who were large creditors, whereby Mann was to give Ogilvy, or the firm of which he was a partner, a share of the profits or commissions of the office of trustee, or grant him some other consideration or appointment under him as trustee, on condition that Ogilvy, who was himself a candidate, should withdraw and give Mann his vote and support, or the vote of his firm in the election of trustee, and use his influence with other creditors to get him elected, in pursuance of which agreement "Ogilvy and the said firm voted for, and used their influence with other creditors to vote for and support Mann, and by means of this support and influence thus illegally and corruptly obtained the said Alexander Mann had a majority in value of the votes of the creditors at the meeting for the election of trustee."

After hearing parties, the Sheriff-substitute (Ramsay Ogilvy) allowed a proof, which was to the following effect:—Dickson, the objector, deponed to having been told by Ogilvy that Mann had promised a consideration to Ogilvy, but if Dickson would give more he would support him.

Ogilvy deponed, that in the event of Mann being elected trustee, he promised to give him (Ogilvy) some employment. His statements were corroborated by Mann, who deponed that Ogilvy at first was a candidate himself, and he, Mann, had agreed to support him, when objection was taken to Ogilvy's youth, &c. He (Ogilvy) then came to Mann, "and said he had not time. He asked me to be candidate, and divide the commission. I was startled with that, knowing it to be illegal, and refused to do so. That was on Saturday. I considered it and took advice of friends. Mr Ogilvy came back on Tuesday. I refused, and said the only thing I could do would be to employ him as servant. He was a former clerk of my own. He was fully conversant with the business, and was interested as largest creditor. I gave him distinctly to understand that any remuneration I could give him must be left entirely to myself. He was to be paid at my discretion for any services he might render. He said he was satisfied, and went away. I agreed to employ him at my own discretion. He had not expressly agreed to vote for me; I understood it as a matter of course he would vote for me."

The Sheriff-substitute pronounced this interlocutor:—"Finds that, at the meeting held for the election of trustee on the sequestrated estate of Charles Anderson, manufacturer, Arbroath, Alexander Mann and James Anderson Dickson were respectively proposed for the office of trustee: Finds that, upon the vote being taken, creditors having claims to the amount of L.6009, 4s. voted for Mr Mann, and creditors having claims to the amount

No. 204. — July 1, 1857. Mann v. Dickson.

of L.2179, 17s. 10d. voted for Mr Dickson, and that the preses of the meeting thereafter declared Mr Mann had been elected trustee on the said sequestrated estate; but finds it proved that Mr Mann did, before the day fixed for the election of a trustee, and when he was himself a candidate for the office, enter into an arrangement or agreement with Mr Thomas Anderson Ogilvy, one of the largest creditors on the sequestrated estate, that Mr Ogilvy's services should be made use of by him, if elected, in connection with the future management of the estate, and that the said Thomas Anderson Ogilvy should receive remuneration therefor: Finds that, in reliance upon this agreement, Mr Ogilvy did vote for Mr Mann's election as trustee, and did use his influence in inducing others to vote for him: Finds that the election of the said Alexander Mann has been brought about by illegal means: Finds and declares said election to be null and void, and discharges the said Alexander Mann from further proceeding in the execution of said trusteeship, and decerns: Appoints the creditors on the sequestrated estate of the said Charles Anderson to meet to choose a new trustee or trustees in succession, different from the said Alexander Mann, and in his room: Appoints advertisement of the time and place of holding the said meeting to be made in the Gazette by the said James Anderson Dickson: Finds the said Alexander Mann liable in expenses to the objector; allows an account," &c. *

Mann appealed, and pleaded; — (1.) There were no grounds for holding the election void. The objection urged was not statutory, neither was it good at common law. There was nothing fraudulent in promising to employ Ogilvy. The trustee was entitled to assistance, and he had not promised to overpay Ogilvy. On the contrary, he had carefully reserved to himself the determination of the amount of his remuneration. The judgment appealed against was entirely without authority. The case of M'Gowan did not apply. There it was not only alleged that a share of the profits had been promised, but also that the trustee had seriously mismanaged the estate. (2.) The case of M'Gowan still less justified the interlocutor, in so far as it declared the appellant ineligible for re-election. The judgment

* "NOTE.—It was candidly admitted by Mr Mann, in his examination, that he had given a pledge to Mr Ogilvy, before the election, that he would employ him in connection with the management of the estate, and that he expected Mr Ogilvy to vote for him; and it further clearly appeared from Mr Ogilvy's evidence, that it was in consequence of, and in reliance upon this pledge, that he did vote for Mr Mann, and did induce other creditors to a very considerable amount to vote in the same way. Mr Mann may not have had any corrupt motive in making this pledge; but the Sheriff-substitute cannot countenance any proceedings of this kind. It would be injurious to the interests of the general body of the creditors, and is directly contrary to the principle of law in relation to such matters as laid down in the case of M'Gowan, 13th December 1808, and numerous subsequent cases.

"The only difficulty the Sheriff-substitute had was as to the course of the future procedure in the sequestration. There does not appear in the Act to be any express power given to order a meeting for a new election of a trustee in circumstances like the present; and as the case was a novel one, and of some importance in the construction of the New Bankrupt Statute, the Sheriff-substitute took the opinion of the Sheriff-principal. In conformity with the views indicated by the Sheriff, and with the practice of the Court of Session under the old statute of 54 Geo. III. c. 37, as indicated in the case of Cheyne v. Guthrie, 3d July 1828; Railton v. M'Laren, 8th July 1835; and A. B. v. Berry, 10th June 1837, and also being anxious to construe the statute beneficially for the interest of the estate, the Sheriff-substitute has decided that he may order a meeting to be held for the election of a new trustee. He has accordingly appointed the creditor-objector, who has appeared, to intimate it in the Gazette, which is the course directed by the statute to be taken in certain analogous cases."

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seemed to be founded on some supposed analogy between the law of bankruptcy and parliamentary law, but none such existed. A special statute was necessary to disqualify a bribing candidate for a seat in Parliament, and there was no such provision in any of the bankrupt Acts.[1]

LORD WOOD.—The objection to the election of the appellant as trustee under this sequestration is founded on the bargain made by him with Ogilvy, or the understanding which was established between them, and the case is now before us on two questions—1st, Whether or not what took place is only to have the effect of vitiating the election; and, 2d, Whether the appellant is also thereby incapacitated from being re-elected.

I think that where such practices as are alleged have been resorted to, in order to influence the vote of a creditor, and to induce him to solicit and influence the votes of other creditors, it is perfectly competent to bring forward the objection in a note of objections lodged to the election of the trustee,

Then, as to the proof, it is impossible, I apprehend, to read the evidence taken before the Sheriff-substitute without being satisfied that the use of corrupt practices is fully established.

Then, as regards the law, we have the authority of Mr Bell that any such bargain or arrangement as was here entered into is sufficient to vitiate a party's election as trustee. It was indeed urged that all that passed was merely a bargain for services to be performed. But it is manifest that the promise which was made may have the effect of unduly influencing a creditor's vote, and inducing him to be active in obtaining the votes of others as much as the handing over to him a sum of money. It is just a prospective promise or consideration for a prospective vote. I think it indisputable that the appellant procured his election by illegal means.

The case of M'Gowan may not be exactly parallel in its circumstances; but the legal principle which the decision involves, and on which it proceeds, is of clear application to the present case, which is—that corrupt practices by an individual in promoting his election as trustee vitiates the election.

Farther, and upon the remaining question,—whether the consequence is merely the annulling the particular election, or extends to the disqualification of the individual as a candidate for the trusteeship in that sequestration—I think that that point is also ruled against the appellant by the decision in the case of M'Gowan. When a party has once used such practices, there is no security that he will not do so again; and it is impossible to say how far the persons on whom the illegal influences applied to them had operated in inducing their votes at the one election might continue to be operated on, and induced again to vote for the party who had resorted to them. I am clearly of opinion that the sound result in point of law is, that not only is the election in question bad, but that the appellant is also disqualified from being re-elected.

LORD COWAN.—If necessary, I would be prepared to concur in Lord Wood's view, and to hold that by the promise made by the appellant, a party might be as much influenced as by handing to him a sum of money. But the case is not that the party was to be employed to do what the trustee could not do in the conduct of the business of the sequestration. It is, that he was to be employed by the trustee to do part of what fell within his proper duty,—it may be as his clerk or servant. This, as it appears to me, is just a fraudulent device for doing covertly what the parties could not do openly, viz., dividing the commission, which it is proved by the terms of Ogilvy's deposition, as well as of Mann's, was spoken of and known by them both to be illegal. The view I take is simply this, that it was a covert attempt on the part of Mann to procure Ogilvy's support by a promise to give him a part of the profits. We cannot, consistently with principle, and with the decided cases, sanction this, or hold it other than an illegal paction, vitiating the election of the party who entered into it.

On the second point, there may be a little more delicacy, but on that point I am of the same opinion as Lord Wood. It is in vain to say that there may be a second election with none of the objectionable procedure which has vitiated the first. It has not been shewn that any case has occurred where an election has been held to

[1] The respondents cited II. Bell's Com., p. 371.

be vitiated on the grounds we proceed on, and in which a new election has been ordered, without the recognition by the Court, either in the judgment or in the opinions of the Judges, that the party whose election has been set aside is barred from being again elected. In the case of Railton, 8th July 1835, Lord Gillies says—"Now that it is known,"—the case referred to was the use of bribery by a candidate for the office of trustee in a sequestration,—"the question is, what is to be the effect of it? I think it disqualifies him for the office of trustee in *this* sequestration." Were it otherwise, the beneficial effect of the recognition by the Court of the principle on which the original election has been set aside would be frustrated. Nothing would be easier than to go through the form of a second election, avoiding all ostensible tampering with votes, already secured by means of that illegal procedure, the proof of which has proved fatal to the first.

No. 204. — July 2, 1857. Maitland v. M'Clelland.

LORD MURRAY concurred.

LORD JUSTICE-CLERK absent.

THE COURT dismissed the appeal, and found the respondent entitled to expenses.

GRAHAM BINNY, W.S.—WEBSTER & RENNY, W.S.—Agents.

No. 205.

PATRICK MAITLAND, Pursuer.—*M. Napier—Patton.*
JOHN M'CLELLAND, Defender.—*G. G. Bell—Park.*

Process—Res noviter.—There is no abstract rule that a deed or instrument recorded in the public records, can in no case be founded on as *res noviter veniens ad notitiam*. *Circumstances* in which (*alt.* judgment of Lord Handyside, *abs.* Lord Ivory) facts appearing from such a deed were allowed to be added to the record.

July 2, 1857. — 1ST DIVISION. Ld. Handyside L.

PATRICK MAITLAND of Freugh claimed a Crown grant of the oyster fishings in the Bay of Luce, adjacent to his lands; and he presented a petition to the Sheriff of Wigtounshire for interdict against John M'Lelland, a fisherman, interfering with his right.

The respondent pleaded, that the titles produced by the complainer did not confer an exclusive right of fishing; and, at any rate, that the right did not extend to that part of the Bay of Luce in which the respondent had been in use to fish. The record was closed in 1853. The Sheriff dismissed the petition as incompetent. The pursuer brought the case by advocation before the Inner-House; and the Court, before answer, allowed him to bring a declarator of the alleged right. That action was brought in November 1854. The pursuer founded upon a charter of *novodamus* under the Great Seal of Scotland, dated 5th March 1707, and progress of titles down to his own investiture in 1823. He averred that he and his ancestors were feudally vested, *inter alias*, in the lands of Killiness, with the oyster fishings adjacent; and he averred a special service, *inter alias*, in said lands, expede in favour of himself as heir of his father, and the foundation of his title of 1823.

The defender stated that the writing of 1707 was an extract from the Register of the Great Seal, and proceeded on a resignation by M'Dowall of Freugh; but that, among the lands and heritages resigned, there were no sea fishings, nor was any sasine ever taken upon the alleged charter.

The record was closed in June 1855, and the Lord Ordinary made avizandum to the Inner-House *ob contingentiam* of the advocation. The two processes were then conjoined and remitted to the Lord Ordinary, and now came before the Court on a reclaiming note by the defender against an interlocutor by his Lordship, refusing to allow the record to be opened up, in order that there should be added to it, as *res noviter*, the following averments:—(After stating the facts above narrated, and also that by the misrepresentations of the pursuer, the defender believed, that although the *dominium utile* of the lands of Killiness had come to belong to others, the *dominium directum* had remained in the pursuer's predecessors, and had passed to him)—"9. That in this state of knowledge, on the part of the

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defender and pursuer, respectively, the record in the present cause was closed by interlocutor on 6th June 1855, and the cause debated, in the ordinary course of the roll. That while the cause stood for debate, the Lord Advocate appeared in it, and, on 28th November 1855, sisted himself and the Commissioners of Woods and Forests on behalf of the Crown, but without lodging any written pleading, or disclosing in any point the facts or pleas on which he meant to rely. That the said Crown officers afterwards, by summons of declarator, signeted 25th February 1856, raised a separate and independent action against the said Patrick Maitland, pursuer in the present action, against the defender, concluding that he had no right of oyster fishings in the Bay of Luce, except in such part as is *ex adverso* of, or adjacent to, lands now his property, or which were the property of Patrick M'Dowall of Freugh, at the date of the alleged Crown charter of 1707: And in the condescendence annexed to this summons, the Crown officers set forth *inter alia* the facts which are contained in the defender's condescendence of *res noviter*. 10. That on seeing the said condescendence attached to the summons for the Crown, the defender John M'Clelland, and those acting for him, for the first time became aware or had any suspicion of the facts stated in the condescendence of *res noviter*, or of the subject-matter thereof; and they are still uninformed of the way in which the Crown became acquainted with said facts. 11. That said facts are, in substance, that the lands of Killiness (which, of those mentioned in the writings founded on by the pursuer, are the only lands adjoining the sea in the district of the defender's fishing operations) did not at the date of the signature or alleged charter of 1707 belong to M'Dowall of Freugh, in any respect, having ceased to belong to his predecessors as far back as 1643, and being exclusively vested, both in property and superiority, by singular titles, in the Adairs of Kinhilt; and having passed from them and their creditor to Lord Stair, and now remaining and being vested in his present heir or successor." He also proposed to add the following plea in law:—"The intention in the signature or alleged charter of 1707 having been to confer the right of fishing only in water adjacent to the lands belonging to the grantee, the inadvertency or error of including in the alleged grant of *novodamus* the foresaid lands of Caliness, or Killiness, as belonging to the grantee, when they had long ceased to belong to him or his predecessors, and when they truly belonged exclusively to others, could give no right to fishing in water adjacent to these lands."

The pursuer objected to the defender's motion, on the ground that the alleged facts appeared on the face of the public records, and were all along perfectly accessible to the defender and his advisers.

The Lord Ordinary, on 21st May 1857, pronounced the following interlocutor:—"Refuses the motion of the defender that the closed record be opened up, in order that the averments of fact alleged by the defender to be *res noviter*, may be added to the record." *

* "NOTE.—Assuming the relevancy of the facts alleged to be *res noviter*, to support certain grounds of defence to the action, though that appears to depend on the meaning to be put on some words in the pursuer's titles, which the parties construe differently, the question for determination is, whether the defender has shown that the facts proposed to be added to the record fall under the class of *res noviter*, so as to entitle him to have the record opened up? The circumstances under which these facts came to the knowledge of the defender are explained in the minute. The objection of the pursuer is, that the deeds, the contents of which are averred as being *res noviter*, and which had been discovered by another party on the public records, were equally accessible on the defender's own search, before closing the record, as now. The Lord Ordinary apprehends the objection must receive effect on the authority of the case of Grahame v. Grahame, May 29, 1821, Fac. Coll.: affirmed in the House of Lords, June 14, 1825, 1 Wilson & Shaw, 353. It was there held that deeds which have been recorded (in that case a bond of provision

The defender reclaimed.[1] No. 205.

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LORD PRESIDENT.—I am not aware of any abstract rule, such as has been assumed by the Lord Ordinary and the pursuer, that where a deed is on record, it cannot be founded on as *res noviter*. The principle is, that a party is not entitled to found on anything as *res noviter*, which he either knew, or which by reasonable inquiry he might have known; and therefore every case must be judged of according to its own circumstances. The case of Grahame established no general principle. It was a peculiar case; and its circumstances were not precisely the same with the present, whether we look to the nature of the subject-matter of inquiry, or the particular object for which the deeds are now sought to be founded on. Looking to the record, it appears to me that it is rather *ob majorem cautelam*, to prevent objections as to surprise, that this statement is sought to be put on record; and in that view I think that the case of Grahame does not apply, and that the defender may be allowed to make this addition to the record.

LORD CURRIEHILL.—I am of the same opinion. There is no abstract rule, that a matter discoverable by any possible search is not *res noviter*. Every case depends upon its own circumstances; and the sole question here is, whether by proper diligence this party could have discovered the documents or facts which he now wishes to introduce into the case. The circumstance of the documents being in a record, the very object of which is publication, is certainly always a very material consideration in a question of this sort. But it may be that the record does not contain full information, or from the change of names or otherwise in the transmission of property may mislead. According to the statement laid before us here, this property has been in name of the pursuer for a hundred years. Was the defender guilty of negligence in not making inquiry into the records for two hundred years back, in order to test the accuracy of the pursuer's statements and the validity of his titles? I think he was not; and therefore I concur.

LORD DEAS.—I concur. I do not think it can be laid down that a deed or instrument recorded in the public records can, in no case, be allowed to be founded on as *res noviter veniens ad notitiam*. In the case of Grahame, the deeds proposed to be founded on were deeds by or in favour of the party's own ancestor, and may have been regarded as traceable in the family repositories. At all events the case of Grahame did not affirm, as an absolute and inflexible rule, the broad general principle now contended for. Here, the defender is a common fisherman, exercising his right, as one of the public, of dredging for oysters in the sea. He is sought to be interdicted and stopped by the pursuer in virtue of an alleged exclusive right, which can only be constituted by Crown grant. But was the defender bound to know every step in the progress of Crown titles which might be found in the public records,—obscure or not obscure as regarded applicability to particular localities,—from the earliest times downwards? I do not think that would be reasonable. Looking to what the titles in dispute are, and to the circumstances, I think the averments may be competently added as *res noviter*, although I do not know that they are very necessary to the purpose in view.

LORD IVORY absent.

THE COURT pronounced the following interlocutor:—"Recall the said interlocutor reclaimed against; and remit to the Lord Ordinary to grant the motion of the defender, that the closed record be opened up, in order that the averments of fact alleged by the defender to be *res noviter* may be added to the record: Further, of consent of parties given at the bar, they find that the remit before made shall be

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and discharge) could not be received after judgment on the ground of falling under *noviter veniens ad notitiam*. Thus a construction appears to have been given to *noviter veniens*, as exclusive in all cases of deeds accessible to the knowledge of parties by being registered in the public records. And that being so, it seems to the Lord Ordinary that the provision of the statute 6 Geo. IV. c. 120, in regard to the competency of either party, after closing the record, stating matter of fact *noviter veniens*, is to be subject to the application of the same principle."

[1] Mailler v. Hunter, 25th Nov. 1852, ante, vol. xv. p. 88.

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carried into effect in this cause without payment of any expenses by the defender, in consequence of his making such additions to his record; and, on the other hand, that the defender shall not be entitled to any expenses in relation to the discussion of his motion to have the record opened up, in which he has now been successful."

A. Smith, S.S.C.—R. M'William, S.S.C.—Agents.

No. 206.

Donald M'Vicar, Suspender.—*Fraser.*
Andrew Kerr, Respondent.—*Logan*—*A. Mure.*

Diligence—Poinding of moveables—1 *&* 2 *Vict c.* 114—*Suspension.*—A warrant of sale of poinded effects suspended (*alt.* judgment of Lord Mackenzie, *abs.* Lord Justice-Clerk) on the ground that the warrant of sale did not specify the place where the goods were to be sold.

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2d Division.
Ld Mackenzie.
Bill-Chamber.
R.

Kerr obtained a decree against M'Vicar before the Sheriff-court of Argyleshire. M'Vicar was charged thereon, and afterwards an officer was employed to poind his effects. The poinding was reported, and a warrant granted by the Sheriff to sell on the 19th April 1857, which was a Sunday. A suspension was applied for, and the warrant was abandoned. A new warrant of sale was granted in these terms:—"*Inverary,* 18*th April* 1857.—Having considered the foregoing execution and report of poinding, Grants warrant to the poinding creditor, at sight of David Crombie, auctioneer, Inverary, judge hereby appointed, to sell by public roup the subjects mentioned in the said execution, upon Tuesday the 28th day of April current, at 10 o'clock forenoon, exposing the same at upset prices not less than their appraised values: Appoints the roup to be advertised at the church door of the parish within which the place of sale is situated, and at other public places, not later than eight days before the day of sale, and otherwise, in terms of the statute: Further, Appoints a copy of this warrant to be served on the debtor, and on the possessor of the poinded goods, if these are different parties, at least six days before the date of sale, and appoints the sale to be reported within eight days after it takes place. — J. Maclaurin, *S. S.*"

A note of suspension and interdict was presented, and interim interdict granted. The following are the objections to the proceedings which were urged, viz.—That more than year and day had elapsed after the date of the charge before the poinding; that a portion of the poinded effects were in the possession of a Mrs Carmichael; that no schedule of poinding had been left with her; and that the warrant of sale did not specify the place where the sale was to take place.

The Lord Ordinary pronounced this interlocutor:—"In respect the charger has judicially abandoned his right to proceed with the poinding and sale so far as regards the effects in the hands of Mrs Carmichael, and in respect the diligence appears to be regular so far as regards the other effects specified in the execution of poinding, Refuses the note: Recalls the interim interdict: Finds the complainer liable in expenses, subject to modification: Allows an account," &c. *

* "Note.—The interim interdict granted under the first suspension applied only to the first warrant of sale, which was abandoned. An execution has been produced that due intimation of the sale under the second warrant was made to the complainer.

"It has been decided that a poinding is competent after the lapse of a year and day from the date of the charge, without any new charge.—Kerr, 30th May 1837, 15 Shaw, 1041.

"Though the form of the warrant of sale is perhaps not so precise as it ought

M'Vicar reclaimed. The warrant of sale was supported on the ground of its being clear that the sale was to take place where the poinded effects were situated, so that no further specification of the place of sale was necessary. No. 206. — July 3, 1857. Ritchie v. Dickson.

Lord Wood.—The Sheriff is directed by the statute to order a number of matters, so as to be most for the benefit of all parties interested. I think it is a statutory requisite that a warrant of sale shall mention not only the time, but also the place at which the sale is to take place. We must pass the bill.

Lord Cowan.—I think this note should be passed, upon the ground that the warrant of sale is defective, in so far as it does not set forth the place of sale. I do not express any opinion on the other grounds. The mention of a place of sale is a statutory requisite, the want of which, it appears to me, cannot be dispensed with.

Lord Murray concurred.

Lord Justice-Clerk absent.

The Court passed the note.

Wotherspoon & Mack, W.S.—John Robertson, S.S.C.—Agents.

No. 207.

David Ritchie, Pursuer, Advocator.—*Macfarlane—Gifford.*
James Dickson, Defender, Respondent.—*Penney—Fraser.*

Lease—Construction—Removing—Proof.—A tenant pursued a removing against a sub-tenant, who averred that he was tenant under the pursuer's landlord. The pursuer produced his lease, which excepted from the subjects let to the pursuer "the houses presently possessed by the said defender." *Held*, that the terms of the lease did not exclude the pursuer from proving that the defender was his sub-tenant, and that the exceptions in the lease related only to other subjects occupied by the defender.

David Ritchie, tenant of the farm of Mains of Huntingtower under a nineteen years lease from Martinmas 1845 from the trustees of General Cunningham of Newton, presented a summary application to the Sheriff of Perthshire, praying for a warrant to remove James Dickson from a cottage and plot of ground adjacent to the petitioner's dwelling-house at Huntingtower, which, it was alleged, Dickson had been sub-tenant of under the petitioner, on verbal let or tacit relocation, from the date of the petitioner's entry up to the term of Martinmas 1855; and that, more than forty days previous to that term, he had been warned to remove, but had refused to do so. The respondent entered appearance. There were produced — 1st, a tack in favour of James Ritchie, the petitioner's brother and immediate predecessor as tenant of the Mains of Huntingtower, by which there was reserved from the subjects let "the house and garden let to Dickson, baker;" 2d, the lease in favour of the petitioner, from which there were reserved from the subjects let "the whole houses, gardens, and grounds now occupied by James Dickson;" and, 3d, proceedings in a reference entered into between General Cunningham's trustees and the petitioner, in which it was decided that the cottage, &c. in question had been let by the trustees to the petitioner, and that he was entitled to the rents thereof. July 3, 1857. — 2d Division. Sheriff of Perth. R.

At the diet of compearance, the Sheriff noted the following defence: — "Denied that the cottage and garden in question are let to the petitioner by the lease founded on; but it expressly excludes them, which were then occupied by the defender, and denied that the defender is his sub-tenant. The defender is principal tenant under Major-General Cunningham's trus-

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o have been, the Lord Ordinary, as at present advised, does not think the objections urged by the complainer are sufficient to warrant him in passing the note."

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tees. The alleged knowledge and acceptance thereof is denied. With reference to the petitioner's productions, the defender denies—1st. That he is or ever was a party to any reference with the pursuer. 2d. He denies that the alleged reference is valid and subsisting; and 3d. He denies that it embraces the question raised in the present process." The pursuer's denial of this statement was minuted, whereupon the record was closed.

After hearing parties, the Sheriff-substitute pronounced this interlocutor:—"In respect that at the debate parties were not agreed as to the state and title of possession at the time of the lease by the said trustees to the pursuer, and that the correct ascertainment of the relative facts appeared necessary to the right understanding of the extent of the subjects let, and exemptions therefrom—Appoints the pursuer to lodge a condescendence of his averments, . . and the defender to lodge defences."

The pursuer lodged a condescendence, in which were narrated the leases to the pursuer and his predecessor. It was alleged that there were, on the lands belonging to Cunningham's trustees, a variety of buildings, and among others, a row of eight cottages, of which the cottage in question was the sixth, counting from the west. Some of these cottages were let by Cunningham's trustees directly to the defender; others of them, including the cottage in question, were embraced in the lease to the pursuer. The defender, besides the cottages which he held directly from the landlord, had also become sub-tenant under the pursuer's predecessor, of the cottage No. 6, and of certain other subjects. In this way the defender held some cottages as tenant of Cunningham's trustees, and others as sub-tenant under the pursuer's predecessor.

When a new lease came to be granted to the pursuer by Cunningham's trustees, there was excepted the houses "presently occupied by James Dickson" (the defender.) This only meant, however, the houses which James Dickson held directly from Cunningham's trustees, and had no reference to those of which James Dickson was a mere sub-tenant under the former.

The pursuer farther stated that a submission had been entered into between him and Cunningham's trustees (the landlords), in which it was finally found that the cottage in question, No. 6, was included in the pursuer's lease, and was not reserved therefrom. It was farther averred that the defender had recognised the principal tenant as his landlord, and actually paid him rent for the cottage No. 6.

These averments were denied by the defender, who stated (Ist.) That the pursuer's lease excepted from the subjects let to him "the whole houses," &c. then "occupied" by the defender; and (2d.) That at the date of the pursuer's lease, and at the term of his entry, the defender "occupied" the cottage and garden in question.

The record was closed on these papers; and the Sheriff allowed the defender a proof of his second averment. The pursuer put on record a minute, admitting that averment under reference to his own statement.

Having heard parties, the Sheriff-substitute (Barclay) pronounced the following interlocutor:—"Finds it not alleged that the defender has any lease direct from the pursuer, and it is not proved that the defender recognised the pursuer as his landlord in the cottage from which he is now sought to be ejected: Finds that the pursuer's title to sue is founded on the lease, No. 7 of process, whereby there is let to him, by the trustees of the deceased Major-General John Cunningham, 'All and Whole the farm of Mains of Huntingtower,' and amongst other reservations there is reserved 'the castle and whole houses, gardens, and grounds then in the occupancy of James Dickson:' Finds it admitted that the defender, at the time of the said lease, was in the occupancy of the said cottage, and therefore that the

same fell within the reservation or exception from the subjects leased: Finds that the import of the said clause, so plain in itself, and wherein there exists no patent or latent ambiguity, cannot be controlled, nor its operation extended nor limited by extrinsic evidence, especially by writings and transactions to which the defender was no party: Therefore finds the pursuer has no title to sue this removing, assoilzies the defender from the action: Finds the defender entitled to expenses: Remits," &c.*

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Dickson.

The pursuer appealed. After considering a reclaiming petition and answers, the Sheriff (Mure) pronounced the following interlocutor:—"Alters the interlocutor appealed from, in so far as it 'assoilzies the defender from the action:' Dismisses the said action, and, with this variation, affirms the interlocutor submitted to review, and decerns." †

* "NOTE.—Were it not for the rigid and well-founded rule of law that a concluded agreement reduced to writing cannot be extended or limited by extrinsic evidence, even by preliminary writings passing directly between the parties themselves, but preliminary to the final completion of the contract, there do exist no trivial grounds for holding that the cottage in question was really not intended by the parties to the lease to fall within the exception; but the question is not one of intention, but of completed fact, and if there be meaning in language, there was not leased to the pursuer any houses which were at the time of the lease in the occupancy of the defender. The cottage in question was so occupied, and therefore excepted from the lease; it could never be allowed to the Court to introduce the words 'so far only as the same are held by him under lease from us.' That would be to make a new bargain for the parties, which no court of law can or ought to do. Courts are set up to enforce contracts, not to make them, and have to decide on what parties have actually done, not on what they might, could, would, or should have done.

"The question at issue is not, as ably urged by the pursuer's procurator, what title the defender has to hold the property as against Cunningham's trustees, or what title the trustees have to sue such action. The sole question is, what is the pursuer's title to sue this removing and oust the defender. A man may justly owe a debt, but none can claim or sue for it except the proper creditor. The popular action is unknown in our law, nor even in such an action as this was it known in Roman law. There is no class of actions where the instance is more special than in that of removing. The party must shew in the words of style that the occupant must remove and leave the subjects void 'that the pursuer may enter therein.'"

† "NOTE.—Were the condition of the argument that assumed in the reclaiming petition, viz., of a defender standing on a plea of want of title of a very technical description, without asserting any right to hold as against either the pursuer or the proprietors of the subject in dispute, the Sheriff might, in the circumstances, and having regard to what has passed between the pursuer and the proprietors, have inclined to repel such a plea. That, however, is not the condition of the argument. For the defender not only objects to the pursuer's title to sue the action on the ground that the subjects in question are expressly excluded from the lease libelled on, but asserts a right to hold possession as against the proprietors, and founds upon a lease granted to him in 1854, under which, he says, he is entitled to maintain possession during the whole currency of his lease, and in respect of the rent therein stipulated. In these circumstances, and the action being rested on the lease, No. 7 of process, as the title to eject, the question comes to be, whether that lease can be held to give the pursuer a title to demand immediate possession of the subjects and eject the defender. The Sheriff is humbly of opinion that it cannot. He concurs with the Sheriff-substitute in thinking, now that it is admitted that the defender was, at the date of the pursuer's lease in 1845, in the occupancy of the subjects in dispute, that under the words 'whole houses, gardens, and grounds now occupied by James Dickson,' the said subjects must, *ex facie* of the pursuer's lease, be dealt with as excepted therefrom, and that it is not competent, at all events in this summary action of removing, to control or qualify those words by extrinsic evidence, and especially not by the terms of a decree-arbitral in a submission to which the defender was no

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The pursuer advocated, and the Lord Ordinary made avizandum to the Court.

The advocator pleaded;—The cottage in question having been found by the arbiter to be part of the subjects let to the advocator, the respondent was bound to pay to the advocator the rent of it, as much as if the terms of the lease had been determined by a declaratory action. Besides, there was no proper averment that the respondent held in tack from General Cunningham's trustees, nor did he even produce any receipts for the rents from them for the years since 1845. The pursuer alleged in his petition that he had a lease of the subjects in question, and his allegations were made more full in his subsequent condescendence on that point, on which a record was closed. There being evidence on record that the defender was the subtenant of the pursuer, he could not object to the title of his author. At any rate, the pursuer may still prove his title, which it is quite competent for the pursuer in a removing to make up in the course of the process.[1]

The respondent pleaded;—The first question to be disposed of was the title of the advocator. Though the respondent did not aver that he had any lease, he averred that he was in the occupation of these premises at the date of the advocator's lease, which, being admitted, clearly excepted them from the subjects let to the advocator. The respondent, being a tenant of various subjects under the pursuer's landlord, had no special receipts for the rents of the cottage in question, which was of trifling value only, being stated by the pursuer at L.2, 10s. per annum. The Sheriff-substitute, rightly holding the decision of the cause to depend upon the construction of the advocator's lease, in which the description of the subjects excepted was referred to the occupation of some of them by the respondent at the date of the lease, allowed the respondent a proof of his averment to that effect, and a conjunct proof to the advocator, under which the advocator might have proved, if he could, that the averment was false; but instead of this, it was admitted to be true, which clearly excluded the advocator's title.

Lord Wood.—I confess I have some hesitation in dissenting from interlocutors pronounced by the learned Sheriff-substitute and Sheriff of Perthshire, particularly in a question of removing, with cases of which description they must have so frequently to deal; but I venture to think it probable that the point chiefly pressed upon us, on the part of the pursuer, had not been prominently insisted on in the inferior Court.

The action is a summary one of removing, brought in January 1856, by petition at the instance of the complainer against the respondent, the defender in the action, to have him ordained instantly to remove from the cottage, No. 6 on the plan produced, and the defence primarily and properly so raised, if meant to be insisted on, is to the title of the pursuer.

The pursuer's title is a lease from the proprietors of Huntingtower, dated 1[illegible] June 1846, by which he says the cottage No. 6 is let by them to the pursuer, from the preceding term of Martinmas, and which cottage he alleges the defender occupies as his subtenant. The defender, in defence, avers that the cottage is not c[illegible]

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party, and which was pronounced not only after the raising of the present action, but after the record had been closed as between the pursuer and defender. The Sheriff had at first some doubt whether the defender's averment as to his right to hold possession against the proprietors was sufficiently distinct, for those in the paper No. 23 of process are certainly vague in this as well as other respects. But the averment is explicit in the short record as originally made up and closed, which must, it is thought, still be dealt with as the statutory record. The sheriff delayed advising this case sooner, as the parties seemed to wish an inspection, which he was unable to overtake until the sittings held at Perth last week; and as the action has been disposed of on a plea of want of title, he has thought it better simply to dismiss it instead of assoilzieing the defender."

[1] Mackintosh v. Munro, 23d November 1854, ante, vol. xvii. p. 99.

tained in the pursuer's lease, and that he does not occupy it as his subtenant; but at the same time not averring on the record (that is, on what I hold to be the record, viz. the one closed on the 21st March 1856), specifically any title from any other party.

In support of this defence, the defender refers to the terms of the pursuer's lease, and particularly to an express reservation from it, by which there is reserved "the castle, and whole houses, gardens, and grounds, now occupied by James Dickson," that is, the defender.

Now, it is admitted that at the date of this lease the defender was in the occupation of the cottage in question, which superseded any necessity of proof by the defender of his second counter averment, in his answers to the pursuer's condesendence, as allowed by interlocutor of 21st March 1856.

The defender therefore contended, that by the admitted state of the fact, and the express terms of the reservation in the pursuer's lease, as applied to it, the cottage in question is excluded from the lease.

Now, there are no doubt many cases in which the defender in a removing may competently object to the sufficiency of the pursuer's title; and it may be so, even where the defender neither exhibits nor alleges any competing title of possession. But it is a well established rule, that generally the defender cannot impugn the pursuer's title, if his own right of possession flows from the pursuer; if, for instance, the defender is the pursuer's subtenant. And for a very obvious reason, viz. that he cannot challenge or impeach the validity of a title on which his own right depends, and the sufficiency of which, at least to give possession to himself, he has in truth acknowledged.

If, then, the fact was that the defender was the pursuer's subtenant, he could not object to the pursuer's title to remove him from the cottage No. 6. And if so, and the subtenancy is sufficiently averred by the pursuer, but not admitted, then the fact averred ought to be investigated before the question of title is disposed of.

Then, is the subtenancy so averred? Without detaining your Lordship by reading them, I shall only refer to the statement in articles 14 and 15 of the pursuer's condescendence. No doubt the statements contained in them are denied. But I think the averment is well made; and that being the case, the parties are at issue upon a fact relevant to the matter of the sufficiency of the pursuer's title, as in a question with the defender, and his right to object to it.

Looking to the statements in the record, and the documents produced, it appears to me to be difficult to say that the cottage No. 6 must be held to be positively excluded from the pursuer's lease of 1846; that any opposite view is absolutely inadmissible. I think there is at least enough to show that there was room for the pursuer's dealing with it as not excluding the cottage No. 6; and the point is, did he do so? And did the defender deal with him as having a right to sublet to him the cottage No. 6? If the defender did so, I apprehend that, in a qustion with the defender, it is no answer on the defender's part to say, as was suggested, you had no valid right by your lease to the cottage No. 6; and if you had no right, then the cottage must have been possessed by me under the proprietor; for in that case it was on his right that my right to possess could alone be founded.

It may be that, in a question with the proprietor, the pursuer's alleged title might be a bad title to the cottage No. 6, and that, in a question between the proprietor and the defender, it might resolve into this, that the defender had no title of possession, either from the pursuer or from the proprietor, that he was a possessor *sine titulo*. But the question here is, not with the proprietors, but with the pursuer, as principal tacksman, and upon his averment of subtenancy as made. His title, although it might prove to be bad against the proprietors, is the only title to which he can ascribe his possession, and which he cannot repudiate, however bad that title might prove to be as against the proprietor.

Accordingly, take the case that a written sublease from the pursuer were produced, how could the defender be heard to impugn the pursuer's title under the lease 1846, to sue a removing against him? How could it, then, be sustained as a relevant and good answer, that the pursuer's lease, according to its true construction and effect, does not give him the cottage in dispute? And therefore, the defender's possession must be as tenant under the proprietors, and not as sub-

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tenant under the pursuers. I am certain that such a plea would fall to be repelled. And if so, I am not aware on what ground it can be otherwise dealt with when the averment is a subtenancy by verbal lease. I see no room for a distinction. A subtenancy may be as effectually constituted for a limited period by a verbal lease as one for a longer period by a written lease; and I am of opinion that the averment of such subtenancy is in the present case just as relevant as would be the averment of a subtenancy by written lease.

I do not all found upon the submission between the pursuer and the proprietor Cunningham's trustees, and the averment in it as a fortification or clearing of the pursuer's title. It may be that the defender can justly maintain that his rights can in no shape be affected by it. I assume that to be the case, and take the title of the pursuer as it stands on the terms of his lease. And doing so for the reasons I have stated, I am of opinion that before the validity of the pursuer's title to insist in the removing was disposed of, his averment that the defender, after March 1845 or June 1846, possessed the cothouse No. 6, solely as his subtenant, having retained it after that date by agreement with him, and continued so to do when the removing was brought, but which averment was denied, ought to have been made the subject of proof; and that therefore the interlocutor complained of ought to be recalled, and the case remitted to the Sheriff, in order that the necessary investigation may take place.

Lord Cowan.—To entitle a party to insist in an action of removing, he must have a clear title to the subject from which he seeks to have the possessor or occupier evicted. In this case the title founded on by the pursuer is a lease for nineteen years of the farm on which the cothouse and garden occupied by the defender, as his alleged subtenant, are situated; and assuming that these subjects are within the pursuer's lease from the proprietor, there can be no doubt of the sufficiency of his title to insist in this action.

But, further, it is unquestionable that where the right of the party sought to be evicted by the action of removing has flowed from the pursuer, he will not be listened to in objecting to the title—how objectionable, soever, it may be—in a question with third parties holding some distinct and separate right or title to possess. This is no less true where the action is at the instance of a tenant against a subtenant deriving right from him, than when at the instance of a proprietor against parties to whom he may have let the subjects.

The peculiarity of the present case, in the latter aspect of it, has not, as I think, been sufficiently attended to in the inferior court. The pursuer, founding on his lease from the trustees of General Cunningham in 1845, sets forth that the defender is in possession of a part of the subjects within his lease as his subtenant on a verbal tack from year to year by tacit relocation. And in the supplementary record, the averments to this effect are quite distinct, and very specific. I allude particularly to article 14 and article 17 of the condescendence. Moreover, in the answer to article 14, the defender admits that he was subtenant of the subjects under James Ritchie, the pursuer's predecessor, up till 1845, the date of the new lease from the proprietor, now held by the pursuer, and founded on as the title to sue in this action. After that date he denies the subtenancy, and maintains that the subjects of his occupation are held by him directly from the proprietors, and could not be held under the pursuer, because, as alleged, they are excluded from this new lease of 1845.

The defence thus stated is twofold—(1) that the title of the pursuer is bad, as not inclusive of the subjects; and (2) that there is no truth in the allegation of subtenancy on which the action is based.

Now the case has been disposed of by the Sheriff with exclusive reference to the first of these pleas, without inquiry into the matter involved in the second, although that, as I view the case, was truly the primary subject for investigation. Holding, as I think must be held, that there is a relevant averment of sub-tenancy, this is for inquiry, as matter of fact, being denied by the defender, before disposing of the objection taken to the title of the pursuer. For if it be established that the defender did, after 1845, *de facto* possess these subjects, and pay rent for them to the pursuer as his subtenant, the objection to the title to sue will permit of being very easily disposed of, or rather the necessity of disposing of it at all may be superseded.

Upon that objection I may observe, that taken by itself, apart from the title under the proprietors alleged by the defender, I would have felt the same reluctance as the Sheriff has expressed, in holding it sufficient to bar the action. The words of exclusion—although strong and sufficient, it may be, to destroy the title of the pursuer, had there been nothing to explain the extent of his right, in a question with the proprietors—cannot be considered incapable of being construed as between them and their own tenant; and, in fact, the extent of the pursuer's right under the lease has been cleared as against the proprietors. This, of course, cannot avail the pursuer as in competition with any right held by the defender from the proprietors. But whether there exists such a distinct right to possess the subjects in the defender has not yet been proved. Certainly it is not admitted by the pursuer—his case being that the defender is his subtenant. These matters are on the merits, and until they are made the subject of proof, I do not well see how the objection to the title can be finally disposed of, or even properly considered.

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LORD MURRAY.—I do not dissent from the result at which your Lordships have arrived; but I do not mean to go into the points before us as your Lordships have done, and I agree in thinking that this case should be remitted back to the Sheriff.

LORD JUSTICE-CLERK absent.

THE COURT pronounced this interlocutor:—"Advocate the cause: Recall *in hoc statu* the interlocutors of the 23d of July and 3d of November 1856 complained of, and remit the cause to the Sheriff, with instructions, before answer as to the pursuer's title, to allow to both parties a proof of their averments in regard to the house and garden in question, and to each party a conjunct probation; and thereafter to proceed to dispose of the case as to him may be just, with power to the Sheriff to dispose of all questions of expenses both in this Court and in the Sheriff Court.

ALEX. J. NAPIER, W.S.—JOHN GALLETLY, S.S.C.—Agents.

No. 208.

ROBERT HILL, Pursuer.—*Pattison—Moir.*
ROBERT LOCKHART DYMOCK, Defender.—*Penney.*

Process—Reparation—Statute 16 & 17 *Vict. cap.* 67—*Statute* 9 *Geo. IV. cap.* 58, *sect.* 33—*Public Officer.*—In an action of damages against a burgh procurator-fiscal for wrongous imprisonment under a police sentence which was found null,—Plea in defence repelled (*aff.* judgment of Lord Neaves), that the statutory limitation of three months within which the action must be brought, applied not to the issuing, but the execution of the warrant.

Process—Relevancy.—Observed, that in the Outer-House an erroneous practice prevailed of deciding pleas upon relevancy, as prejudicial pleas, in cases where the merits were truly involved.

SEE supra, p. 47.

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The pursuer was convicted, on 18th July 1855, for breach of certificate under the statutes passed for the regulation of public-houses. On 2d August 1855 he was incarcerated on a warrant of that date for payment of the penalties. Of same date he presented a note of suspension and liberation, which was passed; and a record having been made up, the Court, on 18th November 1856, found the judgment and warrant null. On 17th October 1855, the pursuer brought this action, concluding for L.1000 of damages against the procurator-fiscal for wrongous imprisonment. The ground of action was, that "by the said wrongful, illegal, oppressive, and unwarrantable proceedings against the pursuer, and his apprehension and exposure on the public streets of Edinburgh as a prisoner, and his incarceration and detention in prison in manner foresaid, the pursuer has been grievously injured in his character, credit, reputation, and business; his feelings having been deeply wounded, and his health impaired."

The defender's pleas were as follows:—"1. The pursuer's statements on record are irrelevant, and insufficient to support the conclusions of the

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action. 2. The action is barred and excluded, in respect it was not commenced within three months after the cause of action or prosecution had arisen. In any view, the pursuer is barred from objecting to the conviction. 3. The defender is not responsible for any irregularity or informality either in the judgment or conviction, or in the warrant of imprisonment; or at least he is not responsible for any of the irregularities or informalities alleged by the pursuer in this case, and which were committed, not by the defender, but either by the magistrate or clerk of court. 4. The prosecution against the pursuer having been instituted and conducted by the defender in the *bona fide* discharge of his public duty as procurator-fiscal, and neither malice nor want of probable cause being alleged, the pursuer has no good cause of action against him. 5. The pursuer having sustained no damage in consequence of the irregularities or informalities, or any of them, in the proceedings complained of, no damages are due."

The Lord Ordinary, on 26th June 1857, pronounced the following interlocutor:—"Having heard parties' procurators on the defender's first and second pleas in law, and considered the record and whole process, repels the said pleas: Finds the pursuer entitled to the modified sum of four guineas of expenses of process, occasioned by the material alterations made by the defender on his pleadings in the course of adjusting the record, and of which question the consideration was formerly reserved; and decerns against the defender for payment thereof: Further, appoints parties respectively, within eight days, to prepare and lodge a draft of such issues and counter issues as they propose for the trial of the cause." *

* "NOTE.—In the course of the discussion in this case, the second plea in law for the defender, which had been added during the adjustment of the record, was taken into consideration first in order. That plea is founded on the following provision of the Act 9 Geo. IV., cap. 58, sect. 33:—' That every action or prosecution against any Sheriff, justice of the peace, magistrate, constable, or other person, on account of anything done in the execution of this Act, shall be commenced within three months after the cause of action or prosecution shall have arisen, and not afterwards.'

"Assuming that the defender maintains that, in giving effect to the limitation of action here enacted, the period of three months is to be held as consisting of lunar and not of calendar months, it still appears to the Lord Ordinary that the action has been brought within a sufficient time. The cause of action, as libelled, is the pursuer's apprehension and incarceration, which took place on 2d August, while the action was commenced on 17th October 1855. The illegality of that proceeding is said to arise from the nullity or invalidity of the warrant, dated also the 2d August, partly as being informal in itself, and partly as following upon an irregular and illegal sentence, dated 18th July 1855. But even in so far as the previous proceedings are referred to, they are not the cause of action, although their objectionable nature is founded on as giving the character of illegality to the apprehension and incarceration for which the pursuer claims reparation. It appears to the Lord Ordinary, that in cases of this kind the cause of action means the overt act or proceeding which gives immediate occasion to the complaint, and not any previous act or procedure which may come to be founded on in support of the action. An action of damages for imprisonment on an illegal warrant does not arise when the illegal warrant is granted or issued, much less when any anterior proceedings affecting its legality have taken place. The injury and cause of action is the actual execution of the warrant when it is not legal, and the consequent invasion of personal liberty when no legal warrant exists for such a step.

"With regard to the defender's first plea in law, as to the relevancy of the action, the Lord Ordinary considers that the case is somewhat of a special or peculiar nature. He would be unwilling to hold that, in ordinary criminal procedure, a prosecutor is liable in damages for the execution of a sentence, in which the judge may have committed some irregularity, over which the prosecutor has no control. Neither is the Lord Ordinary of opinion that a party will in general be liable in damages for enforcing a decree, whether civil or criminal, which is altogether formal

The defender reclaimed, and prayed the Court to sustain his first four pleas in law, and to assoilzie him from the conclusions of the action. He pleaded, that it was part of his duty to enforce the Acts under which the pursuer was apprehended. The only informality in the procedure had been the omission of certain statutory expressions in the sentence. But the sentence was pronounced by the Judge in the cause. It was not the *dictum* of the procurator-fiscal; and it being the judgment and not the warrant that was complained of, action was barred by the lapse of the statutory limitation. But further, the action was not relevant, there being no allegation of malice and want of probable cause. The defender was therefore entitled to have his first four pleas sustained as pleas upon the relevancy. The question came to be, whether, in every case whatsoever, where a judgment is set aside for irregularity, however slight, that necessarily raises an action of damages—whether a claim of damages is correlative with the right of having the judgment annulled?

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Counsel for the pursuer were not called on.

Lord President.—I do not require to hear anything more. The matter is perfectly plain. This action is expressly laid on the ground of the pursuer's apprehension, imprisonment, and detention in prison, at the instance of the defender, which he alleges was wrongous, illegal, and oppressive, without lawful warrant, and following upon the alleged incompetent, irregular, wrongous, and illegal proceedings which he sets forth, and which he also alleges was to his great loss, injury, and damage. Now that ground of action must run from the date of the pursuer's apprehension; for, although the *origo mali* was in the form of a judgment, the action is limited to the pursuer's "apprehension, imprisonment, and detention in prison." Therefore, upon that point, I think the Lord Ordinary is quite right.

As to the other matters, I do not think we are in a condition to deal with them. We must therefore recall *in hoc statu*, and adhere *quoad ultra*.

Lord Deas.—The cause of action here was the alleged wrongous apprehension; and it was therefore quite right to repel the objection that the action had not been

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or regular, but which may afterwards be set aside in a court of review.—See Aitken v. Finlay, 25th Feb. 1837, 15 Shaw, 683. But the peculiarity of the present case is, that in these proceedings, which are not properly criminal, a sentence was pronounced which was contrary to the statute on which it was founded, and which has consequently been reduced and set aside as null; while, moreover, the execution of that sentence was not the mere act of the court or of the law, but was the act of the prosecutor himself. The original sentence ordained payment of a penalty; and upon failure of payment, it lay with the prosecutor to follow it up or not as he pleased, by applying for and using a warrant of imprisonment as an executorial for enforcing the original sentence. Before doing so, it seems to have been the prosecutor's duty and business to see that he had a valid sentence which could be so enforced, just as it is the part of any ordinary pursuer to see that his decree is regular before he puts it in execution by diligence.

"There is here an objection stated to the regularity of the warrant of imprisonment itself. But apart from that circumstance, it seems, on the grounds already indicated, to be a relevant ground for an action of damages, that a prosecutor has obtained and enforced a warrant of imprisonment upon a sentence previously obtained, but which was a nullity, from its being disconform to the statute under which alone it could proceed. The invasion of a party's personal liberty by a warrant obtained *ex parte*, and therefore *periculo petentis*, without any good or formal foundation to support it, and where the procedure is out of the statute applicable to the case, seems to afford a sufficient ground for claiming reparation.

"It is true that the pursuer might at once have obtained a review by suspension of the original sentence pronounced against him, and his omission to do so in time may enter into the question or *quantum* of damages. But it does not seem to destroy the relevancy of an action of damages any more than a similar omission would have that effect where an irregular charge of horning had been given, and no suspension had been brought till a caption was put in force."

No. 208. — July 8, 1857. Moodie v. Skae.

instituted within the statutory period of three months. But in other respects the interlocutor affords an instance of the inexpediency of the practice of taking up a plea against relevancy as a prejudicial plea, because of its being so urged by the defender. The consequence here is, that while, in form, the defender's third and fourth pleas are untouched, they are, in effect, disregarded; and indeed the whole cause is virtually decided, except the *quantum* of damages. The first plea (which is repelled) relates both to the relevancy and sufficiency of the pursuer's statements to support the conclusions of the action. Now, if the statements be relevant without alleging malice or want of probable cause, the defender's fourth plea is of course ill founded, although the Lord Ordinary in his note makes no remark upon that plea. He does, however, enter fully into the matter of the third plea, which relates to the defender's responsibility for the irregularity of the procedure; and this just illustrates how relevancy is here mixed with the whole merits, and that any judgment upon relevancy is premature. The proper course is to appoint issues to be lodged; and then will arise a question, which may go, no doubt, to the root of the action, whether any issue can be granted where there is no allegation of malice or want of probable cause? But that question is, in the first instance, for discussion before the Lord Ordinary, who, although he cannot settle the issues if the parties continue to differ, may materially ripen the cause by reporting his opinion.

Lord Curriehill.—I concur both as to the limitation in point of time, and also as to the matter of relevancy, and I hope that the judgments the Court are now pronouncing will lead to a change of practice in the Outer-House; and that the Lords Ordinary will exercise a sound discretion in disposing of questions of relevancy, and not dispose of them as a matter of course when parties ask them.

Lord Ivory absent.

The Court pronounced the following interlocutor:—"Recall *in hoc statu* the interlocutor reclaimed against, in so far as it repels the first plea in law for the defender: *Quoad ultra* adhere to the said interlocutor, and refuse the desire of the said reclaiming note: Find the defender liable to the pursuer in the expenses of process incurred by him since the date of the Lord Ordinary's interlocutor reclaimed against; and remit to the Lord Ordinary to proceed with the cause, with power to his Lordship to decern for the expenses hereby found due, as they shall be taxed by the Auditor of Court."

David Manson, S.S.C.—Patrick Graham, W.S.—Agents.

No. 209.

A B, Pursuer.—*Macfarlane.*
David Skae, Defender.—*Penney—Gifford.*

Process—Issues—Amendment of adjusted issue.—An issue as adjusted put the question, Whether, "in the house No. 5 Brown Street," &c.—*Held* competent to amend the issue by adding the word "Lane," conformably to the description in the record, and striking out "No. 5," there being no such number either in the street or lane,—also by adding "then occupied by" so and so, "and now or lately occupied by" so and so.

July 8, 1857. — 1st Division. Lord Neaves. C.

In this case the following issues were adjusted on 24th June:—

"1. Whether, about the beginning, or earlier part, of the year 1854, the defender did, within the Royal Lunatic Asylum, Morningside, and again about the end, or latter part, of said year, within the house at Greenhill, near Edinburgh, then occupied by the Rev. John Kirk, minister of the Independent Chapel, Brighton Street, Edinburgh, or on one or other of these occasions, falsely and calumniously state to the said Rev. John Kirk that the pursuer had committed fornication with C D, now or sometime residing in Leith,—or did make a charge and statement of and concerning the pursuer, of similar import and meaning, to her loss, injury, and damage?

"2. Whether the defender, times and places foresaid, did falsely and calumniously state to the said Rev. John Kirk, that a *fama* or report existed

relative to the character of the pursuer, to the effect that she had committed fornication with the said C D,—or did make a statement of and concerning the pursuer of similar import and meaning, to her loss, injury, and damage? Damages laid at L.500. No. 209. — July 8, 1857. Moodie v. Skae.

Or,

"Whether the pursuer, in or about the month of March 1849, in a house No. 5 Brown Street, St Leonards, committed fornication with C D."

Penney, for the defender, now moved for leave to alter the counter issue, to the effect of deleting the words "No. 5," and adding, after the word "street," the word "Lane," and after the word "St Leonards," "then occupied by Mrs Ainslie or Henderson, and now or lately occupied by James Turner." He submitted that it was quite competent after an issue was engrossed to correct a manifest blunder.[1] In this case the omission of the word "Lane" was clearly a clerical error; for the words of the record were, "in a house in or near Brown Street Lane, St Leonards." Again, the words "No. 5" would lead to ambiguity, if taken as the actual *locus*, for it was difficult to say what were the numbers of the lane, or whether there were five houses. The words proposed to be inserted were better calculated to identify the house.

Macfarlane, for the pursuer.—If the insertion of "No. 5" be a blunder, the Court would not allow it to be amended,[2] nor had they the power to do so after the issues had been definitely settled. The effect of the alteration would be to allow the parties to change the ground of defence, for the proposed correction was not of a clerical error in the description. The localities were different. The alteration was now incompetent.[3]

Lord President.—There are two alterations which the defender proposes to make. One is to insert the word "lane," after the words "Brown Street," He says its omission was a clerical error. So far as we can judge it appears to be so, for in the record the expression is "Brown Street Lane," and not "Brown Street." If the defender had demanded an issue specifying "No. 5 Brown Street," and the pursuer had objected, we could not have granted it. It is not usual to take an issue of "in or near a street," when it is some other place.

The next point is, whether the number can be deleted. I am more doubtful about that. But it is not in the record. It was suggested at the time of adjusting the issues, in order to meet the pursuer's desire to have the *locus* identified, and I put the question, whether the defender was sure of the street, and of the number? and I was told that he was. I think that, considering the way in which it was introduced, it may be amended.

As to the insertion of the other words, I think that the pursuer is entitled to have them.

Lord Curriehill concurred.

Lord Deas.—As to the deletion of "No. 5," I understand the fact to be, that there is no No. 5 either in Brown Street or in Brown Street Lane, so that not being in the record, there is not much difficulty in allowing this deletion. As to the addition of the words, "then occupied by Mrs Henderson," the effect of allowing it will of course be to limit the pursuer, and the defender cannot object to that. The main point therefore is the insertion of the word "lane;" and if this word had not been in the record, the objection would have been serious. But it is in the record, and the effect of the amendment is merely to make the issue and record correspond. I think therefore the alterations may be allowed.

Lord Ivory absent.

The counter issue, as adjusted, was as follows:—"Whether the pur-

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[1] Muir v. Caldwell, 24th March 1853, ante, vol. xv. p. 590; Edwards v. Begbie, 3d Dec. 1850, ante, vol. xiii. p. 227.

[2] Kinloch v. Hill, 19th June 1855, ante, vol. xvii. p. 958.

[3] Act of Sederunt 29th Nov. 1810, sect. 10, Statute 13 & 14 Vict. cap. 36, sect. 39.

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suer, in or about the month of March 1849, in a house in Brown Street Lane, St Leonards, then occupied by Mrs Ainslie or Henderson, and now or lately occupied by James Turner, committed fornication with C D."

RANKEN, WALKER, & JOHNSTON, W.S.—JOHN ROBERTSON, S.S.C.—Agents.

No. 210.

GEORGE MACLACHLAN, Complainer.—*Penney—Macfarlane.*
JOHN MEIKLAM AND OTHERS, Respondents.—*Moir—A. R. Clark.*

Jurisdiction—Foreign—Interdict.—A proprietor of landed estates in Scotland died in England possessed of considerable personalty. By antenuptial contract of marriage he had made a provision for his children, subject to his apportionment, and he afterwards granted a bond and disposition in security therefor over an estate in Scotland to trustees. He also executed a trust-disposition and settlement in the Scotch form, but with an attestation in the English form; one purpose of the trust being, the payment of the childrens' provision. He executed a deed of apportionment and two codicils. These his son challenged by proceedings in Chancery, and he claimed to have the trust-settlement administered under the direction of that Court. The Master of the Rolls having pronounced an order "to deposit in the Record and Will Office all the title-deeds, muniments, and documents," in the possession of the testamentary trustees, who were all in Scotland;—*Held* (*aff.* judgment of Lord Curriehill), that the trustee under the bond and disposition in security was entitled to interdict against the deeds constituting the provision and his trust and security, and the title-deeds of the estate, being removed beyond the jurisdiction of the Court of Session, reserving right to apply for exhibition of them so far as necessary in the English proceedings.

July 9, 1857.
1ST DIVISION.
Ld. Curriehill.
L.
Bill-Chamber.

THE deceased James Meiklam died in England in October 1854, possessed of considerable personalty, and large heritable estates in Scotland. He was survived by his wife, and by a son and daughter. By antenuptial contract of marriage Mr Meiklam provided for the payment of L.20,000 to the children of the marriage at the first term of Whitsunday or Martinmas after his death—which sum was to be divisible by him in such proportions as he should appoint. The complainer, George Maclachlan, was the sole surviving trustee for administering that provision under a bond and disposition in security by Mr Meiklam in his favour, and another trustee now deceased, dated 17th February 1846, and extending over his lands of Carnbroe, situated in Scotland. The respondents were Mr Meiklam's testamentary trustees and executors under a trust-disposition and settlement dated 31st January 1853, and two codicils, dated respectively 31st May and 9th August 1853.

Mr Meiklam's contract of marriage was in the Scotch form. A voluntary contract of separation in the Scotch form was entered into between Mr and Mrs Meiklam on 17th February 1846. The bond and disposition in security of same date was also in the Scotch form. It narrated Mr Meiklam's contract of marriage and the contract of separation; and contained an assignation to the whole writs "and title-deeds of and concerning the lands and others thereby disponed." Mr Meiklam's trust-disposition and settlement was in the Scotch form. It had *ob majorem cautelam* an attestation in terms of the English Wills Act, executed at London upon the 31st January 1853, and was recorded in the Books of Council and Session upon the 18th October 1854. Mr Meiklam was therein designed of Carnbroe, in the shire of Lanark, Scotland, "presently residing in London," and the estate was conveyed to the respondents' testamentary trustees—one of the purposes of the trust being the payment of the truster's debts, particularly the provision of L.20,000.

Mr Meiklam exercised the power of apportionment by a deed of division in the Scotch form; but having *ob majorem cautelam* an attestation in the

English form appended thereto, executed at London the 28th March 1853, and recorded along with the trust-disposition and settlement. Mr Meiklam apportioned L.100 to his son, and L.19,900 to his daughter. The codicils were executed by Mr Meiklam in the Scotch form, and had also an attestation in the English form appended thereto.

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The respondents having entered upon the management *inter alia* of the estate of Carnbroe—which contained minerals of great value—one of their number, Mr Campbell, with consent of the others, obtained probate of the deeds of settlement from the Prerogative Court of the Archbishop of Canterbury on the 30th November 1854, in favour of himself, a power being reserved of making a like grant in favour of the other executors named in the settlement, when they should apply for the same. The complainer now stated that Mr Meiklam's personal estate had proved insufficient for the payment of his personal debts; that the complainer had no security over the minerals in Carnbroe, which were expressly excepted from the conveyance in his bond; and that after deducting the interest of preferable securities, the remainder of the rents of the lands were not sufficient to pay one-half of the interest of the L.20,000, and that the complainer must therefore fall back on the remaining trust-estate, vested in the respondents, for the remainder of the interest. That Mr Meiklam's son had instituted a suit in the Prerogative Court of the Archbishop of Canterbury against Mr Campbell, challenging the deed of division and two codicils, for the purpose of having them revoked and annulled; and that he had also filed a bill in Chancery against the respondents, his sister, and certain other parties beneficially interested under the trust-dispositions, alleging, *inter alia*, that the deed of division and two codicils were void and inoperative as against him, and claiming to have the trust carried into effect under direction of the Court of Chancery. That the defendants had entered a conditional appearance, and that the Master of the Rolls had pronounced an order, "to deposit in the Record and Will Office all the title-deeds, muniments, and documents," in the possession of the testamentary trustees, or others having the same. Art. 17 of the complainer's statement was as follows:—"The said James Meiklam was a Scotchman by birth, and had large landed property in Scotland, and was at the time of the execution of the various deeds hereinbefore recited, and at the time of his death, domiciled in Scotland. The trustees are Scotch trustees, the estate they have to administer is a Scotch landed estate, and the trust-deeds they have to carry into execution are Scotch deeds." The complainer therefore craved interdict against the trustees or their agents removing beyond the jurisdiction of the Court any of the writs or title-deeds of the lands and estates of Carnbroe "and others, situated in Scotland, which belonged to the deceased James Meiklam, and were disponed by him to the complainer by the said bond and disposition in security for L.20,000, dated 17th May 1846, and the title-deeds, writs, evidents, and vouchers, or any of them, of any other estates or effects vested in or held by the respondents, as said testamentary trustees and executors, and liable to the complainer for payment of the said sum or provision of L.20,000, and interest thereof; and also the deeds and instruments under which the said sum or provision is constituted and payable, or any of them, and from giving up the same, or any of them, to any party or parties, to be so removed or otherwise to be put beyond the control of the said testamentary trustees and executors, and the jurisdiction of your Lordships, and beyond the reach of any Scotch process or diligence competent to the complainer."

Answers were lodged for the respondent Mr John Meiklam, who stated (art. 5), that "as the deceased Mr Meiklam was, at the time of his death, domiciled in England, and had considerable property there, the Courts of that country have, by the law thereof, undoubted jurisdiction, and are the

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proper Courts to determine all questions regarding the succession of the deceased, and the rights and interests of all parties therein. As the parties chiefly interested in the said succession are resident in England, it is the most convenient forum for trying the said questions." And after stating that production of the titles was absolutely necessary for carrying on the suit raised by him in Chancery, and, if required in Scotland, they would be produced under proper guards for their security,—he averred that the complainer was the acting agent and factor for the trustees and executors, and that the present application had not been made for the purpose of carrying out the trust-deed, or of securing the interests of the beneficiaries therein, but under the instructions, or at least with the connivance, of the trustees and executors, and in order to afford them a pretence for not implementing the order of the Court of Chancery, and thereby defeating the rights of the respondent. He therefore pleaded that the interdict should be refused.

The Lord Ordinary, on 22d April 1857, pronounced the following interlocutor:—"Having considered the note of suspension, with the answers and productions, passes the note, and continues the interdict, reserving to the respondents, or either of them, to apply to the Lord Ordinary or the Court for the exhibition and use of the documents in question, in so far as the same may be found to be requisite in the proceedings in England, and all answers to such applications."

The respondent reclaimed, and pleaded;—That the complainer had no right to oppose the order for removal of the title-deeds, seeing that the interest of the party for whom he acted was represented in Chancery, and would be protected there.

The complainer pleaded;—That he appeared both in the capacity of judicial factor, as well as agent for the testamentary trustees. He was not only creditor, but *quasi* proprietor of the estate of Carnbroe, and was in these capacities entitled to withhold the titles.

Lord President.—The interlocutor of the Lord Ordinary is right, and the interdict ought, in my opinion, to be continued against removing the writs and title-deeds of the property conveyed in security of the L.20,000 beyond the jurisdiction of the Court, but with power to apply to the Lord Ordinary, and under the conditions and limitations of the Lord Ordinary's interlocutor.

I am also of opinion that the interdict should apply to the deeds and instruments under which the provision is constituted in favour of Mr Maclachan, as trustee for the beneficiaries. That is the main element of the pursuer's title in this matter. And if they are matters that are fairly within the competition between the parties, it is only the more necessary to protect them from being carried off beyond the jurisdiction of this Court. But we cannot grant interdict as regards the title-deeds of the property other than that contained in the conveyance in security. I am not disposed to extend this interlocutor beyond the immediate subject of the right of this heritable creditor *qua* such.

Lord Curriehill.—This case was considered by me in the Bill-Chamber, and the view which I took of it was this: The party who applies for this interdict is heritable creditor upon the estate of Carnbroe. The disposition in security in his favour conveys to him that estate, and also expressly the rights and title-deeds thereof in security of the L.20,000. In the character of disponee and assignee in security he has right to these title-deeds, and, if he chooses, to the possession of the estate itself. He could bring an action of maills and duties for that purpose. Such being the nature of his right to these documents, I was then of opinion, and I still remain of that opinion, that he is entitled to prevent the testamentary trustees from parting with possession of the title-deeds of the property over which that security extends, and above all, from putting them beyond the jurisdiction of this Court. When I pronounced judgment, however, I was not aware at that time that there was any other estate belonging to the truster within Scotland, which was not included in this security. From the explanation we have now had, it appears that there is a property not included. Of course, that conveyance in security does not

comprehend such property, or the rights and title-deeds belonging thereto. Therefore the complainer does not possess that title to them which I supposed he had when I pronounced this interlocutor, and it seems perfectly clear that he cannot be entitled to ask for interdict in respect to such property, for in regard to it he is in no better position than any personal creditor would be. Therefore, I concur entirely in thinking that there should be no interdict as to the subject of the estates other than what is included in the security. The pleadings before me did not direct attention to that difference, and I am glad of the opportunity of correcting it. The deeds and instruments which constituted the provision are distinctly the property of the judicial factor, and I am quite clear that the interlocutor should be adhered to, with the qualification suggested by your Lordship.

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July 9, 1857.
Kilgour.

LORD DEAS.—I concur in the restricted interlocutor proposed to be pronounced by your Lordships. The respondent in Article 5 of his statement places the jurisdiction of the English Courts entirely upon the ground that "the deceased Mr Meiklam was at the time of his death domiciled in England, and had considerable property there." But the complainer, on the other hand, alleges (stat. 17) that Mr Meiklam (who was a Scotchman by birth, and had landed estates in Scotland) was, both when the deeds in dispute were executed, and "at the time of his death, domiciled in Scotland." Until, therefore, the domicile is ascertained we cannot assume the fact on which the respondent himself rests the jurisdiction of the English Courts; and this, of itself, would be a sufficient ground for preventing in the meantime any change as respects the custody of and power over the deeds constituting the complainer's title to the heritable security, which forms, your Lordships know, an heritable Scotch estate. The only doubt I have is as to making the interdict applicable to some of the deeds which are not in the custody or under the power of the parties sought to be interdicted. But if this be not objected to by the parties themselves, it can of course do no harm.

LORD IVORY absent.

THE COURT pronounced the following interlocutor:—"Adhere to the interlocutor reclaimed against, in so far as it passes the note, and as it continues the interdict formerly granted as to the title-deeds, writs, and evidents, or any of them, of the lands and estates of Carnbroe, and others situated in Scotland, which belonged to the deceased James Meiklam, and were disponed by him to the complainer by the bond and disposition in security for L.20,000, dated 17th May 1846, mentioned in the note of suspension: And also the following deeds executed by the said deceased James Meiklam, viz., his marriage-contract, contract of separation, and bond and disposition in security, instrument of sasine thereon, and deed of division, dated the 28th March 1853, subject to the reservations contained in the Lord Ordinary's said interlocutor, which are also adhered to: *Quoad ultra* recall the interlocutor reclaimed against, and remit to the Lord Ordinary on the Bills to recall the interim interdict, except to the extent foresaid."

ROBERT AINSLIE, W.S.—INGLIS & LESLIE, W.S.—MACLACHLAN & IVORY, W.S.—Agents.

ROBERT WILLIAM KILGOUR, Petitioner.—*Boyle*. No. 211.

Entail—Petition—Amendment.

THIS petition was presented under the Entail Amendment Acts, to have improvements allowed. It prayed for service upon *inter alios* "William Thornby Kilgour."

July 10, 1857.

1ST DIVISION.

The intimation bore to have been made to William Thornborrow Kilgour, and on inquiry it turned out that this was the party's real name.

PETITION allowed to be amended, without new intimation being ordered.

AULD & CHALMERS, W.S.—Agents.

No. 212. SIR HEW DALRYMPLE, Bart., Petitioner.—*Ross.*

July 10, 1857. Dalrymple.

1st Division. Ld. Mackenzie L.

Entail Amendment Act—Consent—Tutor ad litem—Statutes 11 & 12 *Vict. cap.* 36, *sect.* 4, *and* 16 & 17 *Vict. cap.* 94, *sects.* 4 *and* 5.

A PETITION was presented for authority to charge entailed estates with debt. The heirs, whose consents were required, were the petitioner's brother and his two sons, who were pupils. The deed of consent was signed by the brother for himself, and also as administrator-in-law and legal guardian for his sons. The Court appointed a *tutor ad litem* to the pupils; and, upon his giving his consent, the Court granted the prayer of the petition.

JOHN MURRAY, S.S.C.—Agent.

No. 213. JOHN FOTHERINGHAM, Petitioner.—*E. S. Gordon.*

July 10, 1857. Fotheringham.

1st Division. Ld. Mackenzie L.

Judicial factor—Factor loco tutoris—Pupils Protection Act.

SPECIAL powers were, after the usual proceedings, granted to a factor *loco tutoris* of a pupil *pro indiviso* proprietor of heritable subjects, to make up titles and grant leases to endure to the term next after the pupil attaining minority. In one case the proposed lessee was the other *pro indiviso* proprietor.

KEEGAN & WALLACE, S.S.C.—Agents.

No. 214. MRS AGNES CHIENE OR THOMSON AND OTHERS, Petitioner.—*Monro.*

July 10, 1857. Thomson.

1st Division. Ld. Mackenzie C.

Judicial factor—Special powers.—The Court, on the petition of the beneficiaries, appointed a judicial factor to a lapsed trust, but refused to grant him special powers in regard to the administration of the trust.

THE late Mrs Melville directed two sums of L.1266, 13s. 4d. and L.333, 6s. 8d. to be invested by her trustees for behoof of the petitioner, Mrs Thomson, in liferent, and her children in fee. On Mrs Melville's death the trustees accepted of the trust. They lent L.400 on heritable security. The remainder of the trust-funds were lent on personal security. The trustees all died without having assumed others to succeed them. The subjects over which the heritable security had been granted having been sold, it was proposed to pay up the principal sum; the present application was therefore made by the liferentrix and fiars for the appointment of a judicial factor to take the management of the trust, and also, in order to save expense, for special powers to the factor to make up titles and assign or discharge the heritable security.

THE COURT appointed a factor, but refused to grant any special powers.

JAMES MOORE, S.S.C.—Agent.

No. 215. JOHN GORDON CUMING SKENE, Petitioner.—*Macpherson.*

July 10, 1857. Skene.

1st Division. C.

Entail—11 & 12 *Vict. c.* 36, *sect.* 26—*Trenching.*

IN this case the Court authorised the petitioner to apply money consigned by a Railway Company, as compensation for entailed lands taken, in repayment of L.188, 11s. 9d. expended on trenching—the trenching not being accessory to drainage, but being, as reported by a man of skill, "executed in reclaiming a tract of 21 acres of old woodland, contiguous to the new steading of farm offices built on the home farm,"—the expense of which steading was also admitted as an improvement within the Act.[1]

ARTHUR FORBES, W.S.—Agent.

[1] Ramsay, 21st Nov. 1854, ante, vol. xiv. p. 74; Farquharson, 19th June 1856, ante, vol. xviii p. 1044.

FRANCIS RUNCIE, Pursuer and Advocator.—*E. S. Gordon—A. R. Clark.*
MRS JANET YOUNG OR LEITH LUMSDEN AND OTHERS (Lumsden's Executors), Defenders and Respondents.—*Penney—Hector.*

No. 216.

July 10, 1857.
Runcie v. Lumsden's Executors.

Lease—Landlord and tenant—Meliorations—Transaction.—Circumstances in which, *held*, that at the expiry of his lease the tenant of a farm on an entailed estate had a good claim for meliorations against the executors of the heir of entail who had granted the lease.

1ST DIVISION.
Ld. Mackenzie L.
Sheriff of Aberdeenshire.

FRANCIS RUNCIE, farmer at Greenlaw, brought this action in the Sheriff-court of Aberdeenshire against the trustees and executors of the late Harry Leith Lumsden, heir of entail of the lands of Rosyburn, concluding for payment "of the sum of L.120, as the sum agreed to be paid to the pursuer by the said Harry Leith Lumsden, the pursuer's author, for houses on said farm of Greenlaw, at the termination of the said pursuer's lease thereof," at Whitsunday 1852. A diligence was granted, and proof allowed in the inferior Court, under which a great deal of evidence, documentary and oral, was adduced.

The facts of the case, as disclosed by it, were thus stated in the interlocutor ultimately pronounced by the Inner-House:—"Find it proven in point of fact—1st, That by missives of lease dated 27th March 1833, between the late Harry Leith Lumsden of Rosyburn and the advocator, and certain printed articles, conditions, and regulations therein referred to, the former let to the latter the farm of Greenlaw for nineteen years, and crops from Whitsunday 1833; and thereby, on the one hand, the advocator was taken bound, at the term of entry, to take off the houses on the farm from the outgoing tenant, and to pay the appreciated value thereof above the dead or lying inventory; and, on the other hand, the said Harry Leith Lumsden became bound, at the term of the tenant's removal, to pay to him a sum not exceeding one year's rent as the value of meliorations, including the value of the houses to be so paid for as aforesaid, at the tenant's entry, as these houses should stand at the termination of the lease, but exclusive of the amount of the heritor's or dead inventory. 2d, That the out-going tenant, William Cowie, having authorised William Simpson, merchant in Blacktown, to act for him in the matter, the advocator and the said William Simpson appointed George Watt, mason in Macduff, and James Clark, wright in Keilhill, and the advocator appointed James Shand, mason in Macduff, and Nathaniel Mair, wright there, to appreciate the value of the houses payable by the advocator to the said William Cowie; 3d, That it is not proved that the said Harry Leith Lumsden furnished any heritor's or dead inventory to the advocator; but his factor Archibald Young, acting for him, wrote to the advocator, on 16th May 1833, that the landlord had no great objection to that valuation going on, provided the valuators should take care to value no houses but those sufficiently built, and which ought to be valued; that as there was a misunderstanding as to the extent of the allowances for buildings to be allowed to William Cowie, the advocator should state to him that the advocator's agreement to the valuation should be under the positive understanding that the same should not infer any obligation to pay for houses beyond the amount which Mr Cowie could instruct the heritor was bound to pay for or allow, by any agreement entered into between the heritor and him, and that the best way of making William Cowie aware of this was to read and give to him that letter, of which Mr Young had kept a copy; 4th, That accordingly that letter was delivered by the advocator to the said William Cowie, and was by him given to the said William Simpson as acting for him in that transaction, and on the following day, viz.. the 17th of May 1833, the valuators appreciated the mason and wright-work, of which the value was so payable by the advocator to

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William Cowie, at the sum of L.141, 13s. 8d., conform to inventory and valuation signed by them, No. 2 of the Inferior Court Process: 5th, That the said inventory and valuation having been communicated to the said Archibald Young, on behalf of the landlord, and communings having taken place regarding the same between him and both the advocator and the said William Simpson, he, the said Archibald Young, objected to certain articles therein contained, amounting to L.14, as not being payable by the landlord, and in consequence that amount was deducted from the foresaid valuation; and the said Archibald Young having farther stated that he thought the value of the other articles was somewhat too high, and recommended a farther deduction, the said William Cowie and the advocator agreed also to that recommendation, and deducted the farther sum of L.10, 1s. 10d., whereby the appraised value of the said houses was reduced to the sum of L.117, 11s. 10d., and by a writing dated 11th November 1833, and signed by the said William Cowie and the advocator, that was stated to be the sum due by the latter to the former; 6th, That that sum, less 11s. 10d. as discount, was paid by the advocator to the said William Cowie, on 11th February 1834, conform to receipt of that date; 7th, That the said writing, dated 11th November 1833, and one duplicate of the foresaid inventory and valuation, having marked thereon the foresaid deductions proposed by Mr Young on the part of the landlord, and that the adjusted sum of L.117, 11s. 10d. was paid by the advocator to William Cowie, as aforesaid, were delivered to and retained by the said Archibald Young on behalf of the landlord, and another of the said inventory, and valuation and markings thereon, was retained by the advocator, and the said adjustment and settlement of the sum payable by the advocator to Mr Cowie under the foresaid lease between the said Harry Leith Lumsden and the advocator was acquiesced in by all concerned during the currency of that lease; 8th, That the said Harry Leith Lumsden died on or about 27th March 1844, and the respondents represented him as his testamentary trustees and executors; 9th. That the foresaid lease having expired at Whitsunday 1852, the value of the meliorations claimable by the advocator under the stipulations therein before mentioned then became payable; 10th, That, under a reference by the respondents and the advocator, the value of the foresaid houses, as they stood at the termination of the lease, was ascertained to be L.196, 3s. 5d., but that, one year's rent of the farm having been only L.120, the value of the meliorations claimable by the advocator is limited to that amount."

The defence mainly relied upon was, that Mr Harry Leith Lumsden, heir of entail, was not liable for the acts of his predecessor, Sir Harry Niven Lumsden, who had granted the obligation upon which Cowie's claim for meliorations depended; and, the pursuer having been certiorated by Mr Young that Cowie had no claim against the late Mr Leith Lumsden, the sum thereafter paid by the pursuer to Cowie could not be dealt with as a claim against Mr H. L. Lumsden or his executors as under the lease of 1833.

The Sheriff-substitute (Watson) decerned against the defenders.*

The Sheriff-depute (Davidson) pronounced an interlocutor, in whi

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* It was remarked in the note attached to the interlocutor—"The only question seems to be whether the late Mr Lumsden was liable for the sum payable to the outgoing tenant in 1833, and if he was not, whether his executors are now enti to set up that defence after all that took place in regard to the obligations imp on the pursuer to pay the outgoing tenant the valuations consequent thereon and the payment by him. The Sheriff-substitute thinks that the conduct of the late Mr Lumsden, and whole circumstances, render the defenders liable to pay the pursuer's claim."

ıfter various findings in fact, he "finds it not proved what the amount of the lead or lying inventory was at the time the aforesaid valuation in May 1833 ras made by the pursuer and William Cowie: Finds it not proved that the aid Harry Leith Lumsden was a party to that valuation, nor that he recog-ised and admitted that the said sum of L.117, 11s. 10d., or any part of the aid sum, was due and payable to the said William Cowie, as outgoing enant, at the end of his lease: Finds it not proved that the said sum was he surplus value above the dead or lying inventory, nor that there was any urplus value: Therefore assoilzies the defenders, but, in the circumstances, nds no expenses due, and decerns." *

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The pursuer advocated; arguing that the proof supported the summons, hile Lumsden's executors maintained that he had never agreed to pay the 120 claimed for meliorations; that the claim was inconsistent with the dvocator's lease; and that the parole proof adduced by him was incom-etent, and ought not to have been admitted.

Lord Curriehill.—I have found some embarrassment in forming an opinion this case, in respect that neither the record nor the evidence are clear or satis-ctory. Looking to the conclusions of the summons, the question is, whether the ırsuer has proved that the landlord agreed to pay him this sum for which he ncludes. In the first place, according to the contract between the parties, there as an obligation upon the incoming tenant to pay something to the outgoing nant in name of meliorations. There is a limitation as to the amount. But ch an obligation necessarily imports that there were some buildings upon this rm over and above the landlord's inventory. The missives do not tell us what at inventory included. But it is quite plain that there was something to be lued and taken by the incoming tenant. Valuators were appointed. This came known to the landlord or his factor, and the day before the valuation the ctor wrote to the pursuer the letter of 16th May 1833.

Now, the landlord did not send his inventory. Probably such an inventory d not exist. If it did, it behoved to be in his possession, and it was his duty that case to have sent it, in order that parties at the valuation might see what ıs contained in it. But what he directs is this: That what should be valued ould not be the whole subjects, but the houses sufficiently built; but that this was t to infer any obligation beyond the amount Cowie could instruct the landlord ıs bound to pay.

With this letter before parties the valuation proceeded, and the sum brought out that valuation was L.141, 13s. 8d.

The valuation was made according to the instructions of the landlord, and there every reason to assume that it was fairly made, because parties having adverse erests attended it. But the parties did not rest on their own opinions on the bject. Both the outgoing tenant, through his agent, and the incoming tenant nt to the landlord, or what is the same thing, to his factor, and he went over valuation, pointing out certain articles which he thought ought not to be luded, and also criticising the valuation itself, as being in his opinion too high, l corrections were made on his suggestion. These corrections fairly implied proval of all the articles to which they did not apply. Those which were

* The following passages from the note of the Sheriff-depute shews his view of law applicable to the case: — "Is it proved, that supposing Sir Harry Niven ımsden, the former proprietor, had been in life in May 1833, Cowie would have d any good claim against him? There is no lease between Cowie and his land-d in this process, no agreements, no dead inventory, no proof of any surplus lue being due to him. If the pursuer could have shewn that Mr Lumsden or his tor recognised the sum paid by him to Cowie, or any part of that sum as really e, that would have been enough. But, unfortunately, he has not been able to that." He added—"Still, the pursuer did pay Cowie a large sum, and it is possible to divest the case of the impression that it has come to a hard result for e pursuer."

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objected to altogether were deducted, and the sum thus brought out was actually paid by the advocator to the party who acted for Cowie, the outgoing tenant. One copy of the valuation so corrected was left with the landlord's factor, from whose repositories it was recovered under the diligence in this action, and another retained by the incoming tenant. The necessary presumption from all these circumstances is, that the landlord did agree to pay this sum to the incoming tenant, and to the extent of L.117, 11s. 10d. I think that the pursuer has made out his case.

Lord President.—I come substantially to the same conclusion, and on the same grounds.

Lord Deas.—I attach great weight to the Sheriff's interlocutor, which he places upon perfectly judicial grounds. But the real question turns upon the matters of fact involved in his concluding finding, that it is not proved that Mr Harry Leith Lumsden was a party to the valuation between the pursuer and Cowie, nor that he recognised or admitted the L.117, 11s. 10d., or any part of it, to have been due to Cowie. Now, as regards the valuation, it is true enough that Mr Lumsden was not a party to it as fixing the actual amount due to Cowie. But through his factor, Mr Young, he was a party to it, as fixing the value of the buildings, subject to the question how much of that value was payable to Cowie. The advocator was bound by his lease to pay whatever allowances were due to Cowie, and that something was due to him is substantially admitted in Mr Young's letter of 16th May 1833, which bears, "as there is a misunderstanding as to the extent of allowances for buildings on the farm to be allowed to Mr William Cowie," the valuation should not infer an obligation in favour of Cowie beyond the amount he could shew the proprietor was bound to pay to him by any agreement between them. But it was the extent or amount of allowances due to Cowie which alone was disputed, and not the fact that something was due to him. Now, whose duty was it to produce the lease or agreement with Cowie, and likewise the dead inventory? Surely that of the landlord; and if he produces no dead inventory, how can he demand a deduction in respect of it from allowances otherwise admittedly due to Cowie? It was also his duty to have had an inventory made up with the advocator at his entry. For the articles of lease bear, "The tenant shall receive the houses on the farm by an inventory, and pay, at his entry, the surplus value above the dead or lying inventory." But I see no inventory given to the advocator at entry except the inventory and valuation between him and Cowie. Then the agreement of 11th November 1833, relative to that valuation, bears that, "in order to settle the matter," L.10, 1s. 10d. should be deducted from the valuation, "leaving L.117, 11s. 10d. sterling due by me Francis Runcie to said William Cowie." Now how could L.117, 11s. 10d. be due by the advocator to Cowie except upon the footing that this was the sum due to Cowie for the buildings after deducting whatever fell to be deducted from it? True, this was a mere agreement between the advocator and Cowie. But the material fact is that it was recovered out of the repositories of Young, the landlord's factor;—at least the depositions of havers bear so, and I cannot, without proof, assume the fact to have been otherwise. Now if the proprietor allows his incoming tenant to pay,—as it is admitted the advocator did pay, —L.117, 11s. 10d. to the outgoing tenant in implement of an obligation to pay him his allowances, and the proprietor keeps in his repositories, without objection, for nineteen years, an agreement bearing that this was the sum actually due,—can the proprietor, at the end of that time, turn round and say that not a sixpence of this is to be repaid upon such grounds as are pleaded here? I cannot arrive at that result, even apart from the deposition of the advocator, to the effect that he reported to Young the settlement he had made with Cowie, with which Young seemed well pleased. Young himself is dead, which is another result of the delay. But his son depones—"In all cases on Rosyburn, the outgoing and incoming tenants of any of the possessions invariably settled together after consulting my father." I do not doubt that this happened here, and that it would be altogether unjust now to disallow a payment *bona fide* made on the understanding that it was acquiesced in, and was to be repaid by the landlord.

Lord Ivory absent.

The Court pronounced the following interlocutor:—(After the findings in fact above quoted)—"Find in these circumstances in point of law, that by the conditions of the foresaid lease the respondents, as representing the said Harry Leith Lumsden, are liable in payment of that sum, with interest from Whitsunday 1852: Therefore repel the defences; decern in terms of the libel: Find the respondents liable to the pursuer in the expenses incurred by him, both in this Court and in the Inferior Court: Appoint an account," &c. No. 216. — July 10, 1857. Cullen v. Kerr.

Webster & Renny, W.S.—Jopp & Johnston, W.S.—Agents.

John Cullen, Pursuer.—*Penney—Buchanan.* No. 217.
Archibald Kerr, Defender.—*Macfarlane—A. R. Clark.*

Agent and Principal—Repetition—Reparation—Relevancy.—A broker instructed to purchase railway shares on 15th October, of that date notified the purchase of 180 to his employer, who, on 6th November, paid the price and got the transfer, but did not register. The seller of 50 of these shares brought an action against him to compel him to register, and for relief of calls. It turned out that these 50 shares had been purchased on 6th November. The purchaser was assoilzied, but without expenses.

The purchaser now sued the broker for repetition of the price of the whole shares, and payment of the expenses incurred in the action at the instance of the seller of the 50 shares. Besides the objection to the 50 shares, it was alleged generally that none of the shares in the transfer were those purchased for him on 15th October.—*Action dismissed*—1. (*alt.* judgment of Lord Handyside, *abs.* Lord Ivory), as regarded the claim for repetition, in respect there were no conclusions for reduction of the transaction, nor was there any offer made to restore the transfers. 2. (*aff.* judgment of Lord Handyside), so far as regarded the claim for repayment of the expenses incurred in the other action.

In October 1847, John Cullen, W.S., employed Kerr, a sharebroker in Glasgow, to purchase shares in the Great Northern Railway Company. On 14th October he wrote to Kerr, to the effect that if he had not bought the shares, "I renew the order for to-morrow;" and on 15th October Kerr wrote to Cullen: "I have bought for you 180 shares of the Great Northern Railway." He also of same date wrote: "I now beg to send you list of to-day's prices and purchase note, viz., of . . . 180 Great Northern." July 10, 1857. — 1st Division. Ld. Handyside. L.

After some correspondence as to the price, Cullen sent his clerk to Glasgow on 6th November 1847, with the amount. 447, 18s. 6d. This was paid to Kerr, who at the same time delivered to Cullen's clerk the transfer and relative certificates as for 180 shares Great Northern. The transfer was signed by William Lindsay and Alexander Black. Sometime thereafter Black raised an action against Cullen, to compel him to register 50 Great Northern shares purchased from him, and to relieve him as seller of a call then due, and of all future calls. It was admitted in the course of the action that though these 50 shares were embraced in the transfer, they were not part of those bought on 15th October, but others bought on 6th November. The case was taken by appeal to the House of Lords, and, after a remit by them, Cullen was assoilzied, but the Court found no expenses due. (See ante, vol. xiii, p. 1114 and 1185; and vol. xv, p. 646.) Pending that action, Cullen raised an action of relief against Kerr; but, after defences were lodged, it was allowed to lie over till the issue of the one at Black's instance, and it was now conjoined with the present action, which concluded, (1), for repetition of "the sum of L.446, which the defender wrongfully or by undue concealment obtained and received from the pursuer, on or about the 6th day of November 1847, and thereafter wrongfully retained or misapplied;" and, (2), for payment of "L.1500, or such other sum as shall be found to be the amount of the costs incurred by the pursuer in defending

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himself against the action" at the instance of Black against him, "both in this Court and in the House of Lords, with the legal interest thereof," &c.

In his condescendence the pursuer narrated the circumstances attending his employment of Kerr in 1847, his instructions, and the correspondence that ensued. He quoted the transfer, which commenced as follows:—"I William Lindsay of Edinburgh Esquire in consideration of the sum of L. paid to me by John Cullen Esquire of York Place Edinburgh writer to the signet do hereby assign and transfer to the said John Cullen one hundred and thirty shares numbered &c.—And I Alexander Black of Glasgow accountant in consideration of the sum of L. paid to me by the said John Cullen, do hereby assign and transfer to the said John Cullen fifty shares numbered &c. of and in the undertaking called the Great Northern Railway Company," &c. It was signed by Lindsay, Black, and by the pursuer, who now averred "he had no knowledge of, nor any previous communication with, either of these persons, and, in particular, he had no contract, agreement, or connection of any kind with Mr Black, who was an entire stranger. But as he believed that the instrument truly, and *bona fide* related to, and was meant to be in fulfilment of the purchases previously made for him by the defender on the 15th October, professing, as it does, to transfer the exact number of shares reported by the defender as having been purchased for him on that occasion, he, without hesitation, put his name to it. But the pursuer afterwards discovered that the shares referred to in this deed formed no part of the shares purchased by him or by the defender on his account on the 15th October; that, in fact, the defender had made no such purchase at that time, and had never at any time purchased any shares whatever, either from Lindsay or Black, on the pursuer's account. Accordingly, in an action at the instance of the said Alexander Black against the present pursuer it was admitted by Black, and was a fixed point, that the sale alleged to have been made by him, and in implement of which he granted the above transfer, did not take place till the 6th of November 1847, and could not, therefore, by possibility, include or apply to shares confessedly purchased for the pursuer by the defender on the 15th October preceding. The price of the shares said to have been sold on the 6th November, did not correspond with any of the prices at which the defender reported the various purchases to have been made for the pursuer on the 15th of October. While the numbers of the shares are carefully specified in both transfers, the price or consideration money is in both left blank. If there was any reality in the transaction, or any price at all, either stipulated for, or paid to, the parties appearing as alleged venders in the transfer, so vitally material a circumstance as the amount of the price or consideration money must of necessity have been set forth in the instrument; but while the parties concerned were at the pains to specify minutely the numbers of the shares, they left the price or consideration money an entire blank. It afterwards appeared that the railway company had made a call of L.2, 10s. per share on the 3d of November, three days before the date of the alleged sale on the 6th, which neither Lindsay nor Black had paid. By that neglect or failure they were disqualified from executing any transfer. The transfer, as sent by the defender to the pursuer, was incapable of registration, and was truly inoperative and unavailing. On the other hand, the pursuer was not in possession of any materials which could have enabled him to supply the defects in the instrument, as no such materials were furnished to him, nor any information given to his clerk by the defender when the money was paid. . . . . After signing the transfer the pursuer became aware that it was wholly inoperative."

The pursuer then narrated further correspondence, which issued in the actions above referred to, and after detailing the action at Black's instance and the result of it, he pleaded—"1. As the pursuer's instructions to the

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defender to purchase Great Northern shares on his account were limited to purchases to be made on the 15th of October 1847, and as the defender duly reported that he had fulfilled his instructions by the several purchases made on that day, whereof he communicated all the particulars in a regular purchase note, he was not entitled, without the pursuer's knowledge, consent, and fresh instructions, to make any new or additional purchases for him. And as the defender did unwarrantably, and in violation of his duty, involve the pursuer in a new pretended purchase, falsely said to have been made on his account on the 6th November, of which the pursuer knew nothing, and for which he gave no authority, the defender is liable to relieve and indemnify the pursuer against that alleged transaction and all its consequences. 2. As the defender represented the purchase said to have been made on the 6th November as one of those made on 15th October, and thereby misled the pursuer into that belief, on the faith of which he induced the pursuer to pay to him the sum of L.446 as the price of said shares last mentioned, he is now in law and justice liable to repeat and pay back to the pursuer the said sum, with interest thereof, as libelled. 3. As the defender was the cause of the pursuer being involved in a long litigation with Black, the result of which is that there was no such transaction between Black and the pursuer as the defender falsely represented, he is now liable to relieve the pursuer of the whole expense of that litigation."

Pleaded for the defender;—1. The pursuer's averments were irrelevant. 2. "The defender having acted in conformity with the employment and instruction given him by the pursuer, and according to the usage and rules of the Glasgow Stock Exchange, he is entitled to absolvitor. 3. The pursuer having adopted and acquiesced in the transaction as completed for him by the defender, and having taken the shares and accepted of the transfers thereto, and retained the same as his own property for so long a period, is debarred from now maintaining such an action as the present."

The Lord Ordinary pronounced an interlocutor, in which he "finds that the pursuer has stated relevant grounds to entitle him to insist in the first conclusion of his last raised summons, that the defender should repeat and pay back to him the sum of L.446 sterling, therein concluded for; and allows" issues to be lodged: "And with regard to the second conclusion of the same summons, for payment to the pursuer of such sum as shall be found to be the amount of the costs incurred by the pursuer in defending himself against the action at the instance of Alexander Black, Finds that the pursuer has not set forth sufficient grounds to subject the defender to make payment as concluded for, and in so far dismisses the summons," "reserving all questions of expenses." *

* "NOTE.—The cause was debated before the Lord Ordinary, on the relevancy and sufficiency of the pursuer's averments to subject the defender to the conclusions of the action; and, in the course of the discussion, the pursuer was allowed to lodge tentative issues, upon which the debate was resumed. These issues were treated as explanatory of the grounds of the pursuer's action, and not as superseding a judgment on the relevancy independently of them. Should the action be sustained as regards either conclusion, the defender reserved what he should urge as to framing the issues to try the cause.

"There are two actions which have been conjoined, the first being an action of relief, brought by the pursuer in consequence of the action raised against him by Mr Black. That action having been followed by defences, was allowed to lie over for several years, apparently till the action at Black's instance had been brought to a conclusion. The result of it is matter of notoriety, from the reports of the case in this Court and in the House of Lords. Its final conclusion was, that the pursuer obtained absolvitor, but without expenses. The pursuer then raised a new action against the defender, and, being conjoined with the action of relief, a record was made up and closed. The new action appears to embrace in its conclusions all the

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Both parties reclaimed;—The defender, in so far as the interlocutor found that "the pursuer had stated relevant grounds to entitle him to insist in the first conclusion of his last raised summons," &c., and the pursuer against the last finding of the interlocutor.

claims of the pursuer against the defender; and though the fact of the action of relief having been brought and conjoined with the latter is to be kept in view, it seems to the Lord Ordinary that the necessity of any judgment being pronounced on the conclusions of the former is now removed by the issue of Black's action, and the specific conclusion applicable to that state of matters introduced into the later action, and supported by the averments on record.

"The pursuer insists upon two separate claims. The first is, that the defender should repeat and pay back the sum of L.446, which the summons alleges that he wrongfully, and by undue concealment, obtained and received from the pursuer, and retained or misapplied, under the circumstances averred on record. The other is, that he should make payment to the pursuer of the sum of L.1500, or such other sum as shall be found to be the amount of the costs incurred by the pursuer in this Court and in the House of Lords, in defending himself against the action by Black, from which he finally obtained absolvitor, but without expenses. The defender, Mr Kerr, pleaded that there were no relevant or sufficient grounds to subject him under either conclusion. The Lord Ordinary has seen cause to draw a distinction between them, and is of opinion that the pursuer is entitled to an issue under the first conclusion, though he thinks that the second conclusion cannot be supported.

"The present case can scarcely be considered and disposed of under either of its conclusions, without reference to the previous case of Black v. Cullen, which originated out of the same business transaction. No doubt Mr Kerr was not a party to that case, and it may be open to him to resist the pursuer's claim for repetition of the sum of L.446 paid over to him, notwithstanding the view taken, in the former action, of the nature of the sale made by Black. Without prejudging the case which Mr Kerr may have in defence to the present action, when it shall come to be tried, the Lord Ordinary is of opinion that the pursuer has set forth on the record grounds, both relevant and sufficient, to entitle him to reclaim that sum of L.446, as having been wrongfully received by the defender, and misapplied by him. Under the former action, it has been found that Mr Cullen did not purchase the shares belonging to Black, and which, through Mr Kerr, were transferred, and to payment of which, it is alleged, the L.446 were applied. If this was an unwarranted and wrongful act of the defender—beyond his powers and the limits of his employment—and unauthorised by the pursuer, which his averments on record plainly assert, there appears to be sufficient relevancy to support the pursuer's action to have the money repaid. Having rejected the shares, and the relation of seller and purchaser between him and Black no longer existing, the pursuer holds nothing for his money, and apparently it continues in the defender's hands without consideration. The defender's special grounds of defence will remain open to him; but, as the case is disclosed upon the pursuer's part of the record, the Lord Ordinary cannot but sustain the action and allow an issue.

"The case of the pursuer upon this record, to support the other conclusion of the summons, raises a question of some difficulty. The defender maintained that the fact of the pursuer, though assoilzied from the action at Black's instance, having been refused his expenses, implied misconduct as a litigant, or that the justice of the action was with his adversary; and that to entertain the claim in the present action would be to inquire into the grounds on which the Court had proceeded. But it was farther objected, that the pursuer had not set forth upon record any grounds to remove the presumption against him in having been refused expenses, though he obtained absolvitor, and that to support his present claim against Mr Kerr he was bound specially to connect him with the refusal of expenses, which had not been done. The Lord Ordinary has had some hesitation in pronouncing judgment on this conclusion of the action. He thinks, however, that it is a question for the Court, and that the claim would scarcely be suitable for the subject of an issue to go to a jury. He is humbly of opinion, that the pursuer has not stated any sufficient grounds to entitle him to payment of the costs of Black's action."

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The issues proposed by the pursuer were to this effect:—

1. Whether the defender, on the 15th of October 1847, purchased, or represented that he had purchased, 180 shares of the stock of the Great Northern Railway Company for L.446? and Whether, on or about the 6th November 1847, he wrongfully entered into a transaction with Alexander Black, by which he purchased from him, as if on the authority of the pursuer, a transfer of fifty shares of said stock, and wrongfully transmitted to the pursuer the said transfer, representing it to be a transfer of fifty shares purchased on the said 15th of October? and Whether litigation had resulted, in which the pursuer had incurred expenses to the amount of L.1500, by and through the wrongful conduct of the defender aforesaid?

2. Whether, on 6th November, the defender paid the said sum of L.446, on the false representation of the defender that the said sum was the price of shares purchased for the pursuer on the 15th October? and Whether the defender was resting-owing the said sum?

Lord President.—This case is in a very unsatisfactory shape for decision. It has been formerly before us, on one or other of its branches. At present it appears to stand in this way. Cullen says that he employed Kerr as a broker in 1847 to purchase certain shares of the Great Northern Railway for him; that Kerr purchased these shares on 15th October of that year, and notified the purchase; that some delay occurred in completing the transaction; but that at length in November Cullen wrote to the defender to say that he would send his clerk with the price on a certain day, and that unless the transfers were ready by that day he would exercise the option either of abandoning the transaction or buying other shares. The clerk went on that day. He paid the price, and the transfer was put into Cullen's hands. The transfer bears to be by Messrs Lindsay and Black. The title apparently is complete. Matters remained in that position for some time. A call was due, and Black being pressed for payment, began to move against Cullen, who having looked to the transfer, found that it was blank in some respects, and that Black, so far as he could understand, was not the party from whom he had made the purchase. The object of Black's action was to compel Cullen to register the shares, and relieve him of present and future calls upon the fifty shares sold by him. That led to a great deal of litigation. Cullen resisted Black's demand, and brought one of the actions of relief, now before us, against Kerr the broker, to relieve him of Black's claim. Cullen contended that he had had no transaction with Black; that he had nothing to do with the purchase on 6th November; that he had authorised purchases to be made in October, which were made, but that there his connection with the matter ceased. After judgment in this Court, and an appeal to the House of Lords, the case took the form of a certain adjustment of facts, amounting to a sort of special case, on which it was sent back to this Court, and on which we were called upon to pronounce judgment. We did so in favour of Cullen. We dealt with the case before us on the facts admitted by Black, and went not beyond the special case, if I may so call it, which was presented to us. The Court were not unanimous on the subject, and I expressed the difficulty which I had in dealing with the case on those special admissions, and excluding what I thought might be very important light on the matter.

Cullen now follows out the action against Kerr for relief from Black's claim, limited to the fifty shares. From the liabilities Black sought to attach to him, he has been already assoilzied; and he has brought a second action, which has been conjoined with the first. In it he also demands that Kerr shall pay him the expense incurred in resisting Black's attempt; and he now claims repayment of the L.446 paid for the shares in November 1847.

This action is presented to us in a way by no means satisfactory to my mind. In the first place, the record consists of inferences, and insinuations, and deductions, rather than of averments—and those upon points not material. But farther, it does not take up the whole case, and aver facts sufficient to enable us to deal with the whole interests of parties, for the specific allegations have reference to only 50 of the 180 shares. Then as to the demand for repayment of the L.446 paid for 180 shares, whereof 130 were said to be transferred by Lindsay, and only 50 by Black, the pursuer does not tell us what he is going to do with the shares, or what he has done with them. What has become of them? Is he to get back the money, and also keep

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the shares? For all that we know he may have already sold them. I think that Mr Cullen has mistaken his remedy. He should have sought to set aside the whole transaction, and restore matters *in integrum*. I give no opinion, whether, after the interval of time he can do so, or whether Lindsay or Kerr would be entitled to object; nor whether railway shares are all alike, or whether one set of shares is as good a tender as another? But, as the action stands, it is a demand for repayment of the price, without saying anything about the shares for which the price was paid. I am not disposed to sustain such an action upon such a statement.

In regard to the claim for expenses, it is impossible to deal with it separately, for the two questions are bound up together in this action; therefore I am disposed to give effect to the reclaiming note for the defender, and to refuse the reclaiming note for the pursuer.

Lord Curriehill.—I come to the same result, and upon the same grounds. The pursuer asks payment of the purchase money, on the ground that it was paid by him *sine causa*. But he tells us in the record that he gave it in exchange for the transfer and scrip certificates. Is he to get back the money without returning that for which he paid it? There are no reductive conclusions, nor is there any offer to return the transfer. He cannot succeed in an action of *condictio indebiti* on that footing. Assuming that there had been the fraudulent concealment alleged, the remedy to which that would have entitled Cullen would have been not the action to which he has had recourse, but a reduction on the ground of fraudulent concealment and misrepresentation. I am quite clear that he has not made out a case for repetition; and I shall express no opinion as to what might be the merits of any other remedies if he had resorted to them. He has this difficulty to contend with, that he cannot allege that he purchased any particular shares, nor that there was any *delectus personæ* in the transaction. Therefore, whether concealment and misrepresentation could be established, remains open for consideration.

In regard to the pursuer's demand for payment of L.1500, as the expense of defending himself against Black, I think that your Lordship has arrived at a sound conclusion.

Lord Deas.—I concur in the result arrived at by your Lordships. The new summons which was raised in May 1853 comprehends both branches of the pursuer's claim. It concludes, 1st, for repetition of the L.446 paid in November 1847, as the price of the shares purchased on 15th October; 2d, For relief of the expenses incurred by the pursuer in the action at Black's instance, in which the pursuer was assoilzied, but no expenses were found due to him.

As regards the sum of L.446, the case stated by the pursuer is this:—He says that, in conformity with instructions, the defender bought for him, on 15th October 1847, 180 shares of the stock of the Great Northern Railway, at prices which amounted to the above sum;—that, on 6th November 1847, the pursuer received from the defender a transfer, by Messrs Lindsay and Black, of 180 shares of said stock, with relative certificates, and paid in exchange therefor the price of L.446;—that the pursuer afterwards discovered that other parties, and not Messrs Lindsay and Black, had been the sellers of the shares bought for him on 15th October; and upon these bare facts, which alone the pursuer proposes to put in issue, and retaining in his possession the certificates and transfer and without proposing to reduce either the transfer or the actual transaction which he alleges to have taken place on 15th October, he concludes for repetition of the L.446. The whole case, when so put, appears to me a *non sequitur*. The pleas in law and the issues, proposed by the pursuer as the issues on which he stands, are alike insufficient to warrant the proposed result. Suppose all the facts embodied in the issues to be admitted, would it necessarily follow that, under the last of these issues, in which the gist of the whole lies, the defender was indebted and resting-owing to the pursuer in the L.446? I think not. The pursuer, in art. 4 of his condescendence (after having stated the prices in the previous article), says, "In this manner the purchase of 180 shares of the stock of the Great Northern Railway on the pursuer's account, was made and completed by the defender, on the 15th October 1847, in conformity to his instructions." And, in article 24, he says that, on 6th November, "he discovered from the defender's books, which the defender reluctantly showed, the names of the different parties from whom the defender had purchased the 180 shares, as communicated on the 15th October 1847." Well then, if this be so, let

him demand to be furnished with a transfer from these other parties on giving up the transfer and certificates in his possession, and this will raise the question alluded to by your Lordship in the Chair, whether shares of stock are claimable as ear-marked, or whether one set of 180 shares is not as good a tender as another? But to hold the original purchase of 180 shares as well made and binding,—to retain the transfer and certificates applicable to the subsequent purchase of the same number of shares,—and, at the same time, *per saltum*, to demand back the whole price of L.446, appears to me to be totally out of the question.

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Then, as regards the expenses of the action at Black's instance, it has been decided that Black could not enforce against the pursuer a sale of shares made to the defender on 6th November 1847, for the plain reason that the pursuer had given no mandate for that purchase. But, for the reasons stated by your Lordships, it does not follow that the defender is liable to the pursuer for the expenses incurred in that litigation. As yet it has not even been decided that the pursuer can refuse the same shares if tendered to him by the defender, and the pursuer has brought no action to try that question. The defender was no party to the action at Black's instance; and I think it a most material fact that, in that action, for reasons which we must here assume to have been sufficient, the pursuer was found not entitled to his expenses against the very party who, of all others, was most clearly liable for them, if the pursuer had been fairly entitled to indemnity.

Lord Ivory absent.

The Court pronounced the following interlocutor:—"Recall the interlocutor submitted to review: Find that it is set forth by the pursuer on record, that on 15th October 1847, 180 shares of the stock of the Great Northern Railway Company were purchased for him by the defender, as broker, and that on 6th November 1847, he paid to the defender L.446, being the stipulated amount of the price of said shares, and that at the same time transfers in his favour to 180 shares of the stock of the said Company, and relative certificates, were delivered to him as in implement of said purchase, which transfer and certificates have been retained by him: Find that the pursuer now seeks repetition of said sum of L.446, on the ground that the shares mentioned in the said transfers were not the shares purchased for him on 15th October, but were other shares purchased on or about the 6th November, without his authority, and that he was induced to pay the said sum and to receive the said transfers and certificates in the belief that they had reference to the shares purchased for him on 15th October: Find that while in this action the pursuer demands repetition of the said sum of L.446, he does not seek to rescind or offer to relinquish the purchase made for him on 15th October, and does not seek to rescind or offer to relinquish or restore the transfers in his favour delivered to him of 6th November, and relative certificates: therefore, assoilzie the defender from the conclusions of both of the conjoined actions as laid, and decern: Find the defender entitled to the expenses incurred by him in each of these actions, as well as in the conjoined processes," &c.

John Cullen, W.S.—Morton, Whitehead, & Greig, W.S.—Agents.

Rose Walls or Lenaghan and Others, Pursuers.—*Logan*—*Mair*. No. 218.
The Monkland Iron and Steel Company, Defenders.—*Penney*—*A. B. Shand.*

also,

Mary Boyle or Callaghan *v.* The Monkland Iron and Steel Company.

Process—Marriage—Legitimacy—Issue.—Held, by the Lord Justice-Clerk, that in an action of assythment by a person saying she was the widow of a deceased, when the defenders did not admit the marriage, it was incompetent to put in issue and prove before a jury a disputed marriage, and equally that children could not in that shape prove legitimacy.

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Process—Jury trial—Verdict—Ambiguity.—An issue was sent to a jury in an action of assythment, divided into three parts, which put the following queries:—(1), Whether a person deceased suffered severe bodily injury from an explosion in a coal-pit; (2), Whether he suffered farther injury from undue detention at the pit-bottom; and (3), Whether the deceased's death was in consequence of these injuries. This verdict was returned,—"Find for the pursuers on both the first and second issues, by a majority of nine on the first issue, and by a majority of ten on the second issue, and assess the damages," &c. On a motion for a new trial, *Objections* to the verdict—(1), as *informal*, in respect it treated what was really three parts of one issue as separate issues, and was neither a general verdict, nor contained an answer to the whole matters put in issue; (2), as *ambiguous*, in respect it did not appear whether the jury intended to return a verdict for the pursuers on the whole case; or, if they did, whether they proceeded on the ground of the death having been caused by the accident, on which the whole case depended,—*repelled* (*diss.* Lord Wood, *abs.* Lord Justice-Clerk).

2d Division. Sheriff of Lanarkshire. R.

James Lenaghan, and Edward Boyle or Callaghan, two miners, were employed by the Monkland Iron and Steel Company to drive a mine from the bottom of a shaft to a seam of ironstone. Both having died, as was believed, in consequence of injuries received while in the defender's employment,—the widow and children of each raised an action in the Sheriff-court of Lanarkshire, concluding for damages and solatium against the defenders. The general averments in the two cases were the same, and both were advocated on interlocutors allowing proof.

The allegations were, that the deceased, in the usual course of their work, were let down the shaft to take the night shift at eight o'clock on the evening of the 23d March 1852: That while at work an explosion of fire-damp occurred, by which they were severely injured: That the whole woodwork of the mine being displaced, it was some time before they reached the bottom of the shaft: That the engineman heard the first signal to raise them about two o'clock in the morning: That he did not raise them to the pit-mouth, but went to Airdrie, distant about a mile and a-half or two miles, for assistance, though there were colliers' houses within ten minutes' walk: That Lenaghan and Callaghan were taken up, but not till about five in the morning; That they were wet, having been for sometime standing "up to the middle" in water at the pit-bottom; and that in consequence of the injuries so received they died three or four days afterwards. It was alleged that the mine was in a defective state, and that there was a want of sufficient workmen at the pit-head to raise the deceased when the signal to do so was given.

The issues adjusted and verdicts returned in the two cases were similar, and it was arranged that the same debate and proof should also be held to apply to both.

The following were the issues adjusted in the case of Lenaghan:—"It being admitted that the defenders are proprietors or lessees of a pit at or near Gartlee, near Airdrie, known by the name of Number Four Brownsburn Pit, and that they were in the occupation thereof during the year 1852:

"Whether, on or about the 23d or 24th March 1852, the said deceased James Lenaghan, when engaged in the service and employment of the defenders in forming or driving a stone mine, or road in the said pit, with the view of searching for ironstone on behalf of the defenders, sustained severe bodily injury, in consequence of an explosion of fire-damp in said pit, caused by the fault of the defenders? And,

"Whether the said deceased, after being injured as aforesaid, sustained further severe bodily injury from being detained for several hours at the bottom of the said pit, by reason of the person or persons in charge of the same, and of the engine and cage and apparatus connected therewith,—in neglect of the proper signal to raise the same, and of his or their duty.—

unduly delaying to raise the said deceased from the bottom of the said pit? And,

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"Whether the death of the said deceased was occasioned by the said injuries, or by one or other of them, and by the fault of the defenders, to the loss, injury, and damage of the pursuers?

"Damages laid at L.1000 sterling."

In the issues as originally approved by Lord Handyside, was one,—

"Whether the pursuer Mrs Rose Walls or Lenaghan is the widow, and the other pursuers, Thomas Lenaghan and Ellen Lenaghan, are the lawful children of the said deceased James Lenaghan."

The case was set down for trial before the Lord Justice-Clerk, when, in in consequence of the defenders refusing to admit that the pursuers stood in the relation of wife and children to the deceased, and the presiding Judge intimating an opinion that it was quite incompetent in such a form to try a question of marriage and legitimacy, the trial was put off to enable them to take such proceedings as were necessary to establish their relationships. Afterwards the defenders minuted an admission of the relationship alleged, and the case was tried before Lord Deas and a jury, when a verdict was returned for the pursuers, which was set aside as contrary to evidence, and a new trial granted. (See ante, p. 52).

The new trial took place at Glasgow on the 4th May 1857, Lord Handyside presiding.

The following verdict was returned:—"The jury, after having been kept inclosed in deliberation for upwards of six hours, say upon their oath, that in respect of the matters proven before them, they find for the pursuers;—on both the first and second issues, by a majority of nine on the first, and a majority of ten on the second; and assess the damages as follows, viz.: L.100 to Mrs Walls or Lenaghan, and to each of her children who may be under 15 years of age, L.50."

The defenders now moved for a rule on the pursuers to shew cause why the verdict should not be set aside. In support of the motion it was urged that the verdict was informal; that it treated the different parts of what was one issue as if they were distinct issues; and, moreover, did not find that the death of the deceased, on which alone the claim for damages was founded, was caused by the accident, and that it was contrary to evidence. The rule was granted.

In support of the verdict it was argued;—Though a verdict might be in a certain sense inoperative as returned, it was within the jurisdiction of the Court to remedy any defects where there were materials for doing so; and it was the practice of the Court to put such a construction upon a verdict, where that could fairly be done, as would render it operative.[1] There was here clearly a general verdict for the pursuers. What followed that part of the verdict which expressed the general finding in their favour, was merely explanatory of the majority of the jury who considered the pursuers' case proven on the two branches of the issue, which the jury had by mistake conceived to be separate issues.[2] The evidence was minutely examined to shew that it fully warranted the verdict for the pursuers; and it was pleaded, that there were two concurrent verdicts for the pursuers, a fact that should have some weight in determining whether the verdict was contrary to evidence.

To which it was answered;—The jury had been clearly mistaken as to the nature of the issue, and the result was a verdict not only ambiguous, but

[1] Lawson v. North British Railway Co., 16th July 1850, ante, vol. xii. p. 1250.

[2] Railton v. Mathews, 11th March 1846, ante, vol. viii. p. 747; Macaulay v. Buist and Co., 9th Dec. 1846, ante, vol. ix. p. 245; Melrose v. Hastie and Co., 7th March 1851, ante, vol. xiii. p. 880; Swimmerton v. Marquis of Stafford, 9th Nov. 1810, iii. Taunton, p. 231; ii. Tidd's Practice, p. 908.

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which left the case in inextricable confusion. There was nothing in the verdict from which it could be inferred that the intention of the jury was to return a general verdict for the pursuers. It was more reasonable to suppose that the jury held that the deceased had sustained severe bodily injuries from the explosion and from the delay in raising them to pit-head, but not that their death was the result of these injuries.

The Court made avizandum. At advising,—

Lord Murray.—It was strongly urged by the defenders that the verdict in this case is ambiguous, and that, therefore, on that ground alone, it ought to be set aside and a new trial granted. On this question I have no difficulty. It appears to me perfectly clear what the jury intended to find; and further, that they have expressed that intention in terms to which the Court is bound to give effect.

There is printed on page 45 of the appendix, what are termed "Issues" in Lenaghan's case. These must have been before the jury in the same terms as they are printed and laid before us, and must be considered as the foundation of the verdict. They commence with an admission, that the defenders are proprietors of a pit near Gartlee, in the neighbourhood of Airdrie, and that they were in the occupation of that pit in 1852. Then follow three paragraphs, each of them commencing with "Whether," and which are, though printed separately, bound together with the conjunction "and." I must hold that the verdict refers to those as the issues which were placed before the jury. The verdict differs from what usually occurs, by the jury having differed in opinion, and having prolonged their deliberations for upwards of six hours; and then they determined on what the jury call the first and second issues by a majority of votes, and after having done so, assessed the damages. Suppose that the jury had not been divided on two matters, which they called the first and second issues. Would there then be any ambiguity in the verdict? The verdict would then have been in these terms:—

"A jury having been impannelled and sworn to try the issues between the said parties, the jury say upon their oath, that, in respect of the matters proven before them, they find for the pursuers on both the first and second issues, and assess the damages as follows."

Could anybody say that that would have been a doubtful or ambiguous verdict? It would have been a verdict entirely for the pursuers on the first and second issues; and it seems to me equally for the pursuers upon the matter whether the death of the deceased was occasioned by the said injuries, to the loss, injury and damage of the pursuers. The assessment of the damage is certainly an affirmance of the third issue, that the death of the deceased was occasioned by the fault of the defenders to the loss of the pursuers. If that is the necessary result of the verdict, omitting the passage relating to the difference of opinion and subsequent vote of the jury, it does not appear to me that the most special consideration of the issues and verdict throw any doubt on the matter, but, on the contrary, explain why the verdict should be special as to what the jury termed the two issues, and more general or less special as to the conclusion and assessment of damages. The first is in these terms—(reads it.)

No person can be surprised, after reading the evidence, at the jury having differed on that subject; and, at any rate, it is certain that they found each of what they term the first and second issues matter of great difficulty; the majority, as the verdict bears, after deliberating for six hours, consisted of nine. The verdict on what the jury termed the second issue is in these terms—(reads it.) On that the majority are ten. No person can say that the evidence is so clear as to make it anyway surprising that the jury should have deliberated long upon it, and have been obliged at last to come to a division on the subject. But supposing these two matters settled by the votes the jury came to, there is no reason to suppose that there was any difference of opinion as to the result. Unless the Court is authorised to hold it to be absolutely necessary that the verdict should have contained an assent to what was almost matter of necessary deduction from what the jury had found on the other two points, it appears to me that the jury, by assessing the damages, fully conveyed their assent to that almost necessary inference from what they had previously settled. It might have been more complete, but I think it is hardly possible for any person who reads the proceedings, to have any doubt that

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the jury, differing as they had done on other matters, had no difference on this, and assessed the damage as a consequence of what they had found after much difference of opinion.

It usually happens, that where certain matters are attended with much difficulty, and have been much debated, discussed, and at length finally settled, and what remains does not seem to admit of doubt, it is passed over somewhat hastily, and only what seems essential is expressed. They might have considered it as a third issue, and following out the previous arrangement, and therefore on the third issue find for the pursuers, and assess the damages. That would have made the verdict most formal and complete; but as the third issue was framed so as to admit of being applied to either of the previous issues, and the jury had come at length to affirm both, I do not believe that they thought they had anything more to do than to assess the damages. The death of the party soon after the facts which were made the subject of these two issues, was the only undisputed point in the cause; and as what may be called the third issue was so framed as to make the damages refer to a finding on either point, after the jury had found both, they appear to have had no doubt, and there was not room for any difference of opinion, except as to the amount of damages, on which there appears to have been none.

I am unable to surmise that the jury had any difficulty there, or considered it necessary to do more than express their opinion by assessing the damages.

If this is held to make the verdict doubtful, it may give rise to a great many questions with regard to future verdicts.

I am far, however, from holding that the evidence in this case on both the points on which the jury differed, and determined by majorities, was not attended with very great difficulty—and it was certainly a case on which it is no way strange that some of the jury did not agree with the majority;—but it must be recollected that this is the second verdict of a jury to the same effect.

The case has been tried without any exception being taken to the law as laid down by the Judge, and he was not asked to state anything to the jury, in addition to the observations he made on the evidence. The defenders might, if they had thought fit, have desired the Judge who tried the case to state to the jury, that the evidence on either or both of these two issues was entirely in favour of the defenders, and that there was no evidence adduced by the pursuers to establish either of these two issues, which the jury ought to take into consideration; but nothing of the sort appears to have taken place. The Court must therefore hold that the case was heard to the satisfaction of both parties, and that the Judge who tried the case held there was evidence on these matters of fact which the jury were entitled to consider, and make the subject of their verdict. It would be a very strong thing, indeed, to set aside a verdict in these circumstances, and award a third trial.

I do not conceive it any part of my duty to attempt to place myself in the position of a juror in this case, and say whether, if I had been in the jury-box, I should have been in the majority or minority in the division which took place. It is no necessary duty on the part of a judge to do so. It might be considered as trespassing upon the proper functions of the jury. It is the duty of the judge to state the law, and to see that the case is duly tried, but it is the peculiar province of the jury to ascertain the facts—*De jure respondent judices, de facto jurati.*

I may, however, be permitted to observe, that persons in the situation of the defenders, who make contracts relative to coal and other mines, where such accidents as are the subject of this trial may occur, have a very important duty to perform. It is very important that all agreements (which, for that matter, might be printed and filled up) should make it perfectly clear what are the responsibilities which they respectively incur.

This may surely be done, and might prevent many questions. It may make the contractors and workmen more prudent and cautious, and by making them so, may be the means of saving many lives, and preventing many litigations.

No person can read the agreement between Harty and Lenaghan and Mr Dundas and Son, without being of opinion that it might have been made more clear, and have pointed out to Harty and Lenaghan the responsiblities that they were or were not to incur during their contract.

That is a very important matter, and worthy of the consideration of those

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respectable persons who have coal and other mines in Scotland; and they are called upon, both from considerations of humanity and, I may add, personal interest, to direct their attention to the subject.

LORD COWAN.—The defenders, in support of their motion for a new trial, maintain—1st, That the verdict is essentially defective; and, 2d, That it is contrary to evidence.

On the first of these points, the terms of the issue sent to trial afford the materials for judging of the sufficiency of the verdict. Substantially, the matters embraced by what are called "the issues," although in the form of distinct questions, truly constitute but one issue. And the case was so dealt with in the argument submitted to the Court.

The first question in the issue relates to the injury sustained by the deceased, in consequence of explosion of fire-damp, caused by the fault of the defenders; and the second question in the issue relates to the further severe injury sustained by the deceased, from his being detained for several hours at the bottom of the pit, through the neglect or undue delay of the person in charge of the pit, and the machinery therewith connected. These two questions embrace the negligence and *culpa* charged on, causing the injuries to the deceased, from both or one or other of which, through the fault of the defenders, death proceeded. And the third question in the issue, accordingly, is, "whether the death of the said deceased was occasioned by the said injuries, or by one or other of them, and by the fault of the defenders, to the loss, injury, and damage of the pursuers?"

These several questions are run into each other, and connected together, so as to form the issue which the jury had to try.

There can be no doubt that a verdict generally on the issue for the pursuers, accompanied by an assessment of damages, would have been unobjectionable. The jury were under no necessity of finding specifically upon each of the questions embraced in the issue, although in deliberating on the evidence with a view to their verdict, they behoved carefully to have every part of the issue under their attentive consideration.

The verdict returned was—"The jury, after having been kept enclosed in deliberation for upwards of six hours, say upon their oath, that, in respect of the matters proven before them, they find for the pursuers on both the first and second issues by a majority of nine on the first, and a majority of ten on the second; and assess the damages as follows," &c.

This seems to me, in substance and effect, to be a finding for the pursuers on the whole matters embraced in the issue.

There is no set form of expression in which the jury are required to return their verdict; but if its meaning be clear and free of ambiguity, any departure from mere technical accuracy of expression will be overlooked. The case of Lawson, 16th July 1850, referred to in the discussion, affords a strong illustration of this proposition. And for my part, in reading the issues and the verdict in this case, I have no doubt as to the meaning of the jury. I think their verdict was intended to embrace, and does embrace, the whole matters of fact in issue, by the finding for the pursuers, and the consequent assessment of damages; and entertaining this conviction, I do not feel myself entitled to hold it ineffectual.

In construing the verdict it is material to keep in view what is certified to the Court by the Judge who presided at the trial, as to the manner in which the verdict was received and recorded by the clerk of Court. The notes state—"The jury retired at half-past 11 P.M.; they returned into Court after the lapse of an hour, and were told they must continue in deliberation for six hours, when a majority of nine to three, not less, may give a verdict." And it is then stated—I presume as the admission of both parties—that the verdict was received by the clerk after the lapse of the statutory period, in presence of the agents for the parties. The statute by which this proceeding is regulated is the 17 & 18 Vict., c. 59; and the verdict, in the terms in which we find it, was returned by the jury, and received and recorded by the clerk without objection, as an answer to the whole issue.

Now it appears to me, that the introduction into the verdict, between the finding for the pursuers and the assessment of the damages, of the intermediate words, is accounted for by the necessity thought to exist, if not actually existing, that the verdict should set forth, in terms of the statute, the majority by which the matters

in issue were found for the pursuers. The words employed by the jury, and received by the clerk in recording the verdict, although awkwardly introduced, ought, I think, in justice to the pursuers, and in consonance with what I cannot but hold to have been the true intent and meaning of the jury, to be so read.

But further, and after all, when the jury found for the pursuers on both of the leading subjects of inquiry, they did, in substance and effect, find that the injuries, and subsequent death of the deceased, did result from both of the grounds, in respect of which negligence and fault were charged against the defenders, and in respect of which damages were claimed by the pursuers and awarded by the verdict.

And finally, when the jury, having found for the pursuers on the leading matters for their consideration on the evidence, and on which the liability of the defenders depended, proceed to assess the damages, I consider that they must be held in their finding to have had in view, and to have found, that both of the injuries, for which they held the defenders liable in damages, had, through their fault, caused the death. The last matter put in issue, or what was termed in the argument the third question, is truly the mere sequence of the other two questions; and when these were both found for the pursuers, there remained nothing for the jury to return under this head of the issue, but an assessment for damages. It wouid have been very different had there been a finding for the defenders upon either of the preceding questions. Whether the death arose from that one cause of injury, for which, in that view, the defenders had alone to answer, might require to have been substantially found as the ground for assessing damages. But when the whole preceding matters in issue were found generally for the pursuers, this, in my view, carried with it inherently an answer to the latter part of the issue, and its legitimate result was the assessment of damages.

Although, therefore, I cannot but feel the question to be attended with some nicety and difficulty — and this the more from being aware of my brother Lord Wood's views—I do not think that on this immaterial ground the defenders ought to prevail in their motion for a new trial.

The second ground urged by the defenders in support of their motion is, that the verdict is contrary to evidence.

The argument submitted to the Court by the counsel for the defenders made a great impression on my mind, especially in reference to the first branch of the issue, and had this been the first motion for a new trial I might have been inclined to yield to that impression; but that is not the case, as the result of the motion, if granted, must be a third trial. After carefully considering the evidence and the argument, it is impossible for me to hold that there was not, on both of the leading questions which the jury had to try, evidence of greater or less weight, the effect of which it was for the jury to determine. On the first trial, Lord Deas presiding, the jury found on the evidence for the pursuers. The Court set aside the verdict as contrary to evidence, considering that the defenders were entitled upon that ground to have the case submitted of new to a jury. But the second trial, Lord Handyside presiding, has issued in a similar verdict, and we are again asked to set it aside, and to send the case a third time for trial on the same ground, of the verdict being contrary to evidence. I concur with your Lordship in thinking that we cannot do so without incurring the charge of attempting to interfere with what is properly the province of the jury. They are the competent judges, and have twice had the case upon the evidence before them, and have decided it. Unless there had been something approaching to an absolute negation of evidence to support the verdict, which, meagre as the case may be, cannot with any propriety be said to be so here, I do not think the Court would be justified in finding that the case should be remitted to be tried a third time.

I am therefore of opinion that the rule ought to be discharged, and the motion for a new trial refused.

Lord Wood.—Upon the motion for a new trial, on the ground of the verdict being contrary to evidence, I have nothing to add. I can hardly say that, as a juryman, I should have been prepared to arrive at the same result as the jury has done. My difficulty would have been more particularly great in finding for the pursuers upon the first branch of the issue. But, having regard to the evidence that was laid before the jury on either side, I think that, for the reasons that have already been so fully stated by your Lordship, the verdict of the jury ought not

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to be disturbed, and a new trial granted, in respect of its being contrary to the evidence laid before them,—the true import and effect of which, as establishing or not the facts put in issue, it was their peculiar province to determine.

But I regret to say that I do not find myself enabled to concur in the opinion of your Lordships in regard to the objections taken by the defenders to the verdict, as not being a good and valid verdict in the cause the jury had to try. It is certainly with great diffidence that I differ from your Lordships. But doing so, I think it right, shortly, to state the grounds on which my own opinion rests.

It seemed to be agreed at the debate by the counsel on both sides, that although the questions put to the jury are headed by the title issues, and although what follows the admission is divided into three parts, each containing distinct questions, they were treated at the trial as forming one issue, consisting of three branches, and it was stated by the counsel for the defenders that they were willing to take the objection to the verdict upon that footing, which was considered the most favourable one for the pursuers on which it could be presented. Looking to the course of the argument, this perhaps, does not involve any very material concession.

As the case comes before us at present, the only matter to be considered is, whether or not the verdict, as it stands, is a good verdict, or whether or not it is a bad verdict, from ambiguity, or other more absolute defect,—any question as to the competency of amending the verdict, from such materials as the proceedings may supply, so as to remove any objection on the ground of ambiguity, or uncertainty or otherwise, on the authority of the cases of Marianski and Morgan, is not *hujus loci*.

If one were to judge from the terms of the verdict, it would rather appear that the jury had thought they had three separate issues to deal with; but passing that, it is clear that, holding it to be one issue, the jury responded to it as an issue divided into parts or branches; and, accordingly, whatever may be found to be its sound construction, they do in their verdict give a specific answer to the two first branches of it, while, in so far as regards any specific return, no answer whatever is made by them to the third.

Now, it is not, and cannot be disputed, that the matter put to the jury, in the third branch of the issue, is of the essence of the case, inasmuch as, unless the verdict can be so read or construed as to import a finding upon it for the pursuers, no damages could be legally assessed or awarded to them. Indeed, this is not only admitted by the pursuers, but is one of the grounds on which their argument in support of the sufficiency of the verdict was founded.

I entirely agree with your Lordships, that the learned Judge who presided must be held to have given every assistance to the jury which the case required. No exception is taken, either to the law which his Lordship may have thought it necessary to lay down, or to his not having given any direction, in point of law, which he ought to have given, or was required to give; and therefore I think it may be assumed that the jury were told, that unless the third branch of the issue was proved to their satisfaction, by the evidence adduced, they could not find the pursuers entitled to damages.

But still it appears to me, that although the jury have, by their verdict, assessed the damages at the sums set forth therein, there is neither in that circumstance, nor in any other view which can be taken of the verdict, enough to support it as a good verdict in the cause.

That a verdict for the pursuers generally, without any reference to the particular parts of the issue, would have been a good verdict, is clear. But as the verdict is framed, I hold that, without a straining of its terms, in a manner which I hold to be entirely inadmissible, I am of opinion that it is impossible to read it as finding, in the first instance, a general verdict for the pursuers on the whole issues. I cannot read the verdict as having a stop in the finding at the word pursuers, and that what follows is introduced only as explanatory of the numbers by which the jury had so found upon the first and second branches of it. I think it beyond all doubt clear, that what the jury do by their verdict, as expressed, is, "in respect of the matters proven before them, to find for the pursuers on both the first and second issues"—that it is to this, as the finding of the jury, that the explanation is added; that in so finding it was by a majority of nine on the first, and a majority of two on the second—the immediately preceding words, "on both the

first and second issues," forming no part of the explanation, but an integral part of the finding itself. No. 218.

But rejecting that reading of the verdict, it comes to be a verdict with a positive finding by the jury on the first and second branches of the issue, and no finding, in positive words, at least, upon the third; and that being the case, I confess I am unable to see how the verdict can be construed as nevertheless containing a finding upon the third, which is an essential branch of the issue. I am unable to satisfy myself that the issue can be read so as to hold the third branch substantially a part of each of the preceding ones, or, as it were, to work it into them, in respect of the matters they embrace not inferring any consequence or result of themselves, but requiring the third to make up the complement necessary to any operative result in favour of the pursuers, and in that way to hold that a verdict finding for the pursuers on the first and second branches of the issue may be construed as truly a verdict upon the third also, and as thereby exhausting the whole issue. I cannot inferentially so supply what is not in words to be found in the verdict, which, as framed, does in its terms explicitly apply the finding it contains to the first and second branches of the issue alone. It may be that the finding thus limited will be inoperative—that so construing it, the assessment of damages which follows is rendered nugatory. It may be that the jury intended to find for the pursuers on the third branch of the issue, or thought that by the verdict they returned they had done so. But this, after all, resolves into a speculation upon the views of the jury, no certainty as to which can be derived from the terms of the verdict itself. It may be thought improbable that they assessed damages irrespective of being satisfied that the matter put separately in issue in the third branch of the issue had been proved; but it is by no means impossible that they did so, and that it was not their intention to find for the pursuers on the third branch of the issue, for it does not follow that a jury are always guided in what they do by the direction of the Judge. And if the jury did in fact intend to find for the pursuers, to the effect of assessing damages without finding for them upon the third branch of the issue, I can hardly figure any terms upon which, in that view, they could more appropriately have expressed their verdict, or more clearly have conveyed their meaning, unless, indeed, they had in so many words stated that they did not find for the pursuers on the third branch, or that upon it they found for the defenders. Now that being the case, and although there were difficulty in supposing that the jury did not intend to find for the pursuers on the third branch of the issue, I cannot assume that they did not, and so raise the verdict into one giving a certain and clear response to the whole issue. Or again, supposing that the intention of the jury really was to find for the pursuers on the third branch of the issue, and that they thought they had done so (but of which, taking the verdict as it is worded, there can, I conceive, be no certainty), then there was, it appears to me, an omission—an unintentional one, it may be—in expressing the opinion they entertained, but an omission which, as the case comes before us at present, cannot be supplied, so as thereby to warrant the at once sustaining the verdict as a good verdict, liable to no objection in respect of ambiguity or non-exhaustion of the issue the jury had to try, and more particularly in respect of its having failed, reading it as it stands, to make a return upon the third and essential branch of it.

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I abstain from going further into the matter. The views I entertain can be of no importance to its decision, and I am sensible that they can be entitled to very little weight in themselves, seeing that they are opposed to those of your Lordships.

LORD JUSTICE-CLERK absent.

THE COURT discharged the rule.

DAVID MANSON, S.S.C.—JOHN ROSS, S.S.C.—Agents.

SIR THOMAS BLAIKIE, Knt. Pursuer.—*Macfarlane—Fraser.* No. 219.
JOHN DUNCAN, Defender.—*Penney—Moir.*

Process—Jury trial—Slander—Diligence where no issue in justification—Provocation.—A director of a bank brought an action of damages for slander against the writer of a letter reflecting on members of the committee of management, of

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which he was one. An issue was adjusted, in which this letter was innuendoed as calumniously representing that the members of the committee had been in 1856 guilty of malpractices similar to others which had caused great loss and damage to the bank and shareholders in 1846;—*Held* (*abs.* Lord Ivory), that the defender was not entitled to a diligence in terms of a specification seeking access to the books and correspondence of the bank for a period of ten years, in order (1) to prove the character of the proceedings in 1846, the pursuer having in his record given a description of them, admitted by the defender in his answers to be correct; nor (2) to prove the nature of those in 1856, in mitigation of damages, no issue in justification having been taken;—*Held*, also, that he was not entitled, with a view to prove provocation, to a diligence to recover letters which he did not aver, had been written, but that he had "reason to believe" had been written by directors of the bank.

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Ld. Ardmillan.
C.

See *supra*, p. 881.

Sir Thomas Blaikie was one of the directors of the North of Scotland Banking Company, who brought actions of damages against Duncan for defamation, as stated above, both individually and in name of the bank. In the action at Blaikie's instance on 4th July, the following issues were of consent approved of:—

"Whether the defender printed and published, or caused to be printed and published, in the 'Aberdeen Free Press, Peterhead, Fraserburgh, and Buchan News, and North of Scotland Advertiser,' of Friday, 23d January 1857, and also in the 'Northern Advertiser,' of 27th January 1857, or either of these newspapers, a communication in the form of a letter, addressed by him to 'the Shareholders of the Aberdeen, Peterhead, and Fraserburgh Railway,' in which, with reference to an Act of Parliament which a railway company was then seeking to obtain, he among other things made the following statements:"—(Here the letter, quoted *supra*, pp. 882-3, was inserted.)

"And whether the said statements, or any part thereof, are of and concerning the pursuer, and falsely and calumniously represent and assert that, through the reckless and improper connivance of the pursuer, and of other directors and members of the Committee of Management of the North of Scotland Bank, some of their number had been allowed to put their hands into the bank till, and take away or transfer any sum they chose, to Mr Robert Milne, the secretary of the Great North of Scotland Railway Company; that, in point of fact, large sums had been so taken away or transferred; that the bank held no security for the sums so taken away or transferred; that the money so taken away or transferred was substantially of the nature of a payment by the pursuer, and other members of the committee of management of the bank, or some of them, to themselves; that the pursuer, as one of the committee of management of said bank at the date of instituting this action, had been guilty of such a juggle, or had indulged in such mal-practices as those which had some years previously caused great loss to the shareholders of the said bank, and had affected its character, credit, and reputation; to the loss, injury, and damage of the pursuer?"

The case now came before the Court, on the defender's motion for a diligence, in terms of the following specification:—"1. All books of the North of Scotland Banking Company, containing entries tending to shew the state of the accounts between the bank and the several directors who were in office in 1845 and 1846, as well as Henry Paterson, the manager thereof,—whether as individuals, or as joint obligants with each other, or with other parties, from the commencement of the year 1846, to the date of raising the present action, that excerpts of such entries may be taken, and certified by the commissioner. 2. All books of the said bank containing entries tending to shew the bills granted by the said parties, or any of them, for advances

made by the bank to them, or any of them, and that for the period foresaid, that excerpts of such entries may be taken, and certified by the commissioner. 3. All reports, and failing recovery of the principals, then copies thereof, by the directors of the said bank to the shareholders thereof, in the year 1847, and since, having reference to the loss of the capital, the discharge of the said Henry Paterson, and the list of debts contracted to the bank by the several parties referred to in article 1st of this specification. 4. The proposal or proposals, and failing recovery of the principals, then copies thereof, submitted by the pursuer to the said bank, or to the Northern Insurance Company, as to the settlement of and security to be given for a joint obligation by him and others for a debt due to the said bank and insurance company, and contracted in or prior to 1846. 5. The register of shareholders of the Great North of Scotland Railway Company, and all other books of the said company, containing entries tending to shew the number of shares held by the said bank, or by any persons who were at the time directors thereof, during the period from the commencement of the year 1845 to the date of raising the present action, with the dates of transfer of the said shares, the names and designations of the parties to whom they were transferred, the amounts of subscription or calls paid thereon, and the dates of forfeiture of such part thereof as was forfeited, that excerpts of such entries may be taken, and certified by the commissioner. 6. All books of the said railway company containing entries tending to shew the names of the directors thereof during each of the years referred to in the preceding article hereof, that excerpts of such entries may be taken, and certified as aforesaid. 7. The minute-book, or minutes of meetings of the directors and shareholders of the said railway company, that excerpts may be taken therefrom, and certified as aforesaid, of all entries in regard to the forfeiture of any of the shares referred to in the 5th article hereof, and of the sederunts of the meetings, shewing the parties actually present. 8. All books of the said bank containing entries in reference to applications for money made by or on behalf of the promoters of the scheme termed the Formartine and Buchan Railway, in or about the month of January 1857, the sums thereupon advanced by the bank, and the securities granted therefor, that excerpts of such entries may be taken, and certified as aforesaid. 9. All books of the said bank containing similar entries in reference to the scheme termed the Denburn Branch of the Great North of Scotland Railway Company, that excerpts of such entries may be taken and certified as aforesaid. 10. The minute-book and other books of the said Formartine and Buchan Railway Company, or the promoters thereof, having reference to correspondence between them, or any party or parties on their behalf, and the said North of Scotland Bank, the National Bank of Scotland, and other banks carrying on business in Scotland, for obtaining advances, in order to make the deposits of money required by the standing orders of Parliament to be made in reference to said undertaking, that excerpts of all entries therein, having reference to such correspondence, may be made and certified by the commissioner. 11. All letters, accounts, bills and obligations, in reference to loan transactions, in or about December 1856 and January 1857, to which the pursuer and the other promoters of the Denburn Branch of the Great North of Scotland Railway, and of the Formartine and Buchan Railway, or one or more of them, were parties,—applicable to the deposits required by the standing orders of Parliament for these schemes respectively. 12. All letters, or copies of letters, by any of the promoters or others on behalf of the Formartine or Buchan Railway, or of the Great North of Scotland Railway, or of the promoters of either of these schemes, to the Bank of Scotland, the Union Bank of Scotland, the Commercial Bank, and the National Bank, tending or calculated to prevent any support being given to the Aberdeen, Peterhead, and Fraserburgh Railway. 13. All newspapers,

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or copies of newspapers, called the 'London Railway Times,' and the 'Aberdeen Herald,' transmitted by post from Aberdeen, in the month of January 1857, to all or any of the said banks, or to any of the leading officials therein."

The pursuer objected to this diligence. He pleaded, that no issue in justification had been taken; and if a diligence so sweeping were granted, the result would be that a party having a sinister object in view, might, by publishing a slander, and not taking an issue in justification, get into an inquiry which would otherwise have been incompetent, and obtain access to private repositories and muniments, to the still greater injury, it might be, of the parties, than that occasioned by the slander. The Court would not grant a diligence to recover evidence which could not be used at the trial, nor would they needlessly expose the private affairs of banks and railway companies to the world. The case of M'Neill v. Rorison[1] was a direct authority against allowing an attempt to prove the truth of a libel without an issue in justification.

Pleaded for the defender;—In order to prove the incompetency of the diligence, the pursuer must shew that by no possibility could the documents sought to be recovered be made evidence in the cause. The sting of the libel consisted in the character of the transaction in 1846, to which these proceedings in 1856 were likened. The character of the calumny was described by the pursuer himself, who admitted malpractices in 1846, and therefore it was competent for the defender to explain to the jury what really was the nature of the transaction in 1846, and that he did not make the statements recklessly, but with some cause or excuse. The general rule was quite clear.[2] It was quite competent to prove circumstances which might mitigate damages, although no issue in justification had been taken. The pursuer's own statement necessarily led to such an inquiry as the defender now proposed to enter into. Farther, it was a material consideration whether the defender's statement was a complete fiction, or whether there was just cause for it. It must be found that what took place in 1846 was flagrantly irrelevant to this action, before the Court could refuse this diligence. A second class of documents sought to be recovered related to the transaction of 1856; and a third class, which might be taken in connection with it, related to what might be called the provocations of the case, which it was competent and relevant to prove at the trial, for the purpose of fixing the proper character of the defamation. It might not go the length of justification in the legal sense; but it was of some consequence whether the defender's statements were correct or not, or whether they were an invention intended to injure this railway, and all connected with it. This was a question of moral wrong, and everything that might palliate it diminished the culpability, and thereby the amount of damages.[3]

Lord President.—The question raised here is of considerable importance, not only in regard to this case, but as determining the course which the Court are to adopt in regard to other cases of a similar nature. This action is brought for alleged slander contained in a letter printed in certain newspapers in January 1857, and which is quoted in the issue. Now, as I understand this letter, it alludes to a thing said to have taken place in 1857; and one of the main points of this alleged slander is, that it represents the pursuer and other members of the committee of management of the North of Scotland Banking Company to have been guilty of such a juggle as had previously caused great loss to the shareholders of the bank. The expression "some years previously," used in the pursuer's issue, has reference, apparently, from the record, to the year 1846, and the calumny is said to

[1] M'Neill v. Rorison, 12th Nov. 1847, ante, vol. x. p. 15.

[2] Macfarlane on Issues, p. 220; Ogilvie v. Scott, 19th March 1836, Sh. & D. vol. xiv. p. 729.

[3] Ogilvie v. Scott, 19th March 1836, 14 S. & D. p. 729.

be that this pursuer and the other members of the committee of management of this bank are alleged to have acted in a way that is parallel to what was done in 1846. The pursuer complains of that as being a very grievous accusation, because what was done in 1846 was very bad. He tells us in his record what it was,[1] and of course the worse it was, the more grievous the accusation.

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The only answer by the defender to that statement seems to be substantially an admission of what the pursuer alleges took place in 1846. The defender's own statement charges the pursuer with being one of the parties concerned in that mismanagement, and sets forth that the mismanagement consisted particularly in advancing large sums of bank money to the North of Scotland Railway Company, without adequate security.[2] It is a direct statement of misconduct on the part of the pursuer in 1846, in addition to any misconduct imputed to him in 1856. But the defender takes no issue in justification; he undertakes neither to prove that the pursuer was a party to any mismanagement in 1846, nor that he was a party to any mismanagement in 1856. He stands on the general defence, and he now asks a diligence to support it. The first thing he proposes to do is to investigate the affairs of the bank in 1846, and he calls for the books and correspondence of the bank in the most general and unlimited terms. His object, we are told, is to shew the participation of the pursuer in the proceedings of 1846, and thereby to mitigate the damages. By proving the character of the proceedings in 1846, while he is not to attempt to justify his slander, he wishes to palliate it, so that in estimating the damages he may be dealt leniently with.

I do not think the defender is entitled to this diligence. The proceedings in 1846 are not the subject of the libel, and the proposal here is to involve the pursuer in something else, which itself might have been the subject of another action of damages. The pursuer describes these proceedings. The defender admits the character of them, and now says, I want to get into these proceedings, in order to shew that you were as bad in 1846 as you are in 1857. That is wholly out of the question in this case. There is no issue taken as to libel upon the pursuer for anything done in 1846. Farther, the inquiry proposed here is of the broadest kind, and I should doubt much whether, under any allegation as to the nature of the proceedings of 1846, the defender could get into such an inquiry. It embraces the whole proceedings of that period. If one party chooses to libel another, by comparing his actings now to the actings of other parties at another time, according to the defender's view, that might be made an excuse for diligence to drag to light the whole proceedings of these other parties. That is an abuse of diligence, and I am quite opposed to granting it.

What follows in the specification falls within the same rule. The calls cannot be granted. They are of that sweeping character that we must refuse them. It is an attempt to ransack matters which have not been put forward in the only shape which could constitute them a defence to this action.

The articles of the specification which refer to the proceedings in 1857 are more to the point. These proceedings are the immediate subject of the action. The complaint is that the directors are accused of having allowed the money of the bank to be taken away recklessly, and put into the possession of the secretary of the Great North of Scotland Railway Company, without obtaining from the Company any security, and that these operations were of the nature of a payment to the directors themselves. That is the subject-matter of the libel,—and that the directors have done it to such an extent that their proceedings are like those of 1846. This diligence is asked for in order to obtain evidence of a statement which is of the essence of the libel, and as to which the defender has made averments, but still he has not taken an issue of justification, and I do not understand the principle of M'Neill and Rorison if it does not reach this case.

In conclusion, the defender calls for all letters by any of the promoters or others on behalf of the Formartine and Buchan Railway, or of the Great North of Scotland Railway, or of the promoters of either of these schemes to various specified banks calculated to prevent any support being given to the Aberdeen, Peterhead, and Fraserburgh Railway. Now on that subject the defender has made the following statement in article 3 of his condescendence in the present action. He says that in the course of the Parliamentary contests between the "rival schemes much

[1] Vide supra, p. 881, art. 3. [2] Vide supra, p. 884.

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excitement was created, and the credit and financial arrangements of each were unceremoniously handled, both in the form of newspaper warfare and otherwise. In particular, the nature and *bona fide* character of the subscriptions to the Aberdeen, Peterhead, and Fraserburgh line were most unfairly assailed in a series of articles in those newspapers, which were under the influence of the Great North of Scotland Railway, of which by this time the pursuer had become a director, as well as of the Formartine and Buchan line; and, in addition to this, attempts were made to injure its credit, and cripple its financial means, by private letters and by articles in newspapers, containing injurious statements against the scheme and its projectors or supporters, which were industriously circulated among the different banks in Edinburgh and other quarters;—and which represented its deposits as delusive, or obtained by unfair means. These attacks, both public and private, which had been perseveringly continued, and which the defender had every reason to believe emanated from the Great North of Scotland Railway and the promoters of the rival branch, naturally led the defender to inquire in what way the deposits for the rival scheme had been obtained, and to bring this matter before the shareholders of the Aberdeen, Peterhead, and Fraserburgh line, in the letter which forms the subject of the present action. The letter itself bears this as the explanation of its being written."

Now this is put forward as a sort of provocation. The proposal is to recover the letters of the promoters, or others on their behalf. The defender does not allege that the promoters wrote any letters. He says that letters were written, and that he has reason to believe that they emanated from the promoters. But he has not averred that in fact they did so. He is pleading his belief as a mitigation of his doing what is complained of. That is a very different thing from pleading and proving that the directors wrote these letters. Therefore I do not think it can be granted. This is altogether an attempt to abuse diligence, which the Court cannot sanction.

Lord Curriehill.—I concur. This diligence as craved must be refused. With regard to the documents relating to the proceedings in 1846, I am prepared to refuse the diligence applicable to them, on the ground that it is too sweeping, and also, that at the discussion these documents it was said were to be used for the purpose of mitigating damages. They are not entitled so to use them, and the case of M'Neill is conclusive. But such being my opinion, I may add that there are some of these documents, which, if they have been properly described, I am not at this moment prepared to say may not be legitimately recovered by diligence. My reason is this: The pursuer, in his innuendo, accuses the defender of having charged him with certain things, one of which is that the pursuer, as one of the committee of management of the bank, had been guilty of such a juggle and malpractices, as those which some years before caused serious injury to the bank and the shareholders.

The pursuer here accuses the defender of having charged him with being guilty of certain things, and the defender is called upon to appear before a jury and meet that charge. Now what is the juggle, and what are the malpractices? The pursuer does not describe these directly in so many words in the innuendo. Now at the trial he will prove the nature of the juggle and malpractices. I assume he must do that, and how? I presume that he is entitled to produce such books and documents as will prove the nature of the juggle with which he has been charged. That being so, is the defender not entitled to prove, if he can, that he has not been guilty, and that he never accused the pursuer of a juggle of that kind? Are we now to determine that he is not to be in a position even to tender such evidence? If he had limited his demand, I am not prepared to say that we might not have granted it, but I reserve my opinion.

Lord Deas.—I am glad that your Lordships are not disposed to grant this application, for it appears to me that, apart from other objections to it, the specification is in terms broad and sweeping to an unexampled degree, and that to grant diligence in such terms would be a mere abuse. I do not overlook the difference between the recovery of documents, to place them within the party's power, and the reception of them in evidence at the trial. But there must be a limit to such right of recovery. A litigant is not entitled to ransack the repositories of third parties, or to heap expense upon his opponent by extensive investigations throughout the country, and overloading the process with documents, the production of which at

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the trial will, it is plain, be either incompetent or useless. He must explain the object for which the writings are wanted, and shew, at least, a *prima facie* case in favour of their admissibility and utility. He must also so frame his specification that, both in respect of time and of the nature and number of the writings, it shall be reasonably definite. If he fails in any of these respects, his application falls to be refused, leaving him to lodge a different specification and to apply of new, which he may of course do as often as he pleases, if so advised. It is not for the Court to pick out a few words or a few lines here and there, and to frame a new specification for the party. If the defender thinks he can do that availably, let him do it for himself, and we will judge of the new specification when it comes. Meantime this specification seems to me objectionable, both on general and special grounds.

The first seven articles admittedly apply to the transactions of 1846 referred to (although very loosely) in the issue, and in the first article[1] of the condescendence and answers. As to the nature of these transactions the parties seem to be agreed, for the admissions in the answer to article 1 of the condescendence are an echo of the statements in the article itself. I see no *innuendo* in the issue to entitle the pursuer to prove that these malpractices were of a different or worse description than the defender has admitted them to be. Nevertheless, as the defender might possibly have had a legitimate object to serve by the recovery of these writings, I asked his counsel what that object was?—whether he wished to make out that the transactions of 1846 were of a less or of a more culpable description than the pursuer represented them to have been? But to this question I received no answer. Now it is plain, that the worse these transactions were, the greater the libel. And if the defender had had in view to diminish damages by shewing that the conduct of those in the management in 1846, to which he likened the conduct of the pursuer and others, who were in the management in 1856 or 1857, was less culpable than it might otherwise be supposed to have been, would he not at once have said so, when the question was asked? He was bound to explain the object for which he wished to recover the writings, and his declining to do so would be, of itself, a sufficient reason for *hoc statu* refusing the diligence *quoad* the first seven articles of the specification, even if there were not other reasons.

But look at what is embraced by these articles. The writings are sought as having reference to what occurred in 1845, 1846, and 1847; but the writings, themselves, may be of any dates between the beginning of 1845 and the raising of the present action in the beginning of 1857—a period of twelve years. And articles 3d, 4th, and 7th, are not even limited to the date of raising the present action. Articles 1st and 2d embrace all entries in the bank books relative to the state of accounts between the bank and every person who had been a director of the bank in 1845 and 1846, as well as of Henry Paterson, the manager, and of every person who had been a joint obligant with Paterson or with any of these directors in the course of the above twelve years, and relative to all bills granted to the bank by all or any of these persons in the course of the same twelve years. Article 3d embraces all reports by the directors in and after 1847 with reference to the loss of capital, the discharge of Paterson, and the debts to the bank of all the parties just referred to. Articles 5, 6, and 7, relate to the shares, and to the transfer and forfeiture of the shares of all persons who have been directors of the Great North of Scotland Railway Company, from the beginning of 1845 to the raising of the present action, and the names of all shareholders who have attended meetings of the railway company during that period, and the names of all persons who had been directors of the company during that period.

Now, we need not consider whether circumstances might not be stated entitling the defender to an investigation even of this extensive kind, laying open the affairs of the bank, of Paterson who had been its manager, of every person who had been a director of it during these twelve years, and of every person who had been a joint obligant with Paterson or with any of these directors, during these years, and also laying open the affairs of the railway company, and of the directors and shareholders of that company for the same period—all without reference to any connection between these parties and the present action, over which they are not said to have any

[1] Art. 1 of the present action is in the same terms as art. 3 of that at the instance of the Bank, supra, p. 881.

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control. It is enough that no such circumstances are stated, or even attempted to be stated here. The defender asks this extraordinary diligence, and declines to specify any object whatever with a view to which he asks it. Then, as to article 4th of the specification, he is equally silent. But it is plain enough that that article relates to the pursuer's alleged share in the transactions of 1846, and that the object of it can be nothing else than to connect him with the malpractices of that period. We cannot allow a party charged with being a slanderer, under the guise of defending himself, to heap upon his opponent another and worse slander—to excuse his having likened the transaction of 1856–7 to the transactions of 1846, by shewing the atrocity of the transactions of 1846, and that the pursuer was a party to both sets of transactions, and this without either plea stated or issue taken in justification.

The remaining articles of the specification are directed to the recovery (and here again it is not limited even to the date of the present action) of all the books of the bank, and of the Denburn Railway Company, and of the Formartine and Denburn Railway Company, and all correspondence between the bank and these companies and the promoters of these companies, or between them, or any of them, and any other banks in Scotland, relative to advances made, or proposed to be made, to either of these two railway companies, with a view to make up their parliamentary deposits, and all correspondence between the promoters and others, on behalf of these railway companies, and the Bank of Scotland, the Union Bank, the Commercial Bank, and the National Bank, tending to prevent support from being given to another railway company, namely, the Aberdeen, Peterhead, and Fraserburgh Railway Company. To this is added a demand (in article 13) for all copies of certain newspapers transmitted by post from Aberdeen in January 1857 to any of the above banks or the office-bearers thereof, without reference to who may have been the senders of these newspapers, the nature or authorship of their contents, the object of sending them, or to the fact of the pursuer, or anybody for whom the pursuer could be held responsible, being in any way connected with them.

Now, this is a case in which, as I have already observed, no plea has been stated or issue taken in justification; and we must take care that under the mere pretence of mitigating damages, the defender shall not be allowed unduly to injure the pursuer and the companies or corporations with which he is connected, or to obtain a fishing diligence for purposes foreign to the legitimate objects of his defence against the present action. I do not question that a defender, for the *bona fide* purpose of mitigating his offence, is entitled to a certain latitude in proving the surrounding circumstances, a knowledge of which may have induced him to publish a particular libel, or to utter a particular slander; nor that even mere information conveyed to him, although erroneous, may not sometimes be allowed, under due precautions, to be proved for that purpose. But it does not follow that he can be allowed, by a general diligence of this kind before trial, to fish up facts and circumstances of which he does not pretend to have had any knowledge or credible information at the time, and which, for anything he pretends to know even now, may turn out either to have no existence or to justify the libel entirely by proving it to be true. If the defender knew or was credibly informed of the existence of any particular documents which mitigate without justifying the libel, let him say so and describe them specifically, so that we may know what we are about in granting or refusing his demand; or let him cite the proper custodiers of these documents (which it is quite competent for him to do) to bring them with them as witnesses and havers at the trial, where they may be used to refresh their memories with a view to questions in themselves held competent, and with means of determining whether their general import ought to be inquired into, which we cannot have now. For your Lordships are aware that general results, like the general import of reports and rumours, may often be inquired into, in mitigation of damages for slander, when the particulars, which might go too far, can neither fairly nor competently be obtained. I see nothing to prevent the defender from obtaining, in this way, from his witnesses, all the general explanations to which he is fairly entitled, of the circumstances which induced him to write the libel, including even the general impression created by the newspaper press. Be this as it may, however, this second branch of the specification appears to me to be objectionable, as well as the first. Nor does the defender ask the second branch if he does not get the first. His object, whatever it may be, is avowedly a combined use of the two.

He stands, indeed, upon his whole specification, and I think we have no course but to refuse his demand. No. 219.

I am the more disposed to be cautious in this matter, because the course the defender has followed is unusual. The Lord Ordinary pronounced a judgment (whether after much resistance or not I do not know) repelling the defender's plea against the relevancy of the action. The defender reclaimed, but at once consented to the refusal of his reclaiming note. I stated at the time, that, apart from such consent, I was not prepared *hoc statu* to have affirmed that interlocutor. Then came the issue proposed by the pursuer, to which the defender at once stated that he had no objections. I explained upon that occasion, and I repeat now, that if the defender had not agreed to the issue, I could not have sanctioned it, in its present form, nor do I suppose your Lordships would have done so. It is loose in the extreme, and contains neither *innuendo* nor explanation to make the allusion to the transactions of 1846 intelligible. Then the word "fraudulent," used in article 5 of the condescendence, is dropped out in the issue, and the only question put is, whether the libel falsely and calumniously asserts that, "through the reckless and improper connivance of the pursuer," and of the other directors of the bank, certain things were done. Now the defender himself says, in article 5 of his statements, that he did not mean to impute dishonesty to the pursuer and the other directors in doing these things, but merely to represent their conduct "as reckless and improper," and likely to reproduce the misfortunes of 1846. If the defender thus admits the construction put by the issue upon the libel to be a sound construction, what is the use of a trial? Is it the mere assessment of damages? All this concession, followed by a demand for a diligence of this unusual character, looks very much as if the defender's object was something else than the legitimate object of defence against this action; and this affords an additional reason for pausing before we grant the unusual demand now made.

July 11, 1857. Currer v. Dickson

LORD IVORY absent.

THE COURT pronounced the following interlocutor:—"The Lords, having heard the counsel for the parties yesterday and to-day . . . Refuse the motion set forth in the notice of motion for diligence at the instance of the defender, No. 15 of process.

MURRAY & BEITH, W.S.—RANKEN, WALKER, & JOHNSTON, W.S.—Agents.

No. 220.

MRS ANN HISLOP OR CURRER, AND OTHERS, Pursuers.—*Penney—Black.*
WILLIAM DICKSON, Defender.—*Pattison—Young.*

Process—Diligence—Open Record.—An action of count and reckoning was brought on the allegation that the defender had been conducting a business for behoof of the pursuer for a number of years. The defender stated that after some years he had purchased the business, and had since carried it on for himself; but he produced no agreement. Before the record was closed the Lord Ordinary granted diligence to recover the whole business books, both before and after the alleged sale. In the Inner House the defender undertook to produce the agreement relating to the sale, and of consent the diligence was refused, so far as it embraced business books subsequent to the alleged sale.

July 11, 1857. 1ST DIVISION. Ld. Ardmillan. C.

MRS CURRER, for herself, and as executrix of her deceased husband, Thomas Currer (who died in 1830), and her children, brought this action of count and reckoning against the defender, on the allegation that on her husband's death he had intromitted with his effects, and had carried on the business of a wine and spirit merchant for twenty-seven years for her behoof, and had never rendered any accounts. At the time of Thomas Currer's death the defender was a shopman in his employment, at No. 7 Antigua Street. He averred that for two years after her husband's death he carried on the business for Mrs Currer, and that in 1832 he was induced by her to purchase it, together with the stock in trade; that thereafter Currer and Company occupied that and the neighbouring shop, and carried on a similar business, and thereafter Currer and Dickson, but that in these

No. 220. businesses the pursuer had no concern. Before the record was closed the pursuer moved for a diligence to recover a number of inventories, pass-books, and other business books, of Thomas Currer, tending to shew the state of the business or stock at the date of Currer's death, and also of Mrs Currer, of Ann Currer, of Currer and Company, and of Currer and Dickson, or any of them. Also,

July 11, 1857. Murray v. Gentle.

"The books of the business conducted by the defender in No. 6 Antigua Street, in name of the said firms, or any of them, including the pass-book, or other book kept, in which the drawings of that business, and payments thereof, were entered."

The Lord Ordinary granted the diligence.

The defender reclaimed, and pleaded;—The diligence was too wide. The case was as yet only at that stage in which the parties were making their averments, not proving them. This might be a proper diligence when they came to proof; but the defender's averment, that he did not carry on the business for behoof of the pursuer, must in the meantime be assumed to be true.

Lord Deas.—The defender has not produced any written agreement in support of his averments. If he had done so, that would have given him a *prima facie* case to stand upon as having carried on the business for himself.

Pattison, for the defender, thereupon undertook to produce such an agreement, and "of consent"

The Court "Refused the desire of the reclaiming note, in 'so far as' the specification related to the books and documents of the late Thomas Currer, and 'to the books of the business carried on by the defender in name of Mrs Currer, or of Ann Currer;' . . . and *Quoad ultra* 'Refused the motion for diligence.'"

David Curror, S.S.C.—John Robertson, S.S.C.—Agents.

No. 221. James Murray Grant, Pursuer.—*Penney—Millar.*
Robert Gentle, Defender.—*A. R. Clark.*

Process—Issues.—In an action of damages by a landlord against his tenant for violation of the lease in burning heather, the defence was, that if the defender's servants had set fire to the heather, it was upon the employment of the shooting tenant or the pursuer;—Form of issues to try the question.

July 11, 1857. 1st Division. Ld. Benholme. C.

The pursuer Grant brought this action against Gentle, who was tenant of two of the pursuer's farms, concluding for payment of L.500, as the amount of the damage which the pursuer had sustained in consequence of muir-burnings on the farms in December 1855, "and for which, as well as for all consequences resulting therefrom, the defender is responsible." The pursuer founded on the lease, by which the defender bound himself to observe the rules and regulations thereto subjoined—one of which was, that no tenant should be at liberty to burn muir without authority. "Each tenant will be answerable for any wood or muir burning on any part of his farm." He stated that certain differences between him and the defender had been referred to arbitration, which resulted in the defender being allowed an annual abatement from his rent—he renouncing all right to burn muir, &c., and undertaking not only not to burn the muir, but to preserve it. Notwithstanding this, on the occasion in question, a portion of a muir was set on fire, and in great part consumed; and it was alleged that "this was done by the defender, or by a person or persons in his employment, or upon his farms, acting upon his orders, express or implied, or at least with his privity, and for his benefit, and for whom he is responsible." The damage was laid at L.500.

He proposed the following issues:— No. 221.

"It being admitted that the pursuer is the proprietor of the farms of Knockie and Foyerbeg, and that the defender is the tenant of these farms, under the lease granted by the pursuer, of which No. 10 of process is an extract,— July 11, 1857. Cunninghame.

"Whether, on or about the 21st day of December 1855, in violation of the provisions of his lease, a portion of the muir on the defender's said farms, known by the name of 'Fichel,' was set on fire by the defender, or by others for whom he is responsible, and was in great part consumed, to the loss, injury, and damage of the pursuer?"

The defender denied that the muir had been burned by his orders, or by any one for whom he was responsible; and alleged, that if his, the defender's servants at any time set fire to heather, they were acting upon the employment or the authority of the shooting tenant, or of some other persons acting on behalf of the shooting tenant or the pursuer. He pleaded, that the pursuer was bound to specify the parties by whom he alleged the fires had been raised. The issue proposed by the pursuer was objectionable, in respect it did not shew what kind of responsibility attached to the defender for the act of the persons complained of. It did not follow, that because the defender's servant might have done this act, the defender was liable. He proposed that the issue should be, whether "the defender by himself, or by others in his employment or on his farms, acting upon his orders, or with his privity, wrongfully set fire," &c.

The following issues were adjusted:—

"It being admitted," &c., as above,—

"Whether, on or about the 21st day of December 1855, in violation of the provisions of his lease, the defender did, by himself, or by another or others, set on fire a portion of the muir on the defender's said farm, known by the name of 'Fichel,' to the loss, injury, and damage of the pursuer?"

Sang & Adam, S.S.C.—Gibson Craigs, Dalziel, & Brodie, W.S.—Agents.

John Cunninghame of Balgonie, Petitioner.—*Bruce.* No. 222.

Entail—Amendment of petition—16 and 17 Vict., c. 94, sect. 3.

The petition was presented, under the 16th and 18th sections of the Entail Amendment Act, for authority to charge the entailed estate with outlay on improvements made subsequent to the passing of the Act. July 14, 1857. 1st Division. L.

Instead, however, of praying for authority to grant bonds upon the whole expenditure, the prayer of the petition was framed, as in the case of improvements made previous to the passing of the Act, for authority to grant bond of annualrent on three-fourths, or bond and disposition in security for two-thirds of three-fourths of the expenditure.

In the body of the petition, the 13th section was erroneously quoted (instead of the 14th) as being applicable, in combination with the 16th section, to the case of such improvements executed subsequent to the passing of the Act.

After the petition had been served and intimated and advertised, but before any remit to the Lord Ordinary, the error was discovered, and a minute was given in by the petitioner, founding upon the 16th and 17th Vict., c. 94, sect. 3, and craving leave to amend the petition without farther service, intimation, or advertisement.

Amendment refused, and petition withdrawn.

Gibson & Hector, W.S.—Agents.

No. 223.
—
July 14, 1857.
Rollo v.
Thomson.

DAVID ROLLO, Pursuer and Respondent.—*Fraser.*
JAMES AND GEORGE THOMSON, Defenders and Advocators.—*Penney—Gordon.*

Property—Master and servant.—Held, that books in which the draughtsman of an engineering firm made sketches, from which finished drawings were afterwards made, of all the machinery made by his employers, but which contained no original designs by himself, belonged not to the draughtsman but to his employers; and that as he had authority to purchase the books at his employers' expense, it made no difference that he had in point of fact purchased them at his own.

1ST DIVISION.
L.
Sheriff of
Lanarkshire.

ROLLO was employed by James and George Thomson, engineers, Glasgow, as draughtsman within their works, the Clyde Bank Foundry. He had sketch-books for that purpose. He left the Thomsons' employment in April 1854, taking eight of these sketch-books along with him. His employers claimed the books as their property, and having caused Rollo to be apprehended, the books were taken possession of by the police. Rollo then presented a petition to the Sheriff to have them restored. A record was made up, and proof led.

Among other witnesses Rollo was examined. He deponed,—" I was engaged by the defenders at first as their draughtsman. My instructions from the defenders were, to prepare a combined view, finished drawings and details of all the machinery made by them." . . " None of these sketch-books contained the finished drawings which were to be handed to the defenders. They contained merely the sketches from which such finished drawings were to be made." . . " None of these books, to my knowledge, contain any original design, nor any sketch of any peculiarity of construction practised in the defenders' works, and no where else." . . " The sketches in these books are partly from finished machinery, and partly from rough castings, to enable drawings to be made on a scale. I made the drawings for the castings from the instructions of Mr Thomson, and from sketch-books which he handed me. The finished drawings of all the machinery were to be kept by the defenders. A great many of the sketches in these books were done in the works during working hours; others were done at home. Occasionally, journeymen drew in these books under my directions, and what they did was done in the shop." . . " I am not aware that the books contain sketches of any of the defenders' machinery, of which a finished drawing was not made, but such a thing might accidentally occur. All the sketches I got from Mr Thomson I left carefully rolled up in his drawing room. At first the working drawings of machines were made from such sketches. Latterly I designed them myself, and he revised them."

The Sheriff-substitute (Smith) found the books to be the property of J. and G. Thomson, and refused the petition, with expenses. The Sheriff-depute (Alison) altered that interlocutor, and decerned for the petitioner—Finding that the books " are mere sketch-books," " that finished drawings were made from these general sketches," and, " in point of law, that these finished drawings belonged to the defenders," " on general principles that such sketch-books belong to the artist, and the finished drawings to the employer;" " that the evidence instructs that, generally speaking, sketch-books of a like description with the present belong to the draughtsmen, and are carried away by them."

J. and G. Thomson advocated, and the case came before the First Division. The interlocutor pronounced by this Court thus states the facts established by the proof:—" Find, in point of fact, 1st, That for some years prior to 7th April 1854, the respondent was in the employment of the advocators as foreman of the draughtsmen in their work called Clyde Bank Foundry, in or near Glasgow; 2d, That in this capacity the respondent kept in the said

work the eight books in question, the contents of which, with the exception of some memoranda or entries said to have been made therein by the respondent for his individual purposes, consist exclusively of sketches from machinery which had been previously made and furnished by the advocators, and of sketches from rough castings, the property of the advocators, from which sketches the working drawings were afterwards prepared for machines to be made at the advocators' said work: 3d, That said sketches were made partly by the respondent in his capacity foresaid, and partly by assistant draughtsmen and others in the advocators' employment, acting under his superintendence: 4th, That in so far as those sketches consisted of sketches of finished machinery, such machinery had either been designed by the advocators, or the design thereof had been prepared by the respondent, and revised by the advocators; and in so far as said sketches consisted of sketches from rough castings, such sketches were made partly according to instructions given by the advocators, and partly from other sketch-books handed by them to the respondent: 5th, That the respondent, in his capacity foresaid, was authorised by the advocators, while in their employment, to order such articles of stationery at their expense as might be necessary for the purposes of their said work; and the advocators all along offered, and still offer, to repay to the respondent whatever sums he may have disbursed in purchasing the books in which the said sketches were afterwards made as aforesaid: 6th, That no demand has ever been made by the respondent for delivery of any memoranda or entries in the said books, separate from his demand for delivery and possession of the books themselves; and the advocators have judicially stated at the bar their willingness that any separate memoranda or entries made by the respondent, exclusively for his individual purposes unconnected with their business, should be taken out of said books and given up to him if demanded."

In support of the note of advocation it was pleaded;—That this was not the case of an artist putting his first thoughts on paper. Rollo was not an inventor in any sense; and even if he were, having been brought into the advocators' premises for the purpose of inventing machinery for them, he would not be entitled to take his invention away with him. But he was nothing but a copying clerk, and if he bought the sketch-books himself he had no right to do so, for the advocators always paid for such stationery.

The respondent pleaded;—That what his employer purchased was finished designs and not first jottings. There must be a clear bargain or custom of trade before an artist who, like the respondent, sold his intellectual labour, could be deprived of his private note-book.

Lord President.—The judgment of the Sheriff-depute cannot stand. There may be private memoranda in these books, but, looking to the character of the books, such private memoranda ought not to have been there. There does not seem to have been any good reason for the respondent purchasing the books at his own cost, for he had power when he required them, to order them at his employers' expense. Again, the books contain all the draughts of all the draughtsmen in the employment of the advocators. So that the respondent's position is this, that without his master's knowledge he buys these books with his own money, and having got all these draughts inserted into them he claims the whole as belonging to himself—not as belonging to the journeymen or draughtsmen. It further appears that these drawings were made in furtherance of the business of the advocators, and what is very important, these sketches are the combined work of the respondent and advotors, for he admits that when he designed anything the advocators revised it, and that none of the books contain any original design. Therefore, looking at all these things, the books appear to me to be the property of the advocators and not of the respondent.

Lords Ivory and Curriehill concurred.

Lord Deas.—I give no opinion upon any question of general principle such as

No. 223. the Sheriff-depute goes upon in his interlocutor; nor upon cases of artists and authors, such as have been put from the bar. I am willing to take the case as we find it in the evidence of the respondent himself, who was foreman of the draughtsmen in the advocators' foundry where machinery is made. (His Lordship here quoted the evidence of Rollo as given above.) There is other evidence which I need not go into, the respondent's own account of the matter being, I think, sufficient to entitle us to hold that the books in question belong to the advocators. Their contents consist of sketches and working drawings. The sketches are all sketches of castings or portions of machinery in the advocators' works. The working drawings were all either prepared under the direction of the advocators or revised by them. The whole were produced by labour paid for by them, except in so far as the respondent may voluntarily have done something at home when he took away any of the books in his pocket, as he says he often did, although the proper place for keeping them was at the works. The whole were intended exclusively for the purposes of the advocators' works, and I do not doubt that they are their property. I am not moved by the fact that the respondent paid the stationer for the books. He need not have done so. He had authority to cause them to be charged to the advocators, and they offered to repay him the cost so soon as they knew he had disbursed it. If there be any memorandums of his own in the books, no objection is made to his taking them out.

July 14, 1857. Robertson v. De Salvi.

THE COURT pronounced the following interlocutor: (after the findings in fact above quoted)—"In these circumstances, find in point of law that the said books belong to the advocators, and that the respondent is not entitled to delivery or possession thereof: Therefore, refuse his petition to the Sheriff, reserving his claim for any sums he can show to have been disbursed by him in purchasing said books, and to be still due to him, and his claim, if he shall assert the same *debito tempore*, for delivery of any separable memoranda or entries which may have been made by him in the said books exclusively for his individual purposes and unconnected with the advocators' business: Grant warrant to and ordain the Sheriff-clerk to deliver up the said books to the advocators, and decern: Find the advocators entitled to expenses both in this Court and the inferior Court: and remit," &c.

PATRICK PAUL, W.S.—WEBSTER & RENNIE, W.S.—Agents.

No. 224. ROBERT HENDERSON ROBERTSON, Petitioner.—*Fraser.*
ANTONIO DE SALVI AND OTHERS, Respondents.—*D. Mackenzie—Scott.*

Bankruptcy — *19 and 20 Vict., c. 79, sects. 45, 47* — ***Foreign*** — ***Mandatory*** — ***Liberation.***—A Scotchman carrying on business in London was imprisoned in the Queen's Bench Prison at the instance of an English creditor. He took out sequestration in Scotland as a partner of a Company, carrying on business in Scotland and in London, and as an individual. A petition for liberation was opposed by the incarcerating creditors;—*Held* (1) that he was not bound to sist a mandatory, he being detained furth of Scotland at the instance of the opposing creditor; but (2), (*cf.* judgment of Lord Mackenzie), apart from the question of competency, that the whole proceedings required explanation, and no sufficient case for liberation had been made out.

Question, Whether the Court of Session has power under the bankruptcy Act to grant liberation from an English Prison?

July 14, 1857. 1ST DIVISION. Ld Mackenzie C.

THE petitioner, Robertson, obtained sequestration under the Scotch Bankruptcy Act in March 1857. He now applied for liberation from the Queen's Bench Prison, where he was detained at the instance of the respondent de Salvi, who, as well as another English creditor of the name of Gower, opposed this application. The facts of the case were thus stated by the Lord Ordinary in a note:—

"The Lord Ordinary has no hesitation in refusing the prayer of this petition.

No. 224. — July 14, 1857. Robertson v. De Salvi.

"The petitioner, Robert Henderson Robertson, states that he carried on business as a bill-broker in London; that he resided in Berkeley Square; and that he was tenant of a house and grounds at Sunning Hill, in the neighbourhood of Windsor. According to his own account, all his creditors reside in England, and he does not pretend that he has any property or funds of any kind in Scotland.

"In September 1856, the petitioner was imprisoned in the Queen's Bench Gaol, Southwark, London, under diligence at the instance of the respondent, Antonio de Salvi, for a debt of L.208, 18s.; and detainers have been lodged with the keeper of the prison against the petitioner by Mr Gower and several other creditors, all of them residing in England. The object of this petition is to obtain liberation from this imprisonment, under the 45th and 47th sections of the Bankruptcy Scotland Act, 1856. Apart from any question of competency which has been reserved, the Lord Ordinary is satisfied, from an examination of the proceedings in the sequestration as engrossed in the Sederunt-book, that a warrant of liberation should not be granted in favour of the petitioner.

"In March 1857, the petitioner, with concurrence of a friendly English creditor, Thomas Broster, applied for, and obtained, sequestration in Scotland. The sequestration was taken out against a firm of Broadbent and Co., described as woollen-merchants in Glasgow, Wigton, and London, 'and Robert Henderson Robertson, as a partner of said company, and as an individual.' No description is given of the petitioner by his occupation or address, so as to enable his English creditors, from the notice in the Gazette, to discover that he was the party to whom the sequestration applied. At the meeting held for the election of trustee, nobody appeared in the character of a creditor except the mandatory of Mr Broster, the creditor who concurred in the petition, and this mandatory voted for the election of a trustee, and fixed the caution at L.10.

"In the Sederunt-book, there is a list of the creditors of Broadbent and Co., and the individual partners, from which it appears that all their creditors reside in England. It does not appear that the company ever had any funds or property in Scotland which could be carried by the sequestration. The pretended state of assets of Broadbent and Company is a complete caricature. It embraces a land-grant of 1500 acres in Poyais, upon which the trustee, in his report, places no value; and, so far as appears, this company, which pretends to have carried on business in Glasgow, Wigton, and London, had no other funds or property of any kind. The trustee's report of 21st April 1857, bears: 'I have got no books nor any other documents;' and he adds, that there is no stock in trade, no book debts, and no other assets.

"There is a list of the petitioner's English creditors in the sederunt-book. But, while he professes to have carried on business in London as a bill-broker, and was sequestrated as an individual, he has given up no state of his affairs, and no account of any assets or property belonging to him. By the 80th section of the Bankruptcy Act it is enacted, "That the trustee shall, as soon as may be after his appointment, take possession of the bankrupt's estate and effects, and of his title-deeds, books, bills, vouchers, and other papers and documents.' And by the 81st section of the same Act it is declared: 'The bankrupt shall make up, and at the meeting appointed for the election of a trustee, deliver to the clerk of such meeting a state of his affairs, specifying his whole property wherever situated, the property in expectancy into which he may have an eventual right, the names and designations of his creditors and debtors, and the debts due by and to him,' &c. Except in giving a list of his English creditors, the petitioner has entirely failed to comply with this important provision of the Bankrupt Act.

"The practical result is sufficiently startling. The trustee reports, 1st,

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That there are no books or documents; and 2d, That there are no available assets of any kind belonging to the pretended company, or to the individual partners, so far as disclosed to him.

"The condescendence for the petitioner does not profess to explain these gross irregularities. The petitioner does not give any account of his connection with Broadbent and Company. As to his private affairs, he merely says, that the whole of his furniture has been made over to his wife and children, so as to be beyond the reach of his creditors. But the decisive points against him are,—1st, That he has delivered up no business-books; and 2d, That he has given up no assets, and no state of affairs, as required by the 81st section of the statute.

"In these circumstances, the Lord Ordinary must be permitted to express his surprise, that the trustee should have granted a certificate of the bankrupt having made a fair disclosure of the position of the estate—a statement which it is impossible to reconcile with the official report of the trustee in the sederunt-book, and the whole proceedings in the sequestration, which are of a most discreditable character."

The minutes of a meeting held 30th April 1857, of the creditors of Broadbent and Company, bore that the trustee stated "that the examination of the bankrupts had not taken place in consequence of the inability to attend by J. Broadbent from indisposition, and R. H. Robertson from his being confined in Queen's Bench Prison, London. The meeting instructed the trustee to concur in a petition to the Lord Ordinary to have R. H. Robertson liberated, that he might come here to be examined." The certificate of the trustee was dated 29th May 1857, and bore that Robertson had made a fair disclosure of his affairs, and "that the interests of the estate had suffered through his incarceration."

The Lord Ordinary pronounced the following interlocutor on 11th June 1857:—"Refuses the petition, and decerns; finds the petitioner liable in expenses: Allows an account thereof to be given in," &c.

The petitioner reclaimed, praying the Court to grant warrant for his immediate liberation, or, "at all events, for his liberation from prison that he may appear in Scotland and undergo the statutory examination, he giving reasonable caution to return to prison to abide the judgment of the Court on this petition after the said examination shall be taken; to find the petitioner entitled to expenses," &c.

When the case was called, the opposing creditors moved that the petitioner should sist a mandatory.

Fraser, for the petitioner, stated that a few days ago the respondent, De Salvi, had assaulted the petitioner in the Queen's Bench Prison to the danger of his life,—the respondent Gower being present; and he now produced medical certificates to the effect that the petitioner could no longer be kept in prison without danger to his life.[1] He therefore pleaded — That this was not a case for a mandatory.[2] The petitioner's absence was involuntary. He was desirous to come to this country to go through his examination, but he was detained in England by the respondents. Farther, England was not a foreign country *quoad hoc;* and, under the statute, the jurisdiction of the Court extended to the whole country. To insist on a mandatory would be virtually to prevent this person being heard, for who would be cautioner or mandatory for a bankrupt?

Scott, for De Salvi, maintained;—That, under this petition, the bankrupt was bound to sist a mandatory.

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[1] See the "Times" newspaper of 8th and 9th July.

[2] Hossack v. Laidlaw, 16th December 1841, ante, vol. iv. p. 268.

Lord President. — This application for liberation is presented by a party :ained in prison by its opponents. He is desirous of coming down here to be ımined, but his opposing creditors will not allow him. They cannot, in these :umstances, insist on a mandatory.

Lords Ivory and Curriehill concurred.

Lord Deas.—I do not think it necessary to go beyond the cause of absence; ause I consider this sufficient to entitle us to refuse the demand for a mandatory. ierever such a demand is made the party is entitled to elide it by appearing at bar so often as his presence is required. The order to sist a mandatory is conuent only on failure so to appear. But if his opponent thrusts him, on the hand, into a foreign jail and keeps him there, and, on the other hand, insists his appearing at this bar, how can the man comply? More especially in the sent case, where the whole question to be tried is the question of liberation, how the respondents insist that the petitioner shall appear at this bar before he can illowed to try the question whether he is to be liberated or not? The proposi- that a party so situated must sist a mandatory before he can be heard is extraınt. There may be other grounds for refusing this demand, but I think the ve sufficient.

)n the merits,—

'raser, for the petitioner, put the petition on two grounds—first, on the und stated in the medical certificates; and, second, upon the condescence. He pleaded;—That the Lord Ordinary had decided the case on a ınd not pleaded either in the answers or at the bar. There was no room blaming the petitioner for extravagant living nor fraudulent conduct. had been imprisoned for nine months, with only two opposing creditors. :re was no ground for refusing this application except neglect of statu- duty, and the petitioner was willing, so far as able, to perform it.

'he respondents were not called on.

ord President.—The Court do not wish to hear more. A great deal must leared up here before we can grant this liberation. There is a great want of ·mation both as to the cause of the petitioner's bankruptcy and as to the course :aling, and as to why it is that, when his business and creditors are in England, sequestration is attempted to be carried out in Scotland. That is in itself a er which shews that the party's conduct requires explanation. As to the state- :s regarding his health, that is something altogether extrinsic to the bankruptcy, I am not prepared to assume that, if they be accurate, there are no means in and to interpose and save a prisoner's life. However, apart from this matter, quite clear for not granting this liberation.

›rd Ivory.—I am of the same opinion. I have great doubts as to the power is Court to grant liberation from prison in England, or of one Sheriff to grant ant of liberation from the prison of another county. These are grave ques- , which it is not necessary now to enter into, for your Lordship has put the ment on the proper ground.

›rd Curriehill.—I have considerable doubts as to the question of competency. an abuse to which the process of sequestration is exposed, that parties avail selves of it as an instrument for obtaining protection from personal diligence. is not the proper object of sequestration; and, therefore, we should be very ıl to prevent it. This looks like a case of that kind, and I am for refusing the ion.

›rd Deas.—Even assuming that there is here a good sequestration, and ning also the competency of granting the warrant craved, it is discretionary, r section 45 of the statute, to grant the warrant or not. Now, on the grounds d by your Lordship and those assigned by the Lord Ordinary, I am of opinion this petition has been rightly refused. In this point of view, it is unnecessary nsider the larger questions alluded to by your Lordships. It is only by going nd the statements in the petition and condescendence, and taking into view langer to life, now for the first time alleged at the bar, that it becomes at all ssary to consider whether this is a good and effectual sequestration, and her, if it be so, we can competently grant the warrant craved. Now I am

No. 224. — July 14, 1857. Farrell v. Arnott.

not at present prepared to hold that this is a good and effectual sequestration. I think there is much to be enquired into and ascertained before we can be satisfied that it is anything else than an abuse of the form of sequestration without the substance. *Prima facie* there are many objections to it, and, till these are cleared up and removed, I am not disposed to consider whether danger to life be a good ground for liberation from an English prison, nor whether it be competent for us to liberate from such prison at all.

The Court pronounced the following interlocutor:—"Refuse the desire of the said reclaiming note: Adhere to the interlocutor reclaimed against: Find the reclaimer liable to the respondent in additional expenses of process: Allow an account to be given in, and remit," &c.

John Walls, S.S.C.—Wotherspoon & Mack, S.S.C.—Hughes & Mylne, W.S.—Agents.

No. 225. Mrs Bell or Isabella Young or Farrell, Suspender.—*D. F. Inglis—A. B. Shand.*

James Arnott and Others, Respondents.—*Moir—Horn—A. R. Clark.*

Arbitration—Interdict—Pactum illicitum.—*Held*, that it was not a good ground for interdicting an arbiter from proceeding with a submission that he was about to consider and dispose of a claim alleged to be illegal, as founded on a *pactum de quota litis* *Observed*, that it was not to be assumed that the arbiter would not rightly dispose of such a claim.

July 14, 1857. — 2d Division. Ld. Mackenzie Bill-Chamber. R.

The late Alexander Wood of Woodburnden, in Kincardineshire, died intestate about the year 1844, leaving a large succession, both heritable and moveable. Two country writers agreed to set on foot an investigation to discover Mr Wood's heir, and to assist him in obtaining possession of his property. After inquiry they came to be of opinion that Mrs Bell Young or Farrell was the party best entitled to the succession. As neither she nor her husband had any means for carrying on a protracted litigation, which it was seen was likely to ensue, the writers in the country, along with agents in Edinburgh and in Aberdeen, agreed to carry on the legal proceedings necessary to enforce Mrs Farrell's rights, who, after the litigation had begun, undertook, by a letter dated 23d November 1846, that in the event of success, "payment for professional trouble and charges also should be liberal, with a reasonable commission and allowance on the value of the property obtained, and the extent of your own risk, trouble, and outlays, and for advances to us and for our support."

After much litigation Mrs Farrell's right to the succession was established. Subsequently a submission was entered into between Mrs Farrell, on the one part, and Mr James Arnott, W.S., who had acted as her agent in Edinburgh, and the other gentlemen who had acted as agents during the course of the litigation, on the other part, whereby they agreed to refer to Mr James Burness, S.S.C., as sole arbiter, all accounts or claims due, charges for risk, commission, and others. After the arbiter had taxed all the ordinary professional charges, the agents, over and above these sums, claimed commission on the amount recovered by Mrs Farrell. She then raised a reduction of the letter of 23d November 1846, above noticed, so far as it referred to commission, and of the submission, so far as it embraced any such claim. She also presented this note of suspension and interdict, praying to have the arbiter interdicted from proceeding in the submission.

It was alleged that he had issued a note, stating his intention to proceed with the submission, notwithstanding the dependence of the action of reduction.

The Lord Ordinary on the Bills pronounced this interlocutor:—"Refuses the note, but reserves to the complainer all pleas competent to her in the

action already raised, or in any reduction or other process, in the event of a decree-arbitral being pronounced; and to all the other parties their answers to any such pleas, as accords: Finds the complainer liable in expenses," &c.* No. 225. July 14, 1857. Farrell v. Arnott.

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* "NOTE.—The Lord Ordinary is not aware of any case where the Court has interfered, by interdict, to stop an arbiter from proceeding with a submission in circumstances similar to the present; and he thinks it would be attended with the most dangerous consequences were any countenance given to such an application.

"By formal deeds of submission entered into between the parties, they submitted all accounts of law business incurred by the complainer Mrs Farrell to her law-agents, and all accounts for cash advances and commission, and all questions and differences connected therewith, to Mr James Burness, S.S.C., Edinburgh, as sole arbiter. Mr Burness accepted of this submission, and a great variety of proceedings have taken place under it. He has taxed the business accounts claimed by the respondents, but he has given no decision on these claims for commission; and the object of the present application is to have him interdicted from proceeding, as arbiter under the submission, to consider or adjudicate upon any such claims.

"It is not pretended that there is anything in the form of the deed of submission to render it *pactum illicitum*, and it does not *ex facie* labour under any intrinsic nullity. Neither is it alleged that the arbiter has become disqualified by interest in the issue, corrupt conduct, or any other cause, from discharging his duty. The sole grounds upon which interdict has been sought are, that the respondents' claim for commission is illegal, and that the complainer has brought a reduction of the submission and other documents, so far as they relate to that claim. But it does not appear to the Lord Ordinary that any relevant grounds have been stated to warrant the interference of the Court by interdict, to stop the proceedings of the arbiter under the submission.

"The main point urged by the complainer is, that the letter by her and her late husband to Mr Alexander Smart, dated 23d November 1846, is *pactum de quota litis*, and as such null and reducible. All such pactions are strongly reprobated by our law, and no reduction is necessary to establish their nullity—Mackenzie v. Forbes, 23d July 1774, 5 Brown's Sup. 528; Johnstone, 1st February 1831, 9 Sh. 364. If the respondents' claims for commission in the submission were founded entirely on that letter, the objection of the complainer may be insuperable, and the arbiter may think himself bound to give effect to it. But Mr Arnott, the Edinburgh agent, so far back as 6th March 1857, intimated to the complainer that he had no interest to defend the reduction of the letter of 23d November 1846, to which he was no party, and on the special terms of which he stated he founded no claims whatever. All the respondents state that they had occasion to manage a variety of cash transactions on behalf of the complainer, on which, apart from special agreement, a commission is payable, according to ordinary usage, and for the trouble and risk connected with these transactions it is said no charges were made in the business accounts.

"Assuming, however, for the sake of argument, that all the claims of the respondents for commission are illegal, that surely would be no ground for stopping the arbiter from adjudicating upon them under the submission. Neither is it of any consequence to allege, that the respondents are founding in the submission on the letter of 23d November 1846, which the complainer maintains to be void and null as a *pactum de quota litis*, any more than it would be a sufficient ground for staying an arbiter's proceedings, to allege that one of the parties was founding upon a forged bill, or any other document liable to an objection in point of law. It is the province of the arbiter to consider and dispose of all such objections, and it must be presumed that he will do his duty by giving effect to them where they are well founded.

"It is equally clear, that the mere circumstance that one of the parties has thought fit to raise a reduction or declarator for the purpose of setting aside the submission, in whole or in part, is no ground for interdicting the arbiter from adjudication upon the claims submitted to him. Great and irremediable mischief might arise from such interruptions; whereas, on the other hand, if the proceedings of

No. 225. — July 15, 1857. Barstow v. Lindsay.

The suspender reclaimed, and pleaded;—It was during the dependence of the litigation as to the Woodburnden succession that Mrs Farrell had signed the letter on which the claim for commission was founded. What was sought to be done in this case was to enforce a *pactum de quota litis*. This was a claim which plainly could not be enforced, being *contra bonos mores;* the Court should therefore interdict the arbiter from going on to consider it. That it was sought to be enforced in the course of a submission did not entitle such a claim to more favour than in the ordinary case.

The respondents' counsel were not called on.

THE COURT adhered.

CHEYNE & STUART, W.S.—JAMES ARNOTT, W.S.—WEBSTER & RENNY, W.S.—Agents.

No. 226.

C. M. BARSTOW, Appellant.—*D. F. Inglis—Mackenzie.*
DONALD LINDSAY (Cameron and Company's Trustee), Respondent.—*Penney—Gordon.*

Bankruptcy.—In the course of two litigations between the individual partners of a mercantile firm, in neither of which the company appeared, although called as defenders in one of them, various remits were made to an Accountant, and large accounts incurred to him. The firm having been sequestrated,—*Held* (*aff.* judgment of Lord Mackenzie), that the Accountant had no claim against the company estate, but only against the individual estates of the partners.

July 15, 1857. — 1st Division. Ld. Mackenzie L.

THE nature of the claim here made on the estates of a bankrupt company, and the whole circumstances, are set forth by the Lord Ordinary in a note appended to his interlocutor, which affirmed the deliverance of the trustee in the sequestration rejecting the claim:—

"The appellant, Mr Barstow, lodged a claim to be ranked preferably on the sequestrated estates of Cameron and Company, and of John Cameron and James M'Murray, the two partners of that company, as individuals, for the sum of L.1463, 17s. 10d., being the balance of certain accounts said to be due to him as an accountant, under remits in two actions which lately depended before the Court. Being of opinion that the litigation, out of which the claim has arisen, was a dispute between the two partners affecting their individual interests solely, and in no degree referring to any matter in which the interests of the company as such were involved, and that in any view Mr Barstow was not entitled to a preference over the other creditors, the trustee, by his deliverance, 'rejects the claim of preference made by the claimant; and he rejects any claim by the claimant against the estate of the company.' After carefully considering the proceedings in the two actions under which the remits were made, and the accounts in question were incurred, the Lord Ordinary sees no ground for disturbing the judgment of the trustee.

"It appears that four accounts are said to have been incurred to the appellant, amounting in the aggregate to L.1958, 9s. 2d., and, after deducting a payment of L.500 made to account, less expenses, the balance claimed is L.1463, 17s. 10d. Now it is important to observe, that the first three accounts in the abstract for L.591, 18s., L.26, 5s., and L.1279, 8s. 2d., all related to business done under two remits from the Court, on the 15th March and 30th May 1854, under the first action, which was brought at the

the arbiter shall ultimately be found to be illegal or ineffectual, the party aggrieved will have his remedy in a reduction.

"These views are strongly confirmed by various decisions of the Court. See Fraser v. Gordon, 5th July 1834, 12 Shaw, 887. Drew v. Leburn, 8th June 1850, 12 D. 983, and 12th February 1852, 14 D. 559; affirmed in the House of Lords, 8th March 1855, 2 Macqueen, p. 1."

No. 226. — July 15, 1857. Barstow v. Lindsay.

instance of Cameron, one of the partners of the company, against M'Murray, who was the other partner.[1] The company are neither pursuers nor defenders of that action. True, it concludes for payment 'to the said firm of Cameron and Company, and to the pursuer and defender, as individual partners thereof;' but the action was evidently intended to be a count and reckoning between the two partners for their individual interests, and accordingly it called upon M'Murray, who had been in the active management of the concern, to account for his intromissions with the funds, both of the old and the new company, in order that the balance due by him might be ascertained. Under this action no decree could be obtained at the instance of the company, and, by a singular omission, no conclusion to make payment to the pursuer as an individual. It thus appears that the three first accounts, which embrace the great bulk of the expenses claimed, were all incurred under remits made in the first action, to which the company were no parties, either as pursuers or defenders.

"As to the last account claimed, which amounts only to L.60, 18s., it was incurred under a remit from the Court on the 20th November 1855, after the supplementary action had been raised and conjoined with the original action. That remit was made to obtain an interim report, so as to enable the Court to dispose of a motion by Cameron for an interim payment.

"The Court had decided on the 13th June 1855, in the original action at Cameron's instance against M'Murray, 'that under the conclusions of the present summons there are no *termini habiles* for pronouncing interim decree in favour of the pursuer individually.' To obviate this difficulty, and enable Cameron to obtain decree for such share of the profits as might be due to him, a supplementary action was raised at his instance on 26th June 1855, directed against Cameron and Company, and against M'Murray as managing partner, and as having intromitted with the funds of the company, and also as an individual.

"In this supplementary action, as in the original one, Cameron was the sole pursuer. The company were not pursuers; and though they were called as defenders, along with M'Murray, in order to give validity in point of form to any decree which might affect the company estate, no appearance was made for them. Defences were given in solely by M'Murray, and a record was made up between him and Cameron, to which the company were no parties. The supplementary action was conjoined with the original one on 13th November 1855, and, as already explained, the only remit made to Mr Barstow, after the supplementary summons was brought, related to the interim report, the expenses of which are stated at L.60, 18s.

"It was only as a step to make out a case against M'Murray, that Cameron and Company were called as nominal defenders in the second action. They never appeared as parties to the record, either as pursuers concurring in the conclusions, or as defenders resisting them. All the litigation from first to last was carried on between Cameron and M'Murray for their individual interests, and a single glance at the record will show that all Cameron's complaints were directed against M'Murray. The company were not the litigants in any sense, and they were not the parties who caused the remits under which the appellant's accounts were incurred. It cannot be said, therefore, that the accounts were incurred on the employment or responsibility of the company, whatever recourse the appellant may have against Cameron and M'Murray, or their estates, as individuals.

"At the debate Mr Barstow founded strongly on the circumstance, that in March 1856 he received payment of L.500 to account of his claim, by a draft on Cameron and Company. But this does not imply that the company considered themselves as the proper obligants in the debt. All the

[1] Ante, vol. xvii. pp. 870, 1142.

No. 226. — July 15, 1857. Sutherland v. Monkland Railways Co.

funds belonging to Cameron and M'Murray were involved in the concern of Cameron and Company, and when the partners consented to the advance from the company funds, all questions of liability were reserved. It is stated that M'Murray placed the draft for L.500 in the books of the company to the debit of Cameron; and there is a letter produced from Cameron's agent, No. 11 of process, bearing that he only consented to the payment, 'reserving his claim against Mr James M'Murray personally for the whole sum in a question of expenses.'

"It was likewise contended on the part of the trustee, that the creditors of the company had derived no real benefit from the remits under which the accounts were incurred, or the proceedings which had followed on these remits. A voluminous report had been prepared in reference to the affairs of the old company, which was dissolved in April 1850; but it was stated that no report had been lodged in reference to the affairs of the existing company, under the second remit made to Mr Barstow—the prosecution of the enquiry having been stopped, and rendered unnecessary by the sequestration on the 16th June 1856.

"On these grounds the Lord Ordinary concurs with the trustee in holding that the appellant is not entitled to be ranked as a creditor on these accounts upon the sequestrated estate of the Company. For any sum that may be justly due to him, the appellant seems entitled to be ranked as an ordinary creditor, on the individual estates of Cameron and M'Murray; but that is a question which is not raised by the present appeal.

"As to the claim made by the appellant to a preference over the other creditors, the Lord Ordinary is not aware of any ground on which it could be maintained; and though special attention was directed to it at the debate, the point was apparently considered so hopeless, that nothing was attempted to be said in support of it, except that the demand for a preference was not to be held as abandoned."

Barstow reclaimed, pleading—That the employment arose out of the contract of copartnership; and that, therefore, the Company were liable.

THE COURT adhered, with additional expenses.

J. & F. ANDERSON, W.S.—DUNDAS & WILSON, W.S.—Agents.

No. 227.

WILLIAM SUTHERLAND, Pursuer.—*Clark.*
THE MONKLAND RAILWAYS COMPANY, Defenders.—*Mackenzie.*

Master and servant—Responsibility for injury to workman.—A workman ordered by an overseer to do what is clearly beyond the limits of the work for which he is engaged, and thereby expose himself to danger, obeys at his own risk, and has no claim for damages against his master for injuries received in doing so.

July 15, 1857. — 2D DIVISION. Ld. Handyside I.

THIS was an action concluding for damages in respect of an injury suffered by the pursuer while employed as a breaksman on the defenders' railway. The pursuer averred:—He was 23 years of age, and in receipt of wages amounting to 14s. per week, when he was engaged by Mr Gray, the locomotive inspector on the railway, to act as breaksman on goods trains on their railway, and particularly on the Bathgate Branch. Gray informed the pursuer when he was engaged, "that he was to act under the instructions of the engineman, and especially of George Simpson, to whose goods train the pursuer was attached." As breaksman the pursuer's duty was "to couple and uncouple waggons, and use the break when occasion required." His proper place on the train was on the hindmost waggon, for the purpose of using the break. The defenders had not stationed any pointsman at the Blackstone Junction, where the branch joined the main line; and to supply this deficiency, George Simpson, the engineman, "had, in order to save

time and to prevent the necessity of stopping the train, been in the practice of ordering the pursuer, when nearing Blackstone Junction, and when the train was in motion, to jump forward along the train till he came to the points, that he might descend as the foremost part of the train reached them, in order to shift the switches, and then jump up on the train after the last part of the train had passed them." To do so formed no part of the pursuer's duty as breaksman, and it placed him in considerable danger. On the 7th January 1856, the pursuer was travelling on the Bathgate branch acting as breaksman of a train consisting of several waggons, some of which were in front of, and some behind the engine. In order to get the train on the main line, it was necessary to shift the points at the junction. The pursuer was then engaged in front of the engine throwing sand upon the rails to prevent the wheels from slipping. He was desired by the engineman to jump forward on the train and shift the points. In doing so his feet slipped and he fell. A waggon wheel passed over his arm, and so crushed it as to render amputation necessary. "It was the duty of the defenders to have a pointsman there, and through their failure to do so, the pursuer sustained the injury. Immediately after the accident the defenders appointed a pointsman at the junction."

The Lord Ordinary appointed parties to lodge issues, and afterwards, in respect parties were not agreed, his Lordship reported the case.

After hearing parties, the Court made avizandum. At advising,—

Lord Justice-Clerk.—I am of a very strong opinion that there has been no relevant matter averred here inferring liability on the part of the Monkland Railway Company. The pursuer was employed as a breaksman, his duty in that capacity being to keep his place on the hindmost waggon, and be ready to do anything necessary in the way of stopping the speed of the train. Then he alleges that at this junction, where the accident happened, the defenders had not stationed a pointsman; and to make up for this deficiency in the necessary service of the railway, Simpson, the engine-driver, had been in the practice of telling the pursuer to perform this dangerous feat. He says expressly that it was not his duty to shift the points, but that it was the duty of the defenders to employ a pointsman at that place.

Now it appears to me to be a material fact in favour of the defenders that there was no pointsman at this place, as that shews most clearly that it was never contemplated that the train should run on past these points without stopping. That the breaksman should get off the train and open the points was most natural, because it was most convenient that he should do so. But when the engine-driver ordered the pursuer to do what resulted in so serious a risk, viz., to pass from waggon to waggon while the train was running on, so as to get down in time to open the points and then climb up again, he did a very rash thing, and in which, if his orders were obeyed by the breaksman, it was at the latter's own risk. I do not think there is any ground stated here on which we can find the pursuer is entitled to an issue.

Lord Murray.—I am of the same opinion. I do not see how or on what principle of law the defenders can be made liable for this accident.

Lord Wood.—I concur. If I could have read the pursuer's condescendence as an averment that the pursuer was told by Gray to obey Simpson in any other respect than with reference to his duty as breaksman, I would have had less difficulty. If he obeys the engineman in any other matters he does so in what is out of his proper duty, and at his own risk. I do not think the pursuer has averred any case sufficient to constitute liability against the defenders.

Lord Cowan.—I am of the same opinion.

To give relevancy to the pursuer's case, there must be in the record averments tracing the injury for which damages are claimed to some cause, with which the defenders can be connected, and for which they are alleged to be responsible, through fault or negligence on the part of themselves, or others acting for them, or under their orders. This record contains no such averments. The pursuer alleges that, although his proper place as breaksman was on the hindmost waggon of the train, the engine-driver had been in the practice of directing him to go to the foremost

No. 227. — July 15, 1857. M'Lean v. Hamilton.

waggon along the tops of all the intermediate waggons and to shift the points, so as to prevent the necessity of stopping the train at the junction of the branch line. He also avers, that doing this was no part of his duty as breaksman, and that it put him in considerable danger; and to this it is that he ascribes the accident. But the defenders are not connected directly or indirectly with this by any averments in the record. The pursuer indeed says, that when engaged as breaksman he was told by the manager to obey the engine-driver; but this could apply only to orders relating to such matters as were within his proper duty as breaksman. The pursuer, from anything that is stated, was not placed in any position as the servant of the defenders which bound him to obey the engine-driver's orders in matters beyond the proper duty of his own department on the train. And yet to his acting under such orders, his claim for damages is exclusively traced in the record.

I think, therefore, that this action ought to be dismissed.

The Court pronounced the following interlocutor:—"Find that the statements of the pursuer on this record do not entitle him to insist in his claim for damages against the defenders: Dismiss the action, and decern: Find the defender entitled to expenses," &c.

Adamson & Gulland, W.S.—Wotherspoon & Mack, W.S.—Agents.

No. 228.

William M'Lean, Petitioner.—*D. F. Inglis—A. R. Clark.*
William Hamilton, Respondent.—*Sol.-Gen. Maitland—Young.*

Property—Water.—A superior heritor is not entitled during flood-time to divert from the natural channel of a stream the excess of water over the ordinary flow, without returning it before the stream reaches the lands of an inferior heritor.

July 15, 1857. — 2d Division. Sheriff of Lanarkshire. R.

Mr M'Lean of Plantation brought this suspension in the following circumstances:—A stream runs through the lands of Plantation, which takes its rise near the Glasgow and Johnstone Canal; and, before reaching Plantation, forms one boundary of the lands of Middleton, belonging to Mr Hamilton. For upwards of forty years there had been an occasional flow into the rivulet of surplus water from the canal. A few years ago, Mr Hamilton, with the view of improving his property, enclosed the stream in a brick sewer. Recently Mr Hamilton caused a pipe to be inserted in the arch of the sewer about eighteen inches from the bottom, so as in time of floods to draw off a part of the water. Mr M'Lean, complaining of this operation, presented a petition to the Sheriff of Lanarkshire, praying that the defender should be interdicted from withdrawing any portion of the water of said stream or rivulet, or diverting it from its usual and natural channel, in all time coming, without the petitioner's consent; or performing any operations upon, or in reference to, said stream or rivulet, by which its natural course is disturbed, or its quantity diminished; and that the defender should be ordained to restore the said sewer to the state in which it was before the introduction of such pipe for the purpose of diverting said stream.

The Sheriff-substitute (Steele) pronounced an interlocutor, which, after finding the circumstances above stated, "Finds that this operation" (the insertion of the pipe in the sewer) "was done without the consent and against the remonstrances of the pursuer: Finds, however, that no special damage has yet been occasioned to the pursuer, or at least if it has, no evidence thereof has been led: Finds, as matter of law, that the pursuer is entitled to have the full and undiminished flow of the stream continued to him in its usual channel, and that the defender has no right to deprive the pursuer thereof, by any *opus manufacturæ*, even although the effect thereof should be limited to the time of floods, or should not be equal to carrying off the casual supply obtained from the canal: Finds that the pursuer is

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entitled to complain of the defender's foresaid operations in regard to the pipe sewer as an encroachment upon, and interference with, his right of property, even although no special damage has yet been occasioned or proved: Therefore interdicts the defender in the terms prayed for; ordains him also to restore in the terms prayed for: Finds him liable in expenses," &c.*

On an appeal against this interlocutor, the Sheriff "adhered thereto, for the reasons stated by the Sheriff-substitute, and dismissed the appeal." †

Mr Hamilton advocated; and the Lord Ordinary made avizandum to the Lords of the Second Division, in terms of the Sheriff-court Act.

The advocator argued;—The petitioner was not injured by the pipe complained of, which only drew off a part of the overflow of the rivulet during floods, and did not interfere with its ordinary flows. The interlocutor granting the interdict was too sweeping in its terms, and even interdicted the use of the water for domestic purposes.

Lord Justice-Clerk.—There can be no doubt on the general point involved here, that a superior heritor is not entitled to divert part of a stream to the injury of an inferior heritor. That the pipe complained of by Mr M'Lean is placed so as only to draw off part of what is in excess of the usual flow of this stream, does not make any difference. A flood may be of great value for the purpose of scouring or keeping clean a water-course. The terms of the interdict as it stands may be a little too broad; and it may perhaps be better that an interlocutor of adherence should bear to be without prejudice to all competent use of the stream by the superior heritor.

The other Judges concurred.

The Court pronounced this interlocutor:—"Refuse the note of advocation; adhere to the interlocutor complained of; and remit *simpliciter* to the Sheriff, without prejudice to the advocator using the water of the stream in question for domestic purposes, or other competent use of the same, provided the water be returned to the stream

* "Note.—There are numerous cases and other authorities establishing the lower heritor's right to prevent all interference by the upper heritor with a stream which is purely natural; and the recent case of Mackenzie v. Wodrop, 24th January 1854, 16 D. 381, and others there noticed, are equally conclusive as to a stream partly artificial, when possession has existed from time immemórial."

† "Note.—The rule of law is well fixed, that a conterminous proprietor is entitled to draw off part of the water of a running stream for the natural use of the adjacent proprietors in turning a mill, or the like; but if he does so, he must reconduct it, when it has served his purpose, into the original bed of the stream, to be of like use to the inferior heritors. It does not alter the case that the water so drawn off is not the natural flow of the stream, but the result of a flood, or water let in from a canal, or other artificial work in the upper part of the stream; for all such extra floodings form part of the stream when it reaches the party proposing to abstract it, and thus becomes subject to the common law on the point. The case of Linlithgow Loch, 13th November 1757, founded on by the respondent, seems at first sight very similar to this, but it relates to a loch of stagnant water, which is private, not *publici juris*; and the case of M'Kenzie, 24th January 1854, has applied the general law, in regard to running streams, to all streams, though partly natural and partly artificial. That case, it is true, related to a channel partly natural and partly artificial; but the principle fixed as to the one applies also to the other.—Bell's Principles, 1106, Lord Melville, 31st May 1842; Blantyre v. Deans, 28th January 1848—the latter of which was an authoritative decision. The question here is not for interdict against a superior heritor, to force him to let his artificial works, which have increased the natural flow of water, remain permanently, but with an inferior heritor, who claims right to divert part of the stream which comes down to him, as to which the law seems the same, whether the stream is entirely natural, or partly natural and partly artificial."

No. 228. unpolluted: Find the advocator liable in the expenses in this Court," &c.

July 15, 1857. Forbes v. Campbell.

Gibson-Craig, Dalziel, & Brodie, W.S.—Morton, Whitehead, & Greig, W.S.—Agents.

No. 229.

Patrick Forbes, Suspender.—*Penney—Pattison.*

Colin M'Larty or M'Laverty Campbell and Others, Respondents.—*Macfarlane—Millar.*

Process—Jury Trial—Issues.—In an action of count and reckoning against a party as a trustee, where the defender denied that he held that character, or had intromissions in it, the Court, on the ground that there were questions of fact apart from the accounting, which had to be ascertained at any rate (*abs.* Lord Justice-Clerk), sent to a jury issues, one of which was framed to ascertain the extent of the defender's intromissions.

Form of issue in an action of count and reckoning.

July 15, 1857. 2d Division. Ld. Mackenzie. L.

Colin M'Larty or M'Laverty Campbell and others, all the children of the late Rev. Donald Campbell, and Mary Anne Brown M'Larty, his wife, brought an action of count and reckoning against James Watson, Patrick Forbes, and the said Rev. Donald Campbell, as trustees under the settlement of the late Miss Susannah Christiana M'Larty, who died in October 1847, concluding that they should hold count and reckoning for intromissions with the funds falling under the trust created by the settlement, and with the profits thereof, from 20th October 1847, and denude themselves of the trust, and convey in favour or for behoof of the pursuers, the fee or capital of the trust-funds equally among them, share and share alike; or otherwise to invest and secure it for behoof of the pursuers; and further, that they should pay to the pursuers L.400, or such sum as should appear to be the balance of their intromissions with the profits and produce of the trust-funds from and after 20th October 1847, to the date of the summons, after deducting any sums already paid; and further, hold count and reckoning for all future intromissions till the fee or capital should be paid over to the pursuers, and pay to the pursuers the annual interest or produce till division of the capital. And in the event of the defenders failing to account, the summons concluded alternatively that they should be decerned "conjunctly and severally, or severally and respectively, as might be determined in the course of the process," to make payment to the pursuers equally among them (1) of L.2700, which should in that event be held to be the amount of the capital of the trust-funds due by them, and (2) of L.600, which should in that event be held as the balance of the intromissions with the produce, together with interest on said sum from the date of citation. The action was defended by James Watson, but neither Donald Campbell nor Forbes made appearance. Decree in absence was taken against Forbes, in terms of the alternative conclusions, and the present action was a suspension of a charge upon that decree.

Forbes said that he had acted as agent of Miss M'Larty, and had, with her consent, made investments of her property; but he denied that he had accepted the office of trustee, or had had any intromissions under her settlement, and stated that, till stopped by legal proceedings, he had paid the interest of the funds invested by him to the chargers, or those acting in their names, and was willing still to pay the interest to any one who could give a discharge, or to pay over the principal to a *curator bonis* if appointed.

The chargers did not admit the suspender's statements, either as to the amount of the funds that had come into his hands, or as to the footing on which he had dealt with them.

Parties were ordered to lodge draft issues. This was done, and, in respect

they could not agree as to the form of issues, the Lord Ordinary reported the case. No. 229.

The following issue was proposed by the respondents, in which they were to be held as pursuers:— July 15, 1857. Forbes v. Campbell.

"It being admitted that the defender, Patrick Forbes, along with others, was appointed a trustee and executor of the late Miss Susanna Christiana M'Larty, conform to trust-disposition, &c.:

"It being also admitted that the pursuers, the children of the marriage between the said Donald Campbell and Mrs Mary Anne Brown M'Larty or Campbell, are the beneficiaries under the said trust, to whom the said truster directed the residue of her estate to be paid on the death of their mother, the said deceased Mrs Anne Brown M'Larty or Campbell:

"Whether the defender, the said Patrick Forbes, accepted of the office of trustee, to which he was appointed by the said trust-disposition and settlement, and whether he retains possession of, and has intromitted with, the means and estate of the truster, the said Miss Susanna Christiana M'Larty, and has failed to account for the same? and is resting owing to the pursuers the sums set out in the annexed schedule, or any and what part thereof?"

"Schedule.

"1. Amount of the capital of the trust-funds claimed from the defender, ...	L.2700	0	0
"2. Balance of interest claimed from the defender as due by him at the date of citation to the action, viz. 11th September 1855, ...	400	0	0
	L.3100	0	0

"With interest on said sum of L.3100, from 11th September 1855, till paid."

The following issue was proposed by the suspender:—

"It being admitted that the defender, Patrick Forbes, was, along with others, nominated as trustee and executor by the late Miss Susanna Christiana M'Larty, conform to trust-disposition, &c.:

"It being also admitted that the said Miss Susanna Christiana M'Larty died on the 20th day of October 1847, and that Mrs Mary Anne Brown M'Larty or Campbell died on the day of :

"It being also admitted that by the said trust-disposition and settlement the testatrix directed her trustees to hold and apply the residue of her estate, after payment of her debts, and any legacies she might leave in trust, for behoof of the said Mrs Mary Anne Brown M'Larty or Campbell in liferent, and to the heirs of her body in fee:

"Whether the pursuers, the children of the marriage between the said Donald Campbell and Mrs Mary Anne Brown M'Larty or Campbell, are fiars of, and became entitled, at the death of the testatrix, to the said residue?

"Whether the defender, the said Patrick Forbes, accepted of the office of and became a trustee and executor under the said trust-disposition and settlement, and as trustee and executor foresaid intromitted with the means and estate of the truster since her death, and if so, to what extent?"

The suspender argued; — That this being a case of accounting, was not suited for trial by jury. Failure to account was not a jury question; the only question which could be so tried being whether a party had intromitted.

The respondent argued; — That it was neither incompetent nor unusual to send an accounting to a jury. The mode of procedure was a question of expediency, and was in the discretion of the Court.

Lord Wood.—There is no exception of count and reckonings from the cases that may go to a jury. If this had been an ordinary accounting, we would probably not have made it a jury cause. But I think it proper and expedient that the issue,

No. 229. — July 16, 1857. Granger v. Geils.

after putting the question whether the suspender had accepted the office of trustee, and intromitted as such, should also ask whether he had failed to account, and to what extent. If Mr Forbes succeeds in the first question, he will get the expense of both parts of the case, including that of preparing for the accounting. If he fails, the case may still be recommended at the trial as one more proper for an accountant than for a jury, and then Mr Forbes's preparations for the accounting won't be lost. I see no reason here to deviate from the ordinary course adopted in accountings, when there are previous facts to go to the jury before they come to the question of accounting.

LORD MURRAY and LORD COWAN concurred.

The following issue was approved of.—After the admissions as proposed by the suspender:—"Whether the pursuers, the said Colin M'Larty or M'Laverty Campbell &c., are the whole children of the marriage between the said Donald Campbell and Mrs Mary Anne Brown M'Larty or Campbell; and whether the defender, the said Patrick Forbes, accepted of the office of trustee under the said trust disposition and settlement, and as such trustee has had intromissions with, and retains the means and estate of, the said truster, the said Miss Susannah Christiana M'Larty, and has failed to account for the same to the extent of the sums set out in the annexed schedule, or to any other and what extent?"

(Schedule as above.)

M'QUEEN & BRIDGEFORD, S.S.C.—MORTON, WHITEHEAD, & GREIG, W.S.—Agents.

No. 230. WILLIAM GRANGER Senior, AND WILLIAM GRANGER Junior, Complainers.—*Penney—Scott.*

JOHN EDWARD GEILS, Respondent.—*Young—Mitford Morison.*

Lease—Break—Verbal agreement.—By a written agreement between a landlord and tenant, each had right to put an end to the lease by giving written notice. The landlord gave a written notice, but did not follow it up by a removing, and the tenant continued to possess for some years;—the landlord again gave notice and brought a removing;—*Held* (*aff.* judgment of Lord Mackenzie) that the notice first given had not exhausted the landlord's power, so as to entitle the tenant to remain in possession till the ish fixed by the lease.

Question, whether by mere verbal agreement the clause containing the reserved power could be abrogated?

Process—Removing—Act of Sederunt 14*th Dec.* 1756, 16 *&* 17 *Vict. c.* 80, *sect.* 29—*Warning.*—*Held* (1), that in an action of removing it is not necessary to libel specially on the Act of Parliament; and (2), that although the Act of Sederunt was libelled on, the provisions of sect. 29 of 16 & 17 Vict. c. 80 were not excluded as to the execution of a summons forty days before Martinmas.

Question, whether written notice of intention to remove be equivalent to warning?

Process—Interim execution pending appeal—Interim management.—The Court may grant interim management pending appeal where they would refuse interim execution. They cannot remit to the Lord Ordinary on the Bills during vacation to dispose of a question of interim execution, which can only be granted in the Inner-House, and by four Judges.

July 16, 1857. — 1ST DIVISION. Ld. Mackenzie L.

THE complainers became tenants of the farm of Dumbuck, the property of the respondent, under a minute of agreement of let, dated 17th February 1848, for the period of nineteen years from the term of Martinmas 1847, at the slump yearly rent of L.355.

Thereafter disputes arose between the parties—the landlord, on the one hand, claiming arrears of rent from the tenants, and the latter preferring certain claims of damages against the landlord; and by another minute of agreement, dated 26th and 30th May 1851, they mutually discharged their claims against each other, and declared, "that the terms and conditions of

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the said minute of agreement of let shall continue in full force, with the exceptions after stated." Among these exceptions was the following:—"The first and second parties reserve to themselves the power of putting an end to the said lease, by either of the parties giving twelve months' notice, in writing, to the other, of such intention; but it is declared that no notice of this intention will avail to either party, if given before the 1st day of May 1852."

On the 13th of May 1852, and founding upon the said reserved power, the respondent's agent gave written notice to the complainers of the respondent's intention to put an end to the lease at the terms of Martinmas 1853 as to the arable land, and of Whitsunday thereafter as to the houses and grass; and he required them to flit and remove from the farm at the said terms accordingly. This notice was not followed up by any removing, or other proceedings for that purpose, but negotiations appear to have taken place between the parties with a view to an arrangement. No new written agreement was, however, entered into, and the complainers continued to possess the farm under the two minutes of agreement above mentioned.

On 1st October 1855 the respondent, founding upon the same reserved power, again gave written notice to the complainers of his intention to put an end to the lease of the said farm and pertinents at the term of Martinmas 1856, as regarded the arable lands, and at the term of Whitsunday 1857, as regarded the houses, yards, and grass, and required them to flit and remove themselves, families, servants, goods and gear, furth and from the said farm and pertinents at the said respective terms.

The complainers having intimated that they did not intend to remove under this notice, the respondent, on 11th June 1856 (being more than forty days before the first term of removal), executed a summons of removing against them, founding upon both the minutes of agreement, the second notice, and the Act of Sederunt of 14th December 1756, and concluding for decree of removing at the terms specified in the notice. To this action, which was raised in the Sheriff-court of Dumbartonshire, the complainers lodged defences, and a record was made up and closed, in which the pleas maintained by both parties were substantially the same as in the present suspension. The Sheriff-substitute pronounced decree of removing, in terms of the conclusions of the libel, with expenses; and the Sheriff-depute adhered, on appeal.

Against this decree of removing the complainers presented the present note of suspension, in which they set forth the provisions of the foresaid two minutes of agreement, and the foresaid first and second notices given by the respondent; and they also alleged specially, as regards the first notice,—"The respondent did not remove the complainers at the ish so determined, or avail himself of the break so fixed by him, nor of the power so acquired of removing the complainers at said terms. But, on the expiry of the currency of said notice or intimation, he allowed them to continue to occupy and possess the farm under the terms and conditions of the foresaid minutes of agreement, and recognised and treated them as still his tenants under the same. The complainers thus again became the respondent's tenants on the same terms as under the lease which had determined, or otherwise the right reserved to the respondent under the foresaid provision or exception was thus exhausted or extinguished; and the complainers were thereafter entitled, and were to be permitted to occupy the farm under said lease till the expiry of the full term of nineteen years from Martinmas 1847 and Whitsunday 1848. This was perfectly understood, both by the respondent and the complainers; and the said understanding was expressed as well as acted on and recognised by both parties in their dealings and transactions with each other, in reliance on the lease running on for nineteen years, and on the said understanding so expressed, acted on, and recognised by the respondent as well as

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the complainers, the complainers proceeded to cultivate the farm on a system adapted to a lease for such a period, and to make important improvements upon the lands. In particular, they took in about thirty acres of land on Dumbuck Hillside, that had never before been broken or cultivated. Further, at the respondent's desire, the complainers pulled up and rooted out 100 roods of old hedge at a cost of 5s. per rood. They also drained to a considerable extent, and brought in a considerable quantity of ground in several fields, besides the hillside ground already referred to." They also made many other improvements.

"The respondent Mr Geils was fully aware of all these improvements made by the complainers, and that the said acts were done and improvements made by them, in reliance on the foresaid understanding, and in consequence of its being expressed, acted on, and recognised, by the respondent as aforesaid, and of his treating the complainers as his tenants under the foresaid lease having an endurance of nineteen years. The respondent resides at the place, and saw and approved of said actings and improvements, and of their being so done and made. He took the benefit accruing to him from the same. He also allowed credit for the part payable by him upon the outlay for manures, and accepted the subsequent rents payable under the foresaid minutes of agreement without qualification."

They pleaded;—That the summons in the inferior Court being expressly founded on the minutes of agreement, the notice, and the Act of Sederunt 1756, and on these alone, it was incompetent for the respondent to found on any other act, or the warnings introduced by any other act; that the notice under the agreement merely fixed the ish of the lease, and that legal warning, besides such notice, was necessary, under the Act of Sederunt, and had not been given; that, supposing the Act of Sederunt 1856 to rule, the proceedings were not sufficient and formal under that Act; that the respondent's reserved power of removal was exhausted under the first notice, and that the second notice was, therefore, incompetent, and the complainers were entitled to remain till the natural expiry of the lease; that the respondent had, subsequently to the first notice, dealt with the complainers on the footing that they were to be permitted to remain till the expiry of the full period of the endurance of the lease, and so was barred from removing them; lastly, that, at all events, the note should be passed *ob contingentiam* of the dependence of a process of declarator at the complainers' instance, against the respondent, the object of which action was to have it found that the respondent's first notice had exhausted his reserved power of removing.

On the other hand, the respondent, in his answers, founded upon the Act 16 & 17 Vict. cap. 80, sect. 29, which enacts, with respect to actions of removing before the Sheriff-court, that "it shall be competent to raise a summons of removing at any time, provided there be an interval of at least forty days between the date of the execution of the summons and the notice of removal; or, where there is a separate ish, as regards lands and houses or otherwise, between the date of the execution of the summons and the ish which is first in date."

The respondent pleaded;—That the notice of October 1855 was valid, and had effectually put an end to the lease; that, under the Act of Sederunt 1756, or otherwise, no warning, in addition to said notice, was necessary to entitle the respondent to remove his tenants; that the delivery of said notice, of itself, constituted valid and sufficient warning to the tenants: and, lastly, that the summons of removing having been executed forty days before Martinmas, being the ish first in date, no further or other warning was requisite, under the recent Act of Parliament, and that it was unnecessary in the summons to libel upon said Act.

The Lord Ordinary pronounced the following interlocutor:—"Refuses

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the note: Finds the complainers liable in expenses: Allows an account," &c.*

Lord President.—I confess that I do not feel much difficulty about this case. The interlocutor of the Lord Ordinary is right. As to that clause in the minute of agreement of May 1851, that the first and second parties reserve to themselves the power, &c.—(reads)—I cannot hold that such power was exhausted by the party giving notice, and not following it out by an action of removing, and thereby put-

* "Note.—After carefully considering the whole proceedings in this case, the Lord Ordinary sees no ground for disturbing the judgment of the Sheriff.

"By the agreement of May 1851, the parties reserved power to put an end to the lease, by either of them giving twelve months notice in writing to the other of such intention, subject only to this condition, that no such notice should be available if given before 1st May 1852. On the 1st October 1855, the respondent gave notice in writing to the complainers that it was his intention to put an end to the lease at Martinmas 1856 as regards the arable land, and at Whitsunday 1857 as regards the houses and grass, and required the tenants to remove from the premises at these terms. Founding on this notice, the respondent raised and executed a summons of removing against the complainers on 11th June 1856, being much more than forty days prior to Martinmas 1856, being the first term of removal.

"1st, It is objected by the complainers, that the respondent having, in May 1852, given notice in writing of his intention to terminate the lease, and afterwards passed from that notice, his power to put an end to the lease before its natural expiry is exhausted. To the Lord Ordinary this objection does not appear to be well founded. It is an express condition of the agreement of May 1851, that, after 1st May 1852, the lease may be brought to an end by either party at any time on giving twelve months notice in writing. This is just a conventional break, which may be exercised either by the proprietor or the tenants at the end of each year, upon giving a previous written notice of twelve months. Where a notice has been given and afterwards waived, or passed from by consent of both parties, it cannot, of course, be founded on to any effect; but this cannot deprive either party of his right to bring the lease to a close by giving a new notice in any future year, under the general power reserved in the agreement of 1851. The circumstance that the proprietor gave notice in 1852, and passed from it with consent of the tenants, could not prevent them in any future year, if they saw it for their interest, from availing themselves of the break in the agreement, by giving notice of their intention to terminate the lease, and the same right belongs to the proprietor. The waiver of the notice in 1852 cannot be held in law equivalent to a relinquishment of the break, or the right to give notice to terminate the lease in any future year.

"2d, As notice, in writing, to remove was duly given in October 1855, and the summons of removing was executed in June 1856, more than forty days before the first term of removal, being Martinmas 1856, the Lord Ordinary holds that no further warning was required to entitle the respondent to decree of removing.

"The Act of Sederunt 1756 required the action of removing to be called in Court forty days before Whitsunday, in order to be equivalent to a warning under the statute 1555. This was found to be attended with inconvenience, and a remedy was accordingly provided by the Act 16 & 17 Vict., c. 80, sect. 29, which enacts, that 'it shall be competent to raise a summons of removing at any time, provided there be an interval of at least forty days between the date of the execution of the summons and the term of removal, or when there is a separate ish as regards land and houses, or otherwise, between the date of the execution of the summons and the ish which is first in date.' The Lord Ordinary apprehends that, according to the sound construction of this enactment, if the summons of removing be executed in proper time, no further warning is required.

"It is true the summons of removing does not expressly libel on the recent statute; but it is thought this was not essential, and that the objections to the form of the summons are not entitled to any weight.

"On these grounds the Lord Ordinary has no hesitation in refusing the note."

No. 230. ting an end to the lease. The power that is reserved is of putting an end to the lease. It is said that such power can only be exercised once. But that power never was exercised. I cannot hold, that the party giving the notice was precluded from effectually giving a new notice, either because of such notice not being given at the proper time, or of his having passed from his right to give it. That is substantially the ground of the declarator. Then it is said, that there was a subsequent agreement, and acting thereon. That is not specifically enough set forth. Whether the party was misled, so as to entitle him to other remedies, is a different question. But there is nothing libelled which can do away with the previous conditions of the lease.

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Again, it is objected, that the summons of removing is rested on the Act of Sederunt of 1756, but that there was no previous warning. Now, the answer is satisfactory. The state of the law before the late statute regulating proceedings in the Sheriff-court was, that under that Act of Sederunt a party could bring an action of removing forty days before Whitsunday, without having preceded it by formal warning. That was dispensing with the warning, &c., required by the statute 1555. But it was found inconvenient that such notice should be brought forty days before Whitsunday, when, perhaps, the term of removal was Martinmas, and, in order to remedy that inconvenience, the Act of Parliament was passed which placed the matter on a more reasonable footing, which was to give the party notice by summons of removing, forty days before the term at which he was actually to remove. That is now the law, and the objection here is, that the pursuer libelled on the Act of Sederunt, but not also upon the alterations on it introduced by the Act of Parliament. That does not tie the party up to this, that he must now proceed on the Act of Sederunt. There are two views—1st, The Act of Sederunt is now modified by an Act of Parliament, which Act it was not necessary specially to libel on; or, 2d, If the Act of Sederunt was referred to, it was of none avail, because there is the Act of Parliament which gives the party the positive power of raising a summons of removing at any time, provided there be an interval of at least forty days between the date of the execution of the summons and the first term of removal. This was the case here. Therefore I think that this interlocutor refusing to pass the note should be adhered to.

In a question of suspension in an action of removing, which has been fully litigated in the inferior court, it is a grave matter to pass the note in such a case, because to do so is substantially a decision against the landlord; and I do not think that the tenants having brought a declarator is any reason for passing the note, for in that way it would always be in the power of a party to hang up a process of removing by bringing an action of declarator; but when I look into the declarator, I see that it is rested substantially on the construction put on the minute of lease, as to which I have a very decided opinion; and therefore, upon the whole, I think the interlocutor of the Lord Ordinary must be adhered to.

Lord Ivory.—I concur.

Lord Curriehill.—I am also of the same opinion as to the first question. Power is reserved to either party to put an end to the lease. This was under the existing agreement, as we are told by the suspenders themselves on the record. The landlord gave a notice in 1852. Possibly the tenant might have objected to this first notice being departed from, and have insisted on its being carried out. I do not, however, require to decide that point But it was departed from, and now the tenant pleads that the power can only be exercised *once*. That is true, because when once the power is exercised, the lease is at an end for altogether. But here the lease continued after the notice, with the reserved power in it, and forming a part of it.

Then, as to the technical objection, the Act of Sederunt does not require previous warning; the summons of removing is declared to be equal to warning, if raised forty days before Whitsunday. But the Act of Parliament is a good answer to the objection taken against the time at which this action was raised.

Lord Deas.—I agree with your Lordships. The argument for the complainer resolves into three objections:—1st, That the clause in the lease empowering either party to terminate it by notice was exhausted by the notice of 13th May 1852. 2d, That it was agreed this should be so, and that the lease in future should subsist

without the clause. 3d, That due warning has not been given in terms of the Act of Sederunt 1756. No. 230.

Now, if the first notice had taken effect, the power would, no doubt, have been exhausted. But I cannot hold that a notice which proved abortive (for what reason is not stated), with the acquiescence of both parties, exhausts the power. There is no *mala fides*, oppression, or abuse alleged to raise a special case; and, on the contrary, we see from the correspondence that the parties were negotiating till the period for enforcing the notice expired; and the landlord obviously thought it safer to give a new notice than attempt to proceed upon the old. 2d, Assuming, as we must now do, that the clause was not exhausted by the first notice, I am not prepared to say that the parties could, by a verbal agreement, drop that clause out of the lease, which would virtually have been to make a new lease for the remainder of the nineteen years. But it is unnecessary to consider this, because there is no distinct or even intelligible allegation of any such agreement, and the pleas in law shew that the complainer did not mean to make any such allegation, but only to allege an understanding proved *rebus ipsis et factis*, which will obviously not do in the face of the written lease. 3d, As to the objection under the Act of Sederunt, I reserve my opinion, as I understand Lord Curriehill does also, whether the notice served here could be regarded as a warning in terms of that Act. I think it enough that the enactment in the statute 16 & 17 Vict. cap. 80, is general in its terms, and declares it to be sufficient that the summons of removing shall be executed forty days before the term of removal. The summons is unskilfully framed, for if the Act of Parliament was not to be libelled on, so neither ought the Act of Sederunt. But I do not think this amounts to any such defect or informality as to void the procedure, which is otherwise regular.

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The Court refused the reclaiming note, and found additional expenses due.

The complainers having intimated an appeal, the case came again before the Court on a petition by Geils, praying the Court "to authorise and direct the Lord Ordinary officiating on the Bills to approve of the Auditor's report," and decern for expenses; "and to allow decree to go out and be extracted, and to grant interim execution," both in the suspension and in the removing, "and that notwithstanding said appeal; or otherwise, pending said appeal, to sequestrate the farm," and appoint a "judicial factor or manager thereon."

This petition was opposed.[1]

Lord President.—We cannot at once invert possession here; besides, the prayer asks us to delegate our powers to the Lord Ordinary on the Bills, whereas the statute provides that a quorum of four Judges can alone grant interim execution.

Lord Ivory.—Then, on the merits, we cannot hear parties this session.

Lord Deas.—If the petition had been merely for interim management, we might have disposed of it; but it is for interim execution, and that part of the prayer is not departed from.

Answers were ordered to be lodged by the first box-day.

Wotherspoon & Mack, W.S.—Douglas & Monilaws, W.S.—Agents.

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John Swan, Pursuer.—*Moir.*
John Carruthers, Defender.—*Gifford.*

Process—13 & 14 *Vict. c.* 36, *sect.* 13—*Removal to Inner House*—*Commission to take evidence.*—*Question*, Whether a Lord Ordinary who has decided the relevancy of a case can, pending a reclaiming note against his judgment, grant commission to take evidence to lie *in retentis*.

This was an action of reduction on the ground of fraud and error. A record was made up and closed, and the defender's first plea was, that there

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[1] 48 Geo. III. c. 151.

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were no relevant grounds stated to support the conclusions. The Lord Ordinary repelled this plea, and the defender boxed a reclaiming note to the First Division, which was ordered to the roll.

While the reclaiming note was undisposed of, the defender applied to the Lord Ordinary for a commission to take the evidence of aged witnesses, to lie *in retentis*. He founded on the 13th section of the 13 & 14 Vict., c. 36, which provides that no reclaiming note shall be held to remove the process from before the Lord Ordinary "as regards any point or points not necessarily dependent on the interlocutor so submitted to review, but such process shall, for all purposes and to all effects not necessarily dependent on such interlocutor, remain before the Lord Ordinary," "and shall be proceeded in by him notwithstanding such reclaiming note, if it appeared to the Lord Ordinary or the Court to be expedient and proper."

The Lord Ordinary reported the matter verbally to the Court, stating that he had doubts whether he could himself grant the commission. If the defender succeeded in his reclaiming note, there was an end of the case; and hence the taking of evidence, as well as everything else, was "necessarily dependent on the interlocutor" under review.

> THE COURT waived deciding the point whether the Lord Ordinary had power or not, but themselves, on the report of the Lord Ordinary, granted the defender's motion.

RANKEN, WALKER, & JOHNSTON, W.S.—W. S. STUART, S.S.C.—Agents.

No. 232.

ALEXANDER ROBERTSON, Pursuer.—*A. B. Shand.*
ROBERT GALBRAITH, Defender.—*Logan.*

Reparation—Wrongous use of diligence—Relevancy—Issues.—Allegations to the effect that in a sequestration for rent, owing to the sale having been misconducted with the view of injuring the tenant, his stocking did not bring a fair price, and was sold to the value of double the rent sequestrated for,—*Held* relevant to support conclusions for damages against the landlord both for the sacrifice of the property and for *solatium*. Form of issues adjusted.

Question, Is the pursuer of a sequestration responsible for the proceedings of the auctioneer who carries out the sale?

July 16, 1857. — 2D DIVISION. Ld. Ardmillan. R.

THE pursuer became tenant under missives of lease of twenty acres of nursery ground near Govan, the property of the defender, for twenty-five years from Martinmas 1847, at which term he entered to the ground, and fully stocked it with the plants necessary for carrying on his business of a nurseryman and gardener. The rent was payable half-yearly, and was regularly paid up to the term of Candlemas 1855, when the rent due for the six months preceding Martinmas 1854, amounting to L.55, 10s. 6d., was not paid. In order to recover the rent the defender used sequestration. In this action the pursuer concluded for reparation and damages in respect of the wrongous use of sequestration, and illegal and oppressive conduct in carrying it through.

The pursuer made the following statement:—The defender, on 10th February 1855, applied to the Sheriff of Lanarkshire for sequestration of the plants, crop, implements, &c., on the ground occupied by the pursuer, for payment of the rent thereof due at Martinmas 1854, and for sequestration of his household furniture and effects, for a rent of L.15 alleged to be due for his house,—and in security of the rents to become due at Whitsunday and Martinmas 1855. Of the same date, a copy of the petition for sequestration was served upon the pursuer, and the stock of plants, &c. inventoried and secured. On 9th March warrant to sell was granted to John Morrison.

auctioneer; on the following day it was intimated to the pursuer that the sale would take place on the 16th of March. No. 232.

It was averred that this was too early a day to obtain fair prices; that no one came till within half an hour of the sale to arrange as to the lots in which the effects were to be exposed, or to make such arrangements as were absolutely necessary in order to secure a fair price. Upon the arrival of the auctioneer the pursuer suggested that the stock should be set up in lots to suit the class of purchasers present, and offered to assist in arranging them; "but his suggestions were disregarded, and his services declined; the auctioneer stating, in presence of the parties assembled, that he had his instructions from the defender, and must not be interfered with." Immediately before commencing the sale, the auctioneer announced the following conditions:—"1st, That on a purchase a deposit of one-third of the price should at once be paid in cash, and the remainder before the removal of the articles purchased; and 2d, That the lots purchased should be removed within twenty-four hours." July 16, 1857. Robertson v. Galbraith.

These conditions, it was alleged, were calculated to prevent fair prices being obtained, intending purchasers present being unprovided with the deposit of cash required, and it being impossible, without great loss, to remove the trees, &c. within so short a time; and "though the pursuer, as possessor of the ground, intimated his willingness to allow a longer time for the removal of the plants, the auctioneer, as representing the defender, intimated his adherence to these conditions." The defender's object was to compel the pursuer at all hazards to renounce his possession. In this expectation, and with the view of being able to treat on more favourable terms with an incoming tenant, or otherwise to possess himself of the most valuable part of the pursuer's stock, the defender had the son of his own gardener present instructed to purchase, and who did purchase for his behoof, at inadequate prices, the greater part of the stock." The conduct of the sale was such as to call forth the frequent animadversions of the company. "The auctioneer farther, at an early part of the roup, warned the company that they were in danger to bid for certain lots, as they were liable to be again sequestrated on the following day for rents due to the landlord—this had the effect of preventing sales." Several lots were condescended on as worth in all L.180, but which were knocked down for about L.7, 10s.; and it was alleged that the property had been sacrificed to the amount of at least L.700.

The sum realised at the sale amounted to L.105, almost double the rent for payment of which the defender was entitled to sell. The pursuer denied that he was due the rent for which the sequestration of his furniture and household effects had been granted. Besides the sum of L.700 claimed for pecuniary loss sustained by the misconduct of the sale, L.500 was claimed as solatium and damages for injury to feelings and reputation through the defender's oppressive conduct.

The defender's first plea was, that the grounds of action were irrelevant. The Lord Ordinary ordered the pursuer, before answer, to prepare draft issues; and the following were lodged, having prefixed to them an admission of the sequestration and warrant of sale:—

"1. Whether the defender, on or about the 16th March 1855, in carrying out a sale under the said warrant, acted wrongfully and oppressively in the sale of property and effects belonging to the pursuer, to the loss, injury, and damage of the pursuer?

"2. Whether the defender, in carrying out the said sale, wrongfully and illegally disposed of property and effects belonging to the pursuer, to an extent exceeding the sums for which the said warrant of sale had been granted, to the loss, injury, and damage of the pursuer?

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"Damages under the first issue, L.750.

"Do. under the second issue, L.500."

After hearing parties on the relevancy, the Lord Ordinary pronounced this interlocutor:—"Finds that the pursuer has alleged facts relevant to support the conclusions of the action: Therefore repels the first plea in law for the defender; and appoints the cause to be enrolled for the adjustment of issues: Reserves the question of expenses." *

The defender reclaimed, and contended;—That he was not responsible for the proceedings of the auctioneer, who, acting under the Sheriff's warrant, was an officer of Court; but there had been nothing illegal in those proceedings. The warrant did not specify any particular time at which the sale should take place. The conditions of sale were usual; and the provision that purchasers should pay for the goods before removal was necessary to prevent fraud. The excess of the price brought by the goods sold over the rent sued for had been overstated by the pursuer. There was always some excess to cover expenses; and in this case the excess had been consigned. This case was proper for disposal by the Court, and ought not to be sent to a jury.

Lord Justice-Clerk.—I do not think we can hold that there is not matter averred on this record that should go to proof. A creditor is bound to proceed with due regard to the interests of his debtor, when it is necessary, in order to save himself from loss, that the former should bring to sale poinded effects. I think there is matter here that should go to a jury, but not under the issues proposed by the pursuer. The second issue, as to whether there was a sale of effects to an amount exceeding the sum for which warrant of sale was granted, will not do. That would entitle the pursuer to a verdict, if there was excess, however small. There must always be excess to a certain amount; but it must be shewn that the sale was conducted illegally and oppressively, and with disregard of the interests of the pursuer, to entitle him to damages.

Lord Murray.—A landlord is always entitled to get his rent. In the steps he may take to enforce his right, he may require to use harsh measures; or he may do what is illegal, with the view of driving the tenant from his possession; whether he has done so is matter for a jury.

Lord Wood concurred.

Lord Cowan.—I have much difficulty, and I do not state an opinion as to the liability of the defender for the proceedings of the auctioneer. I think the issue amended as suggested may properly try the cause.

The Court adhered to the Lord Ordinary's judgment, and approved of the following issue, with the admissions prefixed, to the effect above noticed:—

"Whether the defender, on or about the 16th of March 1855, in selling part of the sequestrated effects under the said warrant, did illegally and oppressively sell the same, in disregard of the interests of the pursuer, and in a manner to produce loss, injury, and damage to the pursuer?

"Damages laid at L.500."

Morton, Whitehead, & Greig, W.S.—J. W. & J. Mackenzie, W.S.—Agents.

* "Note.—The second issue proposed by the pursuer seems correct and suitable. The first issue may require adjustment—the word 'illegally,' as well as 'wrongfully and oppressively,' is on the record, and should be in the issue, if that issue is to be pressed. The Lord Ordinary is not prepared to refuse action altogether to the pursuer, in regard to the matters referred to in the first issue. But harsh and vexatious procedure, without illegality, is not of itself a ground of action; and it is only by averring an oppressive motive, and, in pursuance thereof, a wilful and wrongful departure from settled customary practice, that the pursuer has, on this head, made out a relevant case. The issue ought to embrace the elements from which illegality is deduced."

MRS CATHERINE ANNE CAMPBELL OR COCHRANE, AND OTHERS, Pursuers.—*Pyper—Patton—Wood.* No. 233.

JAMES BLACK, Junior, AND JAMES SPENS BLACK, Defenders.—*Logan—A. Moncreiff.* July 16, 1857. Cochrane v. Black.

Trust—Wrongful investment of funds—Partnership—Capital—Accounting.—Two partners of a mercantile firm, who were appointed trustees under a settlement, and employed the trust-funds in their business, paying five per cent to the beneficiaries, were held bound to pay in addition any profits over and above five per cent realised by such use of the funds;—*Held*, that in ascertaining the amount of profits made on the trust-funds, there must be taken into account, not only input capital of the partners, but all other funds obtained on loan, or otherwise, and invested in the partnership business; and that the proportion which the trust-monies bore to the whole funds so employed regulates the share of profits to be made over to the beneficiaries under the trust;—the Court being of opinion, and that the capital input under the contract of copartnery, and periodical docquets fixing the interests of the partners in the excess of property over liabilities, however binding *inter socios*, were of no importance in such a question as the present, with third parties, who were not entitled to share in the profits, on the footing of having been partners.

SEE ante, vol. xvii. p. 321. 2D DIVISION. Ld. Benholme. R.

"The Court having in this case, on 1st February 1855, found that the defenders, who had used L.1000 of trust-funds in their hands, 'as part of the stock or capital of the company of which they were partners in its ordinary trade and business, are liable to account for, and bound to make forthcoming, any profits made on the funds so employed over and above the five per cent of interest paid to the pursuers,' . . . . remitted the case to an accountant, "to examine the books of the company or companies in which the defenders, or either of them, were partners at any time since the death of the truster; . . . . and to report what amount of profit, if any, was made on the proportion of the capital in trade representing the trust-funds used by the defenders in their trade during said period, after deducting five per cent per annum from the profits on said proportion of capital, if profit was made, and also to report what was the proportional interest in the said company or companies of any other persons, partners therein of the defenders, or either of them," &c.

From the report prepared under this remit, it appears that the concern of John Black and Company existed for a considerable time prior to the death of the truster, Mr Campbell, which took place on June 19, 1845, and at that date consisted of the following gentlemen, as partners, viz.:—

1. James Black, senior, holding two-fifth shares of the business. 2. James Black, junior, with a like proportion; and, 3. James Spens Black, holding one-fifth share.

This concern existed till the 1st January 1847, when James Black, junior, retired. The remaining partners continued the business till 1st January 1848, the senior partner holding two-third shares, and the junior partner holding one-third share of the business. At this date Mr Black, senior, retired, leaving Mr James Spens Black as sole partner. A new partnership was then formed, by the admission, at the same period, of Mr Robert Strang Robertson. By the contract of copartnery, it was provided *inter alia*, *Primo*, "The capital stock of the company shall consist of L.14,000 sterling, one-half whereof shall be put into the stock by each party." "*Nono*, The said James Black (the retiring partner), and Hugh Robertson (the new partner's father), have agreed, and hereby agree, each to lend to the said company the sum of L.5000 sterling during the subsistence of the said contract," &c. This concern has continued since, and is the one now in operation.

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There was no written contract of copartnery prior to 1848, and as the profit or loss of the business was divided, not according to the capital each had in the concern, but by fractional shares of the half yearly results of the business, the accountant said he had experienced "some difficulty in fixing what at each balance formed the capital of the company. He has arrived clearly at the conclusion that the capital of the company must be taken as it ordinarily stood in the books at the periodical balances, made without reference to any question such as the one involved in the present proceedings having been in contemplation."

At each half-yearly investigation a docquet was placed in the balance-book, and signed by the partners, in which the capital held by each is specifically referred to. The one immediately preceding the date of the truster's death is dated the 30th of April 1845, and was in the following terms:—

"*Glasgow, 1st May* 1845.—We have examined the balance as stated above, and also in the other books of the company, and find all correct to the best of our knowledge. James Black senior has at the credit of his account, at this date, the sum of L.25,013, 14s. 3d., being the amount of his capital in the firm of John Black and Company. James Black junior has at the debit of his account L.6111, 3s. 7d. sterling, owing by him to the aforesaid company, and the amonnt of James Spens Black's capital in the firm of John Black and Company, is L.1117, 15s. 4d. sterling. In proof of which witness our hands. (Signed) James Black, James Black junior, James Spens Black."

The accountant remarked,—"From the state of the partners' accounts referred to in the foregoing docquet, it appears that the sums stated therein as forming the capital of the partners, is brought out in the following manner, viz.:—

"Amount of debts and assets due to the company at 30th April 1845,				L.64,357	12	7
Amount of debts due by the company,				38,226	3	0
Showing the stock held by the partners in the company to be				26,131	9	7
Divisible in the following proportions:—						
James Black senior, for his share,	L.25,013	14	3			
James Spens Black, ditto,	1,117	15	4			
				26,131	9	7

"At the half-yearly investigations which took place between the date of the above docquet and 1st January 1848, when James Black senior ceased to be a partner, docquets of a similar character to the above were signed by the partners. From the contents of these docquets, containing, as they do, evidence of the views of the partners, it may be fairly inferred that the sums named therein are to be taken as representing what the partners themselves considered to be the capital at each balance of the company's affairs.

"In ascertaining the profits due to the pursuers on their proportion of capital in the hands of the company, the reporter has therefore adopted the sums stated in the docquets above referred to, as the periodical capital of the company, and the calculations which follow (in appendices to the report) are founded on the principle of adding the sums of capital as stated in these docquets to the trust-funds and ascertained profits of the pursuers."

The following extracts from "the general balance-book" and "private journal" of John Black and Company may be taken as specimens of each half-yearly settlement:—

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"GENERAL BALANCE.

31st December 1849.

Dr.	£	s.	d.	Cr.	£	s.	d.
Cash account,	779	19	5	Private Ledger,	26,820	14	8
Bills receivable,	1,788	9	6	James Black, deceased,	4,994	16	0
Cloth account,	19,696	0	0	Hugh Robertson,	5,000	0	0
Dye stuffs account,	1,581	14	1	Mrs Cochran,	998	0	0
Goods account,	17,166	16	0	Bills payable,	27,902	14	6
Utensil account,	8,866	6	6	Debts due to sundries (as per detailed list in Balance-book),	560	11	8
Milngavie building account,	2,778	0	0				
Milngavie house account,	50	0	0				
Western Bank Stock,	3,320	0	0				
Western Bank,	990	0	0				
Adventures, per "Amiga," &c.	1,093	3	3				
Adventure to Sydney,	425	10	1				
Debts due by sundries (as per detailed list in Balance-book),	7,745	18	0				
	£66,276	16	10		£66,276	16	10

Balance, 31st December 1849, referred to in our docquet of 23d January 1850.

JOHN BLACK & CO.
JAMES SPENS BLACK.
JOHN BLACK & CO.
R. S. ROBERTSON.

"*Copy Docquet (from 'Private Journal' of John Black and Company) referred to in the above Docquet.*

"We have examined the balance, as contained particularly in our balance-book and the other books of the company, and have found the same, to the best of our knowledge, correct; and we hereby declare it to be a just and true statement of our affairs as at 31st December 1849. The amount of net free capital in the business being L.26,820, 14s. 8d. sterling; and of which capital L.13,448, 15s. 0½d. belongs to James Spens Black, and L.13,371, 19s. 7½d. to Robert Strang Robertson. Witness our hands, this twenty-third day of January, in the year of our Lord eighteen hundred and fifty. We have also subscribed our balance-book and private ledger as relative hereto.

'JAMES SPENS BLACK.
'R. S. ROBERTSON."

The accountant's report contained his views on many points not noticed above. Objections were lodged both by the pursuers and defenders—those relating to the principle to be followed in fixing the amount of the stock in reference to which the profits payable to the pursuer are to be ascertained, are the only ones discussed.

The pursuers admitted;—"That the report is correct in taking the balances in the books of Black and Co., as shewing the amount of their stock or capital to which the trust-funds fall to be added in the distribution of profits, down to the formation of the existing company in 1848, during which period there was no contract of copartnery fixing the amount of capital." But they contended;—That subsequently to 1st January 1848, the stock of the company must be held to have been fixed and limited to L.14,000 sterling, by the deed of partnership of that date, and that the Accountant had erred in adopting the balances as his guide after that period.

The defenders stated their views thus: — "The capital stock or plant of the company consisted partly of funds contributed by the partners individually, partly of funds acquired in loan from friends or from banks, and (since 1845) of the L.1000 belonging to the pursuers. The whole formed together an aggregate fund, by the employment of all of which the profit of the year was made. But the Accountant regards as capital only the sums which the partners themselves contributed. And at the same time he excludes from the computation all the other funds on which the company actually traded. Yet, on the mere statement of the thing, it is apparent that these last contributed to produce the profits, as much as did the former; and that in precise proportion to their respective amounts. He has taken as the exclusive basis of his computation certain docquets in the company's books, intended to shew,

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and actually shewing, the input capital of the individual partners, instead of certain other docquets in the same books, in which are stated the various items which composed the entire capital stock on which the company traded, and by the use of the whole of which their profits were acquired." Then, after referring to the docquet of 31st December 1849, and the excerpt from the balance-book of that date, they said it was by trading on a capital stock of (including the L.1000 of trust-funds) L.66,276, 16s. 10d. that the company earned the profits of that half year. "This would yield to the pursuer, as her proportion of the profit, one sixty-sixth share. But what the Accountant proposes to be done is to give her one twenty-seventh share.

"This result he reaches in this way:—Looking exclusively to the docquet, he finds the input funds of the individual partners to amount (in round numbers) to L.26,000. To this sum he adds L.1000, the amount of the trust-fund,— thus obtaining L.27,000; and, as a thousand is just the twenty-seventh part of twenty-seven thousand, he gives to the pursuer one twenty-seventh share."

The case having been argued, minutes of debate were ordered in respect of Judges being equally divided in opinion upon the point "what the stock was by which the profits of the concern were produced."

In the paper lodged for the pursuer it was argued;—The first thing to be ascertained by the Accountant in carrying out the remit was the amount of "capital" of Black and Company, and after comparing the definitions in commercial and legal works[1] it was assumed to be "the free amount or balance of property realised or valued after deduction of debts and liabilities." To this amount the trust funds belonging to the pursuers fell to be added as forming part of the whole capital, and entitling them to a proportional share of the periodical profits upon the business of the company up to 1st January 1848, but from and after that date the amount of the capital of Black and Company was fixed by a written contract, by which, while the amount of the stock of the partnership was expressly limited to L.14,000, the other advances agreed to be made were to be of the nature of a loan by third parties, and therefore were necessarily excluded from the capital upon which the profits of the company fell to be estimated. It followed that the sum of L.14,000 must be taken as the capital of Black and Company since the commencement of this contract, in the proportionate division of the profits between them and the pursuers. To this view it was objected —"that the minutes must be taken as evidence of the capital held by each partner in the company upon the day when the docquet was made and signed, and the balance fitted." The pursuers admitted this, as a rule for adjustment of the interests of Black and Company *inter se*. But they objected to the application of any such rule in a question with them. They were entitled to have the relation of their funds employed in the business of the company constituted in 1848, maintained upon the footing upon which the misappropriation thereof was then assumed or continued by the new company, if it were for their advantage to require that this should be done; and no subsequent contract, or *quasi* contract to which they were not made parties, could affect their right in this respect. By assuming the trust-fund as part of the trading funds of their company, when they entered into the contract of 1848, Black and Company became bound to the pursuers, by a *quasi* contract of the most stringent character, in relation to the business of their partnership, as then constituted, which they were not entitled subsequently to alter prejudicially to the pursuers, without their knowledge or consent. And — as in regard to

[1] M'Culloch's Dict. of Commerce, *voce* Capital; Brande's Dict. of Science, Literature, and Art, *voce* Capital; Trench on the Meaning of Words, p. 126; Stair, 1. xvi. sects. 1, 2; Bell's Comm. vol. ii. pp. 612, 614, 619; Collyer on Partnership, p. 105.

the obligation then incurred to the pursuers by their trustee, as one of the partners misapplying their money, and who therein committed a malversation in his office, with whose liabilities only they were at present dealing—that obligation is founded on *quasi* delict,—the principle here contended for becomes only the more clear and indisputable. No. 233. July 16, 1857. Cochrane v. Black.

If the capital be the free fund after satisfaction of liabilities, it was beside the question at issue to enquire whether or not sums lent to the company may or may not be regarded as being equally the source of profit with the misapplied trust-funds belonging to the pursuers in the present case, but it was submitted that there was really no ground, according to the ordinary use of the term, to hold that the stock or capital of a company comprehends the fluctuating or floating funds which they may use. Thus, in the case of a bank commencing business, with a subscribed and paid-up capital or stock of L.100,000,—upon the credit of this stock deposits and loans are made to the bank to the amount of L.100,000 more. With these combined funds, amounting to L.200,000, the bank carries on its business, upon which its profits are realised. Surely the capital or stock of the bank would still be only the L.100,000 originally subscribed by the partners, and the monies held by them in deposit or loan would not be regarded as an addition to the capital of the bank, upon the plain ground that these were held only on condition of being restored to the depositors or lenders.

It was argued for the defenders;—The one essential matter to be determined was, what was it which earned the profits? No just approach could be made towards ascertaining how much any given one thousand pounds may have produced, unless due regard were had to every other thousand pounds which was united with it in the work of joint and common production. This rule had, however, been disregarded by the Accountant, who recognised, as capital or trading stock, those sums only which had been contributed from their own proper funds by the individual partners themselves, thus necessarily displacing from the category of capital the remainder of the stock traded on, in so far as derived from other sources, notwithstanding that each portion of stock, whencesoever drawn, must have contributed in producing the profits, rateably and proportionally with all the other portions, including the direct pecuniary contributions of the partners. If the whole profits earned were to be thus exclusively ascribed to the capital composed of the proper funds of the partners, the claim made by the pursuers for a share of profits would be at once rendered of no avail. For, according to the Accountant, the L.1000 of trust-funds formed no part of the capital, but was one of those liabilities of the company, which, being due to the public, though possessed and used by the company, must be thrown out of view before the true amount of the company's stock could be ascertained.

It was not disputed that in all questions concerning the measure of their rights and liabilities *inter se* the produce of their own direct contributions constituted the capital stock, and their interest in the latter was regulated by the amount of the sums severally contributed by the partners; but if the object be to ascertain what are the claims of a third party in the profits, in consequence of his funds having been improperly used in the company's trade? in such a case, his share being determinable by the amount of those funds relative to the capital of the company, that capital must be held to comprehend all monies—of whatsoever amount, and whencesoever derived—by which the profits have actually been earned.

Suppose the case of a house with no capital at all,—its trading funds consisting exclusively of borrowed money. In such a case the *ratio* of the accountant would give the whole profits to any party who might claim under such a title as that of the pursuer. A principle which led to such results was quite untenable. It was clear that, taking the balance of 31st

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December 1849 as an example, there was an aggregate in that year of L.66,276, 16s. 10d. truly constituting the trading capital or trading stock for the half-year. Each particular item denoted some species of tangible, available property—property actually embarked and employed in their trade. Each species of property contributed, according to its value, to earn the profits of the half-year; and no one item of it could have been withdrawn from the trade without a corresponding diminution of the profits earned. As shewing the effect of the accountant's *ratio* on the present enquiry, his mode of dealing with the L.10,000 borrowed and introduced into the trade under the contract of copartnery was referred to. In ascertaining the stock which earned the profits to be apportioned he had disallowed that sum solely because it was a liability owing to the public, yet it could not be said that it did not earn profit, pound for pound with the trust-funds: nay, by the contract of copartnery it had been placed in the hands of the company for the purpose of enabling the partners to earn profit, and under an obligation to have it in their hands for that purpose till the close of the partnership.[1]

At advising,—

Lord Justice-Clerk.—Of course it is unnecessary to say in this, or, indeed, in any case, that the question before the Court has received most attentive consideration. That question, important as it is in principle, has been argued on both sides in a manner much too artificial, and on grounds which have a great tendency to mislead, by introducing speculations as to what is the capital of a company in the abstract and primary use of the term. Perhaps some of the expressions in our preceding interlocutors may have in part occasioned this line of argument. And, indeed, in the argument at the bar, it was attempted at first to make out that the terms of these interlocutors had decided the question now raised in favour of the pursuers, and had stamped a certain meaning, in regard to the pursuer's claim, on the term capital or stock in trade. But we were all of opinion that any such construction of any terms used in the interlocutors was quite untenable, and that the question now at issue had not been in the contemplation of the Court or the parties at the prior stages of the discussion, in which only the general point was raised, whether the defenders were liable for the profits made by the use of the trust-funds, over and above paying five per cent interest. Perhaps the point is expressed in the best, because the most practical and general manner, in the commencement of the interlocutor of 13th July 1854, in which the claim is stated to be for "profits made on the sum left in the hands of the trading company of J. Black and Company by the defenders, as trustees of the late Colin Campbell, partners of the company, and employed in the trade of that company;" and again—"as the profits averred to have been made on the trust-funds by the employment of the same in the trade of the company, of which the trustees were partners."

The interlocutor of February 1, 1855, goes no further, and the use of the term stock or capital, or capital in trade, does not embarrass the question at all. Accordingly, no argument is now founded by the pursuers on the terms of these interlocutors. On the contrary, the interlocutor of remit to ascertain the profits made expressly finds the liability to be "for any profits made on the funds so employed, over and above the five per cent paid to the pursuers." And the remit is really to ascertain that matter of fact.

In ascertaining the extent of that liability,—in other words, the profits to be accounted for,—the point to be looked to, in my opinion, is the actual matter of fact—what profits were *de facto* made on the use of this L.1000 employed in the trade of the Company by the defenders, along with the other funds on which they traded? I cannot increase such profits beyond the actual fact by any speculations as to what is in one sense the capital in trade of the company in the event of dividing the interests of the several partners among themselves, or if they had been winding up

[1] 2 Docher v. Somes, 22d April 1834, M. and K. vol. ii. p. 653; Crawshay v. Collin, Jac. and W. vol. i. p. 263: Russell, vol. ii. p. 346; Brown v. De Tastet, Jac. C. Rep. p. 284.

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their affairs and paying off debts, and then dividing profits among themselves. Neither can I enlarge the profits actually made on this sum by any speculations as to the terms, capital, or stock in trade, as defined in commercial or legal works, in which these terms are all used in reference to the essentials of a company in the abstract or to the interests of partners. Any view must be unsound which, upon any theory whatever, would give to the pursuers more profits than this L.1000 could make and did *de facto* produce in the trade of the defenders as actually carried on. The accountant has adopted a view which rates the pursuers as entitled at once to be taken as upon a certain footing, and gives them practically a far greater share of profits than ever was or could be made on their L.1000;—exactly as if the L.1000 of trust funds so employed was to be placed on the footing of the proper stock of the partners *inter se*, and over and above 5 per cent. the pursuers would get about L.1300 of profit during the five years the same was used,—although it cannot be shewn that *de facto* any such sum of profit was or could be made on any L.1000 employed in the trade. The pursuers again contend that while the principle of the accountant in the abstract is correct, he has not consistently followed it out, and that his own views ought to have led to a different result in point of fact, and that on his principle they are entitled to a far greater interest in the concern in respect of the use of this L.1000 in the trade of the company, being about L.2130. And as between the accountant and the pursuers, I should be inclined to say, that if I could adopt the principle of the accountant, I should probably be constrained to hold that in its correct application the result contended for by the pursuers would follow. But the principle is, in my opinion, unsound, and, as often happens in the views taken of accounting by attempting to fix or apply general principles, the proper matter of fact to be ascertained is overlooked, and a result is arrived at by a theory in itself quite unjust and contrary to the actual facts of the case.

Let us see, in point of fact, what was the state of this Company as to its original input stock or shares of the partners, and as to its actual trade. They had but a small capital; but their trade seems to have been flourishing, and they were able to conduct it successfully. They borrowed money on which to trade, and on which, over and above the interest they had to pay, they were able to make profit. They bought largely goods on credit, with a view to resell them in a manufactured state, with profit over and above their original cost. And, in the course of their business, they seem to have raised a considerable sum on bills, both for purchases and otherwise. To what extent the amount of bills mentioned in the report were for raising money by accommodation, or were only short bills for the goods they bought, is not stated, and may materially affect the result in point of figures. The whole of these sums and goods were used in their trade and manufacture, in order to make profit over and above the sums due by them on these accounts. It is not disputed that they traded more or less on all these different funds, and so made profit; and that such profits exceeded the interest due on these loans, bills, and accounts, is also certain, otherwise the company would have been bankrupt, and could not have gone on with continued success.

The accountant says,—"The items, Nos. 2, 3, and 4 (in the table quoted supra, p. 1021), all form claims by the public against the company, and all debts due for the various articles of trade and manufacture needful in carrying on the business—such as cloth in its grey state, book debts owing for cloth sold in the manufactured and printed state, and drugs used in the art of dying and printing. The defenders seem to imagine, that notwithstanding these liabilities being justly due to the public for the necessary supplies to the company's business, that all of them are to be looked upon as a portion of the stock or capital of the company. If such a doctrine was established in conducting the affairs of a mercantile firm, then it might be gravely contended that the liabilities of a company on the verge of insolvency formed the stock of the house, and should be assumed, in questions such as the present, as the *bona fide* capital of the concern, when, in reality, they merely represented the debts due by them on bill, or open and outstanding accounts. The accountant cannot concur in the views advanced by the defenders under this head. He is of opinion that, in the general acceptation of the term, the capital of a company consists of the excess of the property of every description belonging to them, over the liabilities of all characters owing to the public; and it is by adopting this principle, and following up the

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contents of the docquets to the balance sheets of the partners themselves, that the capital account has been based in the accompanying report."

What is here said is perfectly true as to capital in the sense in which the accountant uses the term, and as to the class of cases to which his observations apply, viz., in the cases of winding-up and dividing the surplus stock in hand after paying debts, or in settling with retiring, or the representatives of deceased, partners. To ascertain the actual wealth of the company you must always set apart debts, and there can be no proper stock for division until the debts are paid. That is very plain. Again, if retiring partners are to be settled with, or the representatives of a deceased partner, they can claim nothing but their share of the stock which remains after paying all debts and deducting all losses at the time of the dissolution of the concern. But we are not in such a case at all. And this is the source of the error of the accountant. He takes the stock in trade to mean —not the whole capital embarked and used in trade by the company,—but the proper stock which, after settling all liabilities and paying off debts, would have belonged to each partner, if there had been a closing of the concern, and a division of the whole profits made to the shares of the proper company stock belonging to the partners respectively. And then he places the L.1000 of trust-funds on the same footing as the stock of the company, so as to give to the pursuers L.1629 as their share of the whole profits. Now, on what ground can this L.1000 be placed on a different footing in point of its character than any other L.1000 employed in the trade—say, the large sums of borrowed money? Take any sum of L.5000 which the company borrowed on bond or bill. They covenanted to pay on that L.5000 a certain rate of interest, but by using it thus they pay over and above five per cent., say L.100 of profit each year. That profit they keep to themselves, as they got the use of the money for five per cent. Well, then, they take the use of the trust-money—L.1000—at their own hand—to use in their trade, and in direct violation of their duties as trustees, and they are, over and above the five per cent, to repay back all the profits made by the use of that L.1000. But why is that L.1000 to be rated on a different footing from the L.5000 also borrowed, or how can the profits actually made on it be different from the rate and amount of profits made on each L.1000 of the above L.5000? It was used in trade: so was the L.5000. It was used, being borrowed money: so was the L.5000. It made profit: so did the L.5000. But being borrowed without consent, and contrary to their duty, they are to pay all the profit made on "the money so employed" in their trade. Well then, how is this L.1000, in ascertaining the profit actually made, to be on any different character or position than the L.5000?

On the notion of the available fund for division among partners, after deducting debts, this L.1000 ought to be deducted as much as the L.5000. But the accountant somehow gives it the character of the proper stock, after deduction of all other debts. The pursuers more consistently say, on that view, we are to be taken as partners, and to have a partner's share of profits; and they refer to English cases applicable to the rights of partners, or their representatives, whose money has been retained and used in trade. Apart from these cases, the accountant stops short, it would rather appear, in the right application of his own views. But laying aside that discussion between the pursuer and the accountant, the practical error in the accountant's view is the setting about a search for a meaning for the sense in which capital has been used, or is to be applied in this case. The real point for inquiry being truly what profit was made on this L.1000, as its share of the profits made on all the stock in trade on which the profits of the company were made.

If the stock in trade—that is, the aggregate sums embarked in the trade on which profits were made, was L.66,000, on which say L.6000 of profit was made in each year, then one L.1000 can only have a 66th part of that amount of profit. In stating that sum of L.66,000, I take it only as an illustration, but without the slightest intention of adopting any of the results contended for by the pursuers. No doubt a large proportion of the money on which the company traded was borrowed. So was this L.1000. But with it they made profit. So also the cloths they dyed were not yet paid for, nor the materials for their manufacture. They got both on credit. But they used both, and traded with them, and made profit over and above the sums due for each. If it shall be shewn that over and above the cost of such materials they did not make more than the price, then such part of the value

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of the stock on which they traded would be deducted as not having made profit, and the sum of profit effeiring to the trust L.1000 would be increased beyond the 66th share.

But the point is, what difference is there between the value used in trade of money borrowed on regular loan and materials not paid for and this L.1000, except that being used without authority and contrary to duty, the proportion of profits made on that sum is to be paid to its owners over and above legal interest? I can find no difference, and by no theory of accounting can I be persuaded to overlook the actual fact as to the profits made on each L.1000 of the value embarked in the trade (that is the stock in trade), and upon a principle or theory give the pursuers more profit than this L.1000 earned, along with and in like manner as every other L.1000 similarly employed.

It must be at once seen that we have no concern with the principles either established or hinted at in the various English cases, in regard to the settlement with representatives of deceased partners whose funds have been continued without proper authority in the trade, and contributed to the profits made by the partners, and as to the position and interest of such representatives, as entitled to the full *profits of partners*, though not liable for losses. These cases have no application to the question now to be determined. I may mention that I have ascertained that the last case of Webster v. Wedderburne, which excited so much interest both in England and here, has been this winter settled for a few thousand pounds, and will not be again heard of.

As yet I think we have no materials on which we can say what was the amount of the sums and funds embarked in trade, and actually contributing to earn profits for the company. Take, for instance, the large amount of bills. If these were in whole or in part short bills, granted for the annual purchases of the company—being, in fact, postponed payments instead of payments in cash—it is plain that these bills cannot be said to represent money raised for the purpose of being used in the trade, and that in truth cloths or other materials for which they were granted have been already taken into account, and that the defenders had got credit twice over for what was actually used in their trade. If it shall turn out that their bills, or a portion of them, were proper accommodation bills (so far as the Blacks were concerned), of long dates, for twelve or six months, on which, with the aid of other names, they raised sums of money for the use of the trade, then, if profit was thereby made, such must be taken into account as much as money borrowed on a more regular footing. This and other matters must be ascertained before we can come to any definite conclusion, or fix the proportion of the stock in trade which the L.1000 of trust funds represents. The accountant probably has full materials for stating that result to us; but I think we must fix the principle on which this sum of L.1000 is to be stated, and then make a positive and special remit to him for the purpose the Court has in view.

In this practical result, I find, on communication, Lord Wood, who now agrees entirely with me in principle, and whose opinion I shall afterwards read, entirely concurs.

Lord Murray.—Agreeing as I do with your Lordship, I shall not enter into any detail. The only question is, what were the funds which realised the profits? It is a most important question whether the pursuers are to be regarded as placed in the position of partners or not. If they were, then they would have to share loss if any; but they are not liable to any such contingency. They are not made partners, but are parties whose money has been employed and made productive,—they are merely to receive the profits, if any, made by their funds. In this view I am clear that all borrowed money formed part of the capital producing profits. I am glad we are now all agreed on this general principle. There must, of course, be a farther remit, as the facts are not sufficiently brought out to enable us to pronounce a judgment in accordance with that principle.

Lord Wood.—In the outset I may observe that I have no doubt that the question in regard to which the minutes of debate were ordered is entirely open, not being to any extent foreclosed by the prior interlocutors. The question itself is one of some importance and novelty. So far as I am aware, there is no authority in our law having any material bearing upon it, and the English cases which were cited have reference to the rights either of a retiring partner of a company, or of the

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representatives of a retiring partner whose funds have been retained by the company, and employed in its trade.

At the conclusion of the argument which was addressed to us from the bar, I was inclined to adopt the view of the accountant in regard to the amount of capital of the firm of John Black and Company, on which any profit that might be realised ought to be apportioned. In this I was influenced by having an impression that the pursuers, in reference to the amount of trust funds embarked in the company's trade, might be looked upon as partners holding that amount of input stock; in which case, if profit had been to be divided either in certain fixed proportions or in a ratio effeiring to the amount of the sums contributed by each party, including the trust beneficiaries, it might have no effect upon the result, as regards the interest of the pursuers, whether the profit was held to have been made by the capital of the partners employed in the trade, with the addition of the trust-fund or by it, together with the amount of any money that might have been borrowed for the purposes of the trade, or upon the gross assets belonging to the firm. But I need not dwell upon this, because I am now satisfied that the pursuers cannot be looked upon in any other light than as being third parties, whose monies were wrongfully employed in the trade of Black and Company, but without thereby acquiring the character of proper partners to the amount of the fund so employed. And that being the case, I am further satisfied that, on the one hand, the Accountant's view that the capital of the company by which it is to be held that the profits, if any, were made, is to be limited to the funds of the partners employed in the business, cannot be supported; and that, on the other, the view contended for by the defenders cannot, to the whole extent to which it is pushed, be maintained; or at least cannot be maintained upon the footing of the information of which the Court is at present in possession.

Referring to the materials on which the Accountant proceeds in ascertaining for the half-year following the 31st December 1849, the capital by which the profits of that half-year are to be taken to have been produced, (and which half-year I specially advert to, for the reason to be immediately mentioned), it will be found that he fixes it at L.26,810, 14s. 8d. In doing so, the Accountant takes the capital at the amount which, in the docquet to the balance-sheet at 31st December 1849, is stated by the then two partners to be at that date the net free capital in the business, and to belong to them in equal proportions. This sum is the amount of the funds of the two partners then embarked in the trade; and it results from taking the whole assets on the debit side of the balance-sheet, and deducting therefrom all the debts of every description due by the company, the surplus of assets over debts thereby brought out amounting to L.26,810, 14s. 8d. And the Accountant having thus ascertained what he considers to be the amount of the capital apart from the trust-funds, it is upon that sum, with the addition of the trust-funds employed in the business, (and not upon the former exclusive of the latter, as the defenders erroneously allege in the minute of debate), as being together the producers of the profits made during the succeeding half-year, that these profits are apportioned, the pursuers receiving a share of them effeiring to the amount of the trust-fund. The same course is followed in regard to capital and profits at each half-yearly periodical balance, and I have only selected the half-year ending on the 31st December 1849 to which to apply the remarks I have to make, because it is to it that the defenders have referred in the argument they have submitted to the Court.

And here I may just remark in passing,—1st, That I think it unnecessary to advert particularly to the process resorted to by the Accountant in order to give the average amount for the full period of a year, of the stock of the partners; and 2d, That it appears to me that the pursuer's objection to the increase of the capital or stock of the partners, as said to be fixed by the contract of copartnery of 1848, by progressive additions to it, is altogether groundless.

Now, it will be observed that in fixing in the way the Accountant does the amount of the trading capital, there is *inter alia* excluded from forming a part of it all sums of money borrowed on loan and employed in the company's business; and by referring to the credit side of the balance-sheet, it will be seen that thereby there is not brought into account two sums of money borrowed from James Black and Hugh Robertson, amounting together to L.9994, 10s., as well as the trust-fund entered therein as amounting to L.998.

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The rule of law, and the law of this case as found by judgment is, that the defenders are not entitled to make profit for their own benefit of the trust-money belonging to the pursuers, which was employed in the trade of Black and Company, but are bound to render such profit forthcoming to the pursuers. I lay aside for the present the pleas reserved by the interlocutor of 1st February 1855, whether the defenders are personally liable for the share of the profits so made effeiring to the interests in the concern of other partners, and also for the profits after the retirement of either of the defenders.

Now, in applying the law, it appears to me that in the present inquiry abovementioned, sums of borrowed money—and which confessedly were employed in the trade of the company for the half-year ending 31st December 1849—must be taken into account as forming part of the capital, producing what is reported to be the profit of that half-year. If, indeed, the question were only an inquiry as to the rights of partners in a division of profits or otherwise, which, it may be, would all fall to be regulated by their shares of the input stock, then that input stock might be called the capital of the company; but if, on the contrary, it is an inquiry as to the amount of capital or fund by which the profits have been made, then money borrowed by a company, and employed in its trade, forms, I apprehend, part of the trading capital by which the business is carried on, just as much as does the input stock of the partners; for the borrowed money, in proportion to its extent, equally with input stock, contributes to the production of any profits that may be earned. In that respect it differs substantially in nothing from the input stock of the partners, while the money of the pursuers improperly embarked in the business differs only in this from money regularly obtained on loan, that the surplus profits, after payment of the interest, belong not to the Company, as do those effeiring to the latter, but to the pursuers. I am therefore of opinion (and this apart altogether from any special ground on which the two sums referred to may be thought to stand, in respect of the provision in regard to them in the contract of 1848, as substantially declaring them to constitute part of the capital of the Company) that it is impossible to throw out of view borrowed money embarked in the business, as forming no part of that capital by which the profits, if any, are produced, or to which they are to be assigned in any proportional allocation of them. This I think is clear, and hence when the question is (as it is here), what is the profit made by the employment of the pursuers' money, and for which the defenders are to be bound to account, I apprehend that the amount of the capital by which the whole profit has been made in which the pursuers are to share, is not to be fixed upon the basis of the amount of the stock of the partners, together with the trust-money employed, forming that capital, but upon the basis of its being formed by the aggregate amount of these, together with the money obtained on loan. And, the capital being so fixed, then it is by allocating upon it proportionally the whole profit that the pursuers' just share effeiring to the amount of the trust-fund is to be found,—they being entitled to participate in the profits, instead of receiving only the ordinary interest on borrowed money. If a larger share of the profit were assigned to them, they would receive not only the profit made by their money, but a portion, more or less, of the profit made by the monies of others embarked in the trade.

So far, then, I think the view reported by the Accountant, in regard to the Company having capital at 31st December 1849, ought to be modified and corrected, by adding to the capital of L.26,820, 14s. 8d. the sum of L.9994, 16s., the amount of the borrowed money, making together L.36,815, 10s. 8d., and, with the farther addition of the trust-money, stated at L.998, making L.37,813, 10s. 8d., and the same ought to be done with each of the other half years in which there was borrowed money employed in the business. Or, turning to the debit side of the balance-sheet, containing a statement of the assets as at the 31st December 1849 (the total amount of which, or L.66,276, the defenders contend is to be taken as the trading capital), the assets there entered may, to the amount of the said sum of L.37,813, 10s. 8d., be held to be the trading capital for the succeeding half year; but this, not because the assets stated in a balance-sheet afford any correct test of the amount of the trading capital of a company, which I do not think they do, but because the assets to the foresaid amount represent a sum of the same amount on the credit side of the balance-sheet, consisting of the input stock, the

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borrowed money, and the trust-funds. The one is the equivalent of the other. From whichever of the three sources the assets to that amount may have been derived, they constitute an investment of money (or, which is the same thing, of property acquired by it) in the business of the Company, which has a character of permanency. If not diminished by losses, these assets must appear in the accounts of the Company during the period in question—either, it may be, in the same form, or, at all events, in one form or other; and, therefore, it may be said, that, to the extent of these assets, there was a capital embarked in the Company's trade, and that it was by a capital, to that amount, at least, that the profits were produced.

But I hesitate to go further, and hold, with the defenders, that the remaining balance of the assets on the debit side of the balance-sheet are to be also brought *in computo* as forming trading capital, so as thereby to make it amount to L.66,276, 16s. 10d. In specially referring to the amount of the assets, as stated in the balance-sheet at 31st December 1849, I only do so for illustration of the view which I entertain of the question at issue, the remarks I have to make being to be understood as equally applying to the other periodical balances of a similar description.

Now, to my mind, it is difficult to see how, in any case, the amount of the assets, as it may stand on the periodical balance-sheet at the end of a half year, can be taken as determining absolutely, and exclusive of all reference to the opposite side of the balance, the amount of the capital traded upon for the following six months, or any other period, and by which the profit (if any) for these six months is to be held to have been produced, or how, indeed, the gross amount of the assets at any particular date can be so taken. And when, in the present case, the opposite or credit side of the balance-sheet at the 31st December 1849 is turned to, it seems to me to be impossible that the gross amount of the assets can be taken unqualifiedly to be a just criterion of the amount of trading capital embarked in the business, by which the following half year's profits have been made. On examining that side of the balance-sheet, it will be found that there is an amount of bills payable by the Company, and of debts due to sundries, equal to the remainder of the valued amount of the gross assets, after deducting a sum equal to the input stock of the partners, the borrowed money, and the trust-funds; or, in other words, after deducting the foresaid sum of L.37,813, 10s. 8d.

Now, it may be asked, how does it appear that if a balance-sheet had been made up of a week or a fortnight's earlier date, it might not exhibit a less amount of assets by L.5000 or L.10000, or any other sum, than at the 31st December 1849, with a corresponding less amount of bills payable,—the assets and the bills having only come together into the company's accounts during the intervening period; or how does it appear that were a balance made a week or a fortnight after the 31st December 1849, there might not be found an equal diminution of both to a large amount, so that the gross assets (the trading capital contended for by the defenders) would by that time be reduced by some L.5000 or L.10,000? I do not say that it is so. I only put it as what might be the case, in order to test the soundness of the principle which the defenders would desire to have adopted, in fixing the amount of the trading capital of the company. To my mind it appears to be altogether fallacious, for I am not able to comprehend how *that* can be a sound principle to proceed upon, according to which there is, or may be included in, and made part of the trading capital for a half-year, property of so fluctuating a character, and which rests on no other foundation than bills payable by the company at, it may be, one or two months.

Then, again, referring to some of the particular items composing the assets. Take cash in banker's hands—bills receivable—and debts due by sundries, the sum of the last being L.7745, 18s.—can these be allowed to swell the amount of trading capital, when there are bills payable, and debts due to sundries, on the opposite side of the balance-sheet to a much larger amount? The two together may no doubt exhibit portions of the transactions of the company, and in that way may form proper entries in the balance-sheet, but so standing the accounts, I cannot think that the former can be taken as constituting any part of the company's trading capital. Accounts due *to* a company, while debts are due by it—surely do not form trading capital. They are only a set-off *pro tanto* against the debt, and will, it is to be presumed, be applied to its extinction as they are recovered.

In short, as regards the amount by which the gross assets exceed the amount of

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the input stock of the partners—the borrowed money—and trust-fund, against which there is on the opposite side of the balance-sheet an equal sum of bills payable, and debts due to sundries;—and there being nothing in the rest of the materials now before the Court to shew that as respects *that* portion of them, the assets have any character of permanency or continuity—it seems to me that they are to be viewed as being merely floating items of property, with corresponding floating amounts of debt or liabilities. They consist generally of goods or property which, instead of being paid in cash, are to be paid at short credits by bills payable at these deferred dates. While they may appear in the accounts at a particular date, they may only then have come to do so, and may again disappear almost immediately thereafter, together with an equivalent sum of debt, and this without —as is the case with the proper trading capital of the company—reappearing under some different character. Along with the entries on the credit side, they are made up of, and represent transactions arising in the ordinary course of the company's business varying from day to day, and although it may be that on these transactions, or some of them, profit may have arisen, still—the assets in question neither possessing, nor representing anything which possesses, any element of permanency or continued employment in the company's business (which as I think is essential to constitute what in any proper sense can be called trading capital), I hold that, in the present question, they cannot be taken into view as forming part of the capital or fund on which the profits for the half-year were made, and as standing on the same footing with the amount of the input stock, borrowed money, or trust funds employed and put to hazard in the company's business, in an allocation or distribution of the profits.

I am therefore of opinion that the amount of the gross assets, as at the 31st December 1849, or at the date of any of the other half-yearly periodical balances, cannot be taken as fixing absolutely the amount of the trading capital by which the profits have been made, without any reference to the sources from which these assets have been derived. And, as at present advised, I am not prepared to hold that the trading capital of Black and Company for the half year preceding 31st December 1849 exceeded L.36,815, 10s. 8d, exclusive of the trust-funds.

But while, *hoc statu*, I see no ground for fixing the trading capital of Black and Company as at the 31st December 1849 at a larger amount than the above sum, I do not mean to say absolutely that the capital of the company must be limited to that amount. For it may be that money raised by bills, and put into and continued to be employed in the business, may legitimately form part of its trading capital as much as money borrowed on bond. And if it can be shewn by the defenders that to the amount of the assets which I have proposed to exclude in computing the trading capital, or any portion of them, there were funds raised by bills,—not in connection with particular transactions, and beginning and ending with them,—but kept up and traded upon by the company, so that these assets, with the bills, were not mere floating or fluctuating items in account, there might, so far as I at present perceive, be no ground for not enlarging to that extent the amount of capital to which the production of profit is to be assigned. I need hardly repeat that the same observation applies to the other half-year periodical balance.

Lord Cowan.—The question to be solved,—what profits were realised by the defenders on the L.1000 of trust-money employed by them in trade?—seems in itself sufficiently simple. And it would be so, in fact, had the trade been carried on exclusively with the L.1000. In that case, however large the value of the transactions carried on in the course of the year, the whole profits must, as I apprehend, have been accounted for to the beneficiaries.

The difficulty arises from the L.1000 having been employed by the defenders, along with their own funds and capital, in their trade as merchants. This necessitates the inquiry, what the amount of their trading capital was? On the result of that depends the share of the profits realised in the business which is to be ascribed to the L.1000. In itself essentially a question of fact,—it nevertheless involves important principles of accounting on which the pursuers and defenders are at direct variance, while the experienced mercantile accountant under the remit from the Court takes a different view from both.

By the interlocutor of 1st February 1855, the Court found, that as the trust-

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funds had been used by the defenders "as part of the stock or capital of the company of which they were partners, in its ordinary trade and business,"—they were liable to account for "any profits made in the funds so employed, over and above the five per cent of interest paid to the pursuers;" and the remit to the accountant was to report the profit, if any, made "on the proportion of the capital in trade representing the trust-funds." In the principle of that interlocutor all of us concurred, on the grounds fully stated in the opinions given in the report of the case. But it is of primary importance towards the right application of the principle, that no misunderstanding should exist with regard to its intended effect and practical operation. My understanding certainly was, and is, that the trust-money is to be placed alongside, as it were, of the funds embarked by the defenders themselves, in their trade, and forming the capital or stock by which the business was carried on. If the defenders had, including the trust-money, L.10,000, L.20,000, or L.30,000, employed in the business, and the profits realised yielded to them ten per cent on that amount of capital,—then the pursuers are entitled to the same per centage, under deduction always of the five per cent already paid. I do not think it would satisfy the interlocutor, or be consistent with the principle recognised in it, were the accounting for profits allowed to proceed on any other footing.

Further, although it may not be of much use, in the practical solution of the case, to consider what the proper definition is of the term "capital" or "capital stock,"—I find it given in one of the latest authorities in words, which I adopt as expressing my view of the object to be aimed at:—"Capital stock is the sum of money or stock which a merchant, banker, or manufacturer employs in his business, either the original stock, or that stock augmented." The very term capital or stock implies *fixedness* in amount during the profits-year, or period to which the inquiry relates. The extent of the business done, or the gross value of the transactions engaged in, from time to time, in the course of the year or period, can be no just criterion for ascertaining the amount of capital embarked in the concern by the trader. Out of that business, or of those transactions, the profits have been realised; but it is the fixed capital or stock,—the fund with which he has been trading,—that has been the means of realising them. And from this it follows, as a corollary, that the inquiry must have regard to the actual amount of funds employed during the period, whether half-yearly or yearly, in which that business or those transactions have been carried on from which the profits have been derived. It may be of diminished or of augmented amount, as compared with any former period. The fact to be ascertained, is the amount of funds embarked in their trade by the traders during each successive profits-year or period.

With these general observations in view, I will now explain the grounds of the opinion which I have formed.

1. And *first* as to the practical application of the principle of the findings in the interlocutor contended for *by the pursuers*.

From the period intervening between 1845 and 1848, the pursuers adopt the report of the Accountant; and their views so far will be for observation when the principle upon which the Accountant has proceeded is considered. The more material question argued by the pursuers relates to the effect of the written contract in 1848, under the terms of which the business of the defenders was carried on from that year downwards.

Their plea is, that as the written contract fixed the capital stock of the Company at L.14,000, it is to this sum, "as exhibiting accurately the capital of the Company, to which the amount of their trust-estate falls to be added so as to constitute the sum total upon which the profits are to be proportionately divided." And this plea is supported upon the ground that by assuming the trust-money as part of the trading funds of the Company when they entered into the contract, the defenders became bound "by a *quasi* contract of the most stringent character in relation to the business of their partnership as then constituted, which they were not entitled subsequently to alter prejudicially to the pursuers, without their knowledge or consent." This argument is essentially fallacious. It is so in every aspect in which it can be viewed. The defenders did not assume the trust-fund as part of the trading funds of their copartnership under this contract. They did not become bound to the pursuers in any manner or to any effect in relation to the business of

their partnership as constituted by the contract. And it is idle to say that the defenders could not subsequently, at any time they chose, alter or modify their consensual arrangement of 1848 altogether irrespective of the pursuers. The contract of 1848, as embodying the agreement then entered into by the defenders for the conduct of their business, was under their exclusive control. At any time during the seven years of its endurance, its articles, whether in relation to the amount of capital stock or any other matter, were alterable at their pleasure; and it is to mistake the legal position of the pursuers to contend that their consent or knowledge was necessary to make the alterations effectual *valeant quantum* in such questions as those involved in this accounting. To hold this would be to treat them as partners, which they are not. The trust-money in the hands of the defenders was year after year used in their trade and ordinary business along with their own funds; and hence arises the legal liability on their part to account for profits. But during each successive period in the conduct of the business to which the enquiry as to profits applies, there must necessarily be the corresponding enquiry as to the amount of capital invested in the business, the employment of which has been the means of their acquisition. Just as at any time the business might have been discontinued, so at any time the conditions on which it was carried on might be varied or altered by the partners.

The contention of the pursuers would lead to very anomalous consequences. On the same ground they might with equal plausibility allege that, unless they had consented, the defenders, during the seven years of their contract, were not entitled to invest the trust-money otherwise than in their trade or business. At all events, if there is not to be an annual investigation as to capital employed and profits realised for each year of the period that the trust-money continued to be employed in the copartnery business, it could never be ascertained whether five per cent exceeded or fell short of their interest in the profits of that year. And if there is not to be an annual investigation—which the pursuers contend for equally with the defenders—it seems to me that the very enquiry contemplated by the interlocutor could not be carried out. Irrespective of the capital fixed by the contract of 1848, that enquiry must embrace not less the actual funds or capital embarked in the business by the defenders each year or period, than the profits, if any, realised each year or period. And for this very reason, indeed, it is that while the pursuers are entitled to have more than five per cent every year that profits were realised to a greater extent by the defenders, they are to have that per centage even where there was loss suffered by the defenders on the business of the year. Hence it is that the just rights of the parties, as much as the very terms of the interlocutor, require the investigation to be periodical both as to capital and as to profits.

2. The *second* question regards the practical application of the principle of the interlocutor contended for by the defenders; and this appears to me no less erroneous than the proposition maintained by the pursuers.

Their method is to take the entries on the *debit* side of the balance-sheet of each year or half-year, without regard to the entries on the *credit* side, and to hold the gross amount of that side of the balance-sheet as exhibiting the capital or stock employed by the defenders in their trade, on which, it is assumed, profits were realised during the ensuing year or half-year. The objections in principle to this method of proceeding, in the view I take of the case, are numerous.

The amount of the actual funds which the defenders had embarked in their trade at any one period is left entirely out of view, and yet it is in return for the funds or capital so invested that the profits are realised, and with reference to which alone it can be ascertained whether the concern is to the partners a profitable or a losing one.

The capital or stock of the company, in place of being of some fixed amount capable of being taken into consideration in estimating the rate of realised profits each year, is made dependent on the most fluctuating elements. For example, take the general balance struck on 31st December 1849 (and what I state as to it, is applicable to every other year or period), there may have been purchases of cloths, goods, or dye-stuffs, immediately preceding that date, and for which bills were granted, forming a portion of the amount of "bills payable," placed on the credit side of balance. Purchases of large extent may be in that situation, and the goods being added to stock, their value goes to swell the amount of the *debit* side of the

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balance-sheet. And yet had those transactions been entered into not the week *before*, but the week *after*, the date of the balance, the capital or stock, with which the company were trading in the following year, would to that extent have been held of diminished amount. The same observation applies to those entries on the one side of balance, consisting of the *debts* due *to* the company by sundries, and of bills receivable, which must necessarily be of continually varying amount; and to the entries on the other side of balance, composed of *debts* due *by* the company, and of "bills payable" by them. Payments on account of these last, in December in place of January, by exhausting the cash account, or "bills receivable" requiring to be discounted to make such payments, or the debts due to the company requiring to be collected for that purpose, must have had the effect of varying and altering, to an undefined extent, the *debtor* side of the balance-sheet. Yet *that* is to furnish the elements for determining the *fixed* capital or stock on which the defenders were trading.

And I must farther observe, that I cannot at all understand how the unemployed money in the bank on the particular day of striking the balance, or the amount of bills then in the hands of the company, and, above all, the amount of debts due to them on open account, can be held capital stock for the ensuing year, and a source of the profits of the concern, when, if all realised and legitimately applied, they would be employed in the extinction of the debts due by the concern, or of the bills payable by *them*; and when, in truth, the profit on the transactions, represented in value by the amount in these several accounts, has already been realised in the preceding balance, and has been taken into view in striking the profits of the preceding year.

In general, I am of opinion that the view contended for by the defenders is fallacious in principle, by taking the extent of the business transactions in which the company have engaged in trading with their capital, as to afford any just estimate of that capital itself; because, from the very nature of the entries at the debit of balance at any particular date, they are not only fluctuating from day to day, but can at no time give any just approximation even to the amount of funds actually embarked in trade, and yielding profits of a greater or less amount if the trade be profitable, or exposed to loss, to a greater or less extent, if it be the reverse. Without enlarging farther, however, I shall merely add, that the reasoning of the Accountant in his report on this part of the case is, in principle, entirely satisfactory to my mind; and in discussing the practical method adopted by him in applying the findings in the interlocutor of Court under the remit, to which I now proceed, there will be an opportunity of developing the objectionable nature of the defenders' view, in its practical bearing and effect.

3. As regards one part of the accounting, there is a peculiarity which will require to be separately considered,—the effect, namely, of the two debts due by the company for advances made respectively to the extent of L.5000 each by the relatives of the two partners, in terms of the provision in the contract. Leaving these debts for the present aside, as standing in an exceptional position,—I have to express my approval of the principle acted on by the Accountant, and of the practical method he has adopted in getting at the true solution of the rights of parties, as opposed to and contrasted with the views contended for by the pursuers and by the defenders respectively.

What the Accountant has done is to ascertain the actual amount of funds, appearing from the balance-sheet and docquet thereto attached of each year, which the defenders had invested or embarked in their copartnery concern; and this amount he holds to have been the trading capital or stock on which the profits of the ensuing year were realised. It is not alleged that the defenders, in the preparation of the periodical balance-sheets, and in fixing by the docqet annexed thereto the amount from time to time of their trading capital, acted otherwise than in *bona fide*. The estimates made by them, and fixed by the periodic docquets, are to be taken as accurately made. Indeed, the burden of the defenders' argument lies in this, that the docqueted balances merely shew what the partners would have realised had the concern been wound up as at their dates. For that purpose the estimates are admitted to have been well and accurately made; in other words, they afford good evidence of the actual amount of the funds truly invested in the business and embarked by them in the concern at each successive period. And is not this precisely

what is wanted for the right adjustment of this accounting? The capital sunk by the partners with the view of making profit is thereby fixed upon legitimate data. The condition of fixedness is thus satisfied. That fixed amount again is brought out to be the trading capital of each period or year to which the profits annually ascertained have relation. And further, it meets what seems to me all essential, that just apportionment of the profits between the defenders and the beneficiaries in the trust money, which no other principle or mode can possibly do. Each party will draw their due proportion of the annual profits according to the amount of funds respectively invested of theirs in the business, and exposed to the risks and perils of the Company's trade. Taking the actual trading funds of the partners—whether their own or raised by loans I care not—in any one year at L.19,000, and the trust money at L.1000, then the former will have assigned to them 19-20ths of the profits, and the trust beneficiaries will receive 1-20th in so far as it exceeds 5 per cent. on the trust money. But this equal and just proportion,—any departure from which is, in my view of it, inconsistent with the principle on which the defenders' liability to account rests,—cannot but be disturbed and interfered with by the mode of ascertaining the capital contended for by the defenders. According to their views, the greater the extent to which the company with its capital of L.20,000 pushed the business, by just so much less became the proportion of the profits effeiring to the trust money. For if the debtor side of the balance-sheet amounted to L.40,000, the liabilities on the other side of the sheet not being deducted, then 1-40th, and not 1-20th of the profits would be the share falling to the trust beneficiaries, while the remaining 39-40ths would be taken by the partners, although they had invested in the business only L.19,000. The actual result contended for is in reality more inequitable than in the supposed case. For, taking the trust money at L.1000, and the actual funds invested by the defenders in the concern during the year from 1849-50 at the average stated by the Accountant of L.23,000, the amount at the debit of balance in December 1849 is L.66,000. Thus the practical result is, that in place of an equal share being given to the trust beneficiaries and the defenders proportional to the actual funds belonging to them respectively, invested and imperilled in the business, the beneficiaries are to have only 1-66th part of the profits of the year, while the partners are to take the remaining 65-66ths. This is a very effective method, no doubt, of bringing down the share of profits effeiring to the trust money, and in some years possibly to make them less than the 5 per cent. of interest; but I cannot hold it consistent with the principles that ought to rule the accounting. The result may be, that while the pursuers are found entitled to no more than the 5 per cent. they have already received, the defenders will draw upon the actual amount of funds embarked by them in the business a very high per centage under the name of profits.

To illustrate this, let the business carried on have been a banking concern, the partners having advanced as their capital L.9,000, which, with the L.1000 of trust-money, makes L.10,000 at the command of the company for their business. This, in its simplest aspect, consists in the receiving of money on deposit, and advancing money on bills or otherwise, at a higher rate of interest, the difference constituting their profit. Take their deposits at L.40,000. This, with their capital, gives an extent of business throughout the year of L.50,000. If three per cent be paid to the depositors, while five per cent is the rate obtained on their discounts and advances, the annual profit yielded by the concern will be two per cent, on L.50,000 or L.1000. Hence on the capital of L.10,000, composed of the L.9000 embarked in the concern by the partners, and the L.1000 of trust-money, there is realised a per centage of ten per cent. This is the proportion of profits, to which, as it seems to me, the beneficiaries are entitled. But, in the defenders' view, the proportion of profits to be drawn by the beneficiaries is not one-tenth, but one-fiftieth of the whole profits, or two per cent. Consequently, while the partners in the concern, on their capital of L.9000, are drawing ten per cent, the trust-beneficiaries, whose funds have been imperilled in the business, are to be entitled to nothing out of the profits, but must be content with five per cent interest.

What is true as to a banker's business is no less true as regards any other trading concern. The principle is the same, whether it be goods or money—that is the subject-matter of the business; but it may make the result to which it would lead

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more striking, to vary the figures in the preceding illustration, and to suppose that while the trust-money embarked in the business amounted to L.9000, the banker or trader's own funds amounted only to L.1000. The inequality in the apportionment of profits that would follow may easily be calculated.

The truth is, that in no case can the extent of the transactions be taken as affording a just criterion of the extent of stock or capital on which the trading has been carried on. The most unjust results would be the consequence of adopting that principle. In my apprehension, its application would in many cases be tantamount to a refusal to give effect to the principle on which our former interlocutor is founded.

The defenders object to the accountant's principle, that according to him the L.1000 of trust-funds forms no part of the capital stock of the company; and a great deal of observation is made on this assumption. This seems to me to proceed upon misapprehension. No doubt the accountant brings out, and as I think legitimately, the amount of funds or capital belonging to the partners which they had each year embarked in trade; but, in striking the profits, the trust-funds, in place of being left in the entries upon the two sides of the balance-sheet neutralising each other, are added to the funds belonging to the partners, and the profits are then divided upon that basis. The appendices annexed to the report clearly establish this. Accordingly, the acconntant, at page 6 of his report, states expressly that while he adopted the sums stated in the docquets as the periodical capital of the company, "the calculations which follow are founded on the principle of adding the sums of capital as stated in these docquets to the trust-funds and ascertained profits of the pursuers, thus forming a basis for the calculations referred to in the appendices."

While, however, in general I consider the Accountant to have justly appreciated the practical principles that ought to be applied to the case, it seems to me that, in one respect, there is room for holding his report and relative calculations erroneous. I am not satisfied that the point was brought so clearly under his deliberate consideration as it ought to have been, and as I incline to think it should still be. The extreme views contended for by the defenders seem alone to have been considered specially by the Accountant. At all events, we have no special report on the matter to which I now advert, and on which, as at present advised, I think the report and relative calculations require correction.

A trading company may raise part of the fixed capital or funds on which the business is carried on by means of permanent loans from bankers or others. It is even conceivable that a very large proportion of the trading capital may be so obtained. For example, trading companies may, and very frequently do, obtain advances from bankers by means of cash accounts. A sum of L.5000 or L.10,000 thus raised placed at the command of a company for their business may fairly be held as part of their trading capital. And, certainly, when by their contract of copartnership such a mode of raising money to be employed in the business is expressly recognised, it seems to me that funds thus obtained and actually employed in trade with the rest of their capital cannot but be held to stand in the same predicament. Together they constitute the fixed or permanent capital or trading funds of the concern on which their profit is realised. On the same principle, permanent loans obtained for the very purpose of enlarging the capital and increasing the business are to be taken into account. It is on that business so carried on — on that trading capital or stock, consisting—first, of the funds belonging to the partners themselves sunk in the concern; and, second, of the borrowed funds raised for the purpose of increasing their own capital — that the profits of the year are made. Hence, in any question such as is here raised, I think it is the amount flowing from both sources that is to be taken into calculation along with the amount of trust-money traded on in fixing the proportion of profits falling respectively to the partners and to the beneficiaries.

Now, it is satisfactorily established by the terms of the contract of copartnership entered into on 1st July 1848, that, in addition to the funds advanced by the partnership respectively, their relatives, James Black and Hugh Robertson, agreed "each to lend to the said company the sum of L.5000 sterling during the subsistence of the said contract," on payment of interest as therein stipulated, and with power to the company to repay the loans, "but it being understood that the said

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James Black and Hugh Robertson, and their heirs and assignees, shall not be entitled to repayment of the principal sums so advanced by them until the expiry of the contract or the dissolution thereof." This seems to me in substance and effect an express stipulation that the advances under these loans, so long as not paid off, were intended to constitute, as they did *de facto* constitute *pro tanto*, the trading stock of the company. The result was precisely the same as regards the increase of the funds embarked by the partners in their trade, as if the loan had been obtained by the partners individually from their respective relatives, and added to the sums which they had individually embarked in the concern as trading capital. The advances thus obtained partake of all the qualities which the funds periodically invested in the concern by the partners possessed to constitute them trading capital or stock, on which profits have been realised. There may be some flaw in the reasoning at which I arrive at that conclusion. If so, I have failed to perceive it. It is possible that were the matter brought specifically under the view of the accountant, considerations might be suggested, did he remain of the adverse opinion, to warrant an opposite result. My present conviction, however, is, that to that extent the defenders have succeeded in shewing that the report is objectionable, and that the L.10,000 ought to be taken into view along with the amount of capital stated in the periodic docquets from 1st January 1848 downwards, in the ascertainment and apportionment of the profits to which the pursuers are entitled.

Taking as the model balance-sheet, that for the year 1849–50, as before, and having regard to the states in the appendices to the report, the result at which I arrive is, that there must be added to the average capital of L.23,000, brought out as the trading funds of that year belonging to the defenders, the two debts of L.5000 each; and that the proportion of profits must be adjusted on the principle adopted by the accountant, subject to that alteration. The calculations as to the other profits' years or periods will require to be readjusted on the same basis. And, I may add, that it must be for inquiry whether prior to the date of the contract in January 1848, and from 1845 downwards, there were not sums of money borrowed by the company, and used by them as a permanent addition to their trading funds, which ought for these years or periods to be treated as standing on the same footing with the two loans in question. If so, the principle applicable to the latter will equally apply to the former.

In the argument of the defenders it is insinuated rather than stated, that, in the amount of "bills payable," and of "debts due by the company," set forth on the debit side of each half-year's balance-sheet—in that already mentioned of 1849–50—at L.27,902, 14s. 6d., and L.560, 11s. 8d. respectively, there are sums standing in the same situation as the two permanent loans to which I have referred. This may be the case; but it seems to me that the particular sums or debts of that nature ought to have been specifically mentioned. My understanding of the items composing those two entries in the balance-sheet is, that they consist merely of current obligations contracted in course of carrying on the business of the half-year or year, and outstanding at the date of each periodic balance. It is on this footing that the accountant has dealt with them; and in that view of their nature has rightly dealt with them as deductions requiring to be made from the assets, in order to bring out the just amount of the trading capital or funds of the company. No doubt it may be that among the bills payable there are obligations in the shape of accommodation bills, or bills for loans of money, having the effect of giving the company, for a longer or shorter period, the command of funds to be used in their trade as part of their permanent trading capital. Under any remit which your Lordships may make to the accountant, this will be ascertained. All I shall say at present is, that should any such to me unexpected state of the facts emerge, I do not hold myself, in the opinion which I have expressed, precluded from entertaining the question whether funds so raised may not fall under the same principle as the permanent loans of L.10,000 to which I have referred.

I have only to say farther, and in conclusion, that I have attentively considered the English cases to which reference has been made in the argument; and that in so far as the general reasoning on which they proceed can be held applicable to such a case as the present, that reasoning is not inimical, but on the contrary tends to support those views which I think ought to receive the sanction of the Court.

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The Court pronounced the following interlocutor:—"Find that in ascertaining the amount of profits made on the trust funds belonging to the pursuers employed by the defenders in their trade, no fixed sum, whether stated in the docquets to the balance-sheets or otherwise, is to be taken as the amount of the proper capital or stock of the company of J. Black and Company, in reference to which the trust money as it may stand at the commencement of any yearly or half-yearly period is to be rated, and to share in profits with the partners on that sum, as a proportion of such divisible capital: And find, that in ascertaining at any particular date the amount of the capital or fund by which, together with the trust monies, the profits (if any) for the succeeding period of a year or half-year is to be held to have been made, there is to be taken into account not only the amount of what may be found to be the proper input stock or funds of the partners employed in the trade of the company, but all other funds or monies, whether consisting of money regularly borrowed on loan or obtained in any other way in order to be employed in the business, and which have accordingly been invested and employed in it, and on which the trade has truly been carried on for the period in question: Find that the stock or funds employed in the trade, including the trust money, and by which the profit is to be held to have been made as aforesaid being ascertained, the share of the profit to be assigned to the pursuers is to be in the proportion which the amount of the trust money bears to the whole amount of the said stock or fund; and with these findings, before farther answer, remit to to ascertain in each year, without reference to any balances made up by the partners between themselves yearly or half-yearly, what was the total amount of the sums and funds employed in carrying on the trade of the company by means of which profits were made, what was the amount of profits thereby made in each year or half-year, so as to show at once in a short table for each year or half-year, the stock or funds employed in the trade as aforesaid, and the proportion thereto of the trust funds: The Accountant to state the particulars of which the said stock or fund is made up, and to explain the view or principle on which he has proceeded in including the same as forming part of the stock or trading capital by which the profit has been made, and also to explain, in so far as he thinks it necessary for the information of the Court, the grounds on which he has excluded any other items which the parties may have considered ought to have been added thereto: The Accountant to apply to the Court for any farther instructions, if, after considering the opinions of the Judges, he should feel any difficulty in acting on this remit, with power to him to call for all explanations and documents he may require."

Some time after the above interlocutor was pronounced, the whole question of accounting between the parties became the subject of a judicial reference.

William Mackersy, W.S.—W. A. G. & R. Ellis, W.S.—Agents.

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John, William, and James Macfarlane, Pursuers.—*Macfarlane—A. R. Clark.*
John Lowis, Defender.—*Penney—Ross.*

Process—Issues—Property—River.—An action of damages was brought on the allegation that the defender had altered the course of a stream within his own pro-

perty, which resulted in injury to the pursuers' adjoining lands;—*Held* to contain issueable matter. No. 234.

Issue adjusted to try the question. July 17, 1857. Macfarlane v. Lowis. 1st Division. Lord Neaves. C.

This action was brought by the Macfarlanes against Lowis, contending for L.120 as the damage done to two fields belonging to the pursuers, and adjoining the defender's lands, and to the drains in these fields, by and through the operations of the defender on a stream called Boardsburn. The allegations were, that the defender had altered the course of the stream, which was entirely within his own lands, so as to make it run close along the pursuer's march dyke for about 300 yards; "that the course of the stream, as existing from time immemorial previous to the operations, was in no way injurious to the pursuer's fields," but "that part of the new channel or cut at the upper end thereof is higher than some parts of the pursuer's said fields, and the water therein, in time of floods, percolates through the banks to the pursuers' fields, and is otherwise thrown upon them so as seriously to damage the land." The pursuers also alleged that the defender had altered the course of an affluent or tributary of the burn, "which originally flowed into the burn at the most northerly part of its channel upon the defender's lands, being the part farthest from the pursuers' fields. The alteration consisted in making the affluent join the new channel at a right angle immediately opposite to the pursuers' fields, and within almost three feet of them." The result, it was alleged, was to cause "a deposit of stones, gravel, sand, and other debris at the mouth of the drains on the pursuers' lands, so that the drains were choked up, causing, in time of floods, the fields to be overflowed, to the loss and injury of the pursuers;" and the operations were said to have been made by the defender, or others for whom he was responsible, and by his authority, and were wrongful and illegal.

The defender pleaded; — That there was no issueable matter in the record, in respect this was not a question between superior and inferior heritors, nor of conterminous proprietors. The operation was in itself lawful, and there was no averment that it was done in a careless or negligent manner. The defender was entitled to make use of his own property in the manner most beneficial to himself.[1]

The pursuers pleaded;—That the defender was bound so to conduct his operations as not to injure the adjoining lands. Injury was the necessary consequence of the act performed, which made it illegal at common law. It was enough for the pursuers to allege that, in consequence of these operations, injury had been done to them: It might be for the judge at the trial to say whether they had made out a case sufficient for damages.[2]

The Court, on 1st July, appointed the pursuers to lodge issues. They proposed the following:—"Whether, by certain operations executed by the defender in the course of the years 1838 and 1839, or about that time, he altered the natural course or channel," &c. "and whether, in consequence thereof, the lands of the pursuers" "have been, on one or more occasions," "wrongfully by the defenders flooded with water," &c.

The defender objected that the word "wrongously" was here applied to the consequence of his operations. The whole case was that he had performed operations which he had no right to perform, as they brought injury to the pursuer;—they must bring up their case to that point by their issue.

Lord President.—What the record characterises as wrongful are the operations which led to the deposit of stones. The wrong alleged is performing the opera-

[1] Ersk., B. 2, T. 1, sect. 2; Samuel v. Edinburgh and Glasgow Railway Company, 12th December 1850, ante, vol. xiii. p. 312.

[2] Bell's Pr. sect. 1108; Menzies v. Breadalbane, 4th July 1828, 3 W. & S. 235 (op. of Lord Chancellor); Sir Michael Shaw Stewart, Hume, 522, and 15 S. 868.

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tions in such a way as to cause a deposit,—that is, that the defender wrongfully did so and so, whereby the result complained of followed.

The issue, as adjusted, stood as follows:—"Whether, by certain operations executed by the defender in the course of the years 1838 and 1839, or about that time, he wrongfully altered the natural course or channel of a burn or stream called Broadsburn, situated within his property of Northfield and Blushquarter, and adjoining or near to the march between said property and the pursuers' lands of Broadleys, and of a tributary or affluent thereto, so as to cause a deposit of stones, gravel, and sand, or other material, to be formed by the stream at or near the lower end of the new course or channel below or near to the main drain of the pursuers' lands adjoining, whereby the lands of the pursuers, to the extent of two acres or thereby, adjoining or near to the said march, were on one or more occasions, in January and February 1852, or about that time, flooded with water, and the drains thereon choked up, to the loss, injury, and damage of the pursuers?"

Damages laid at L.120.

Alex. J. Napier, W.S.—Hugh J. Rollo, W.S.—Agents.

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Henry Merrick Hoare and Others (Lord Keith's Trustees), Nominal Raisers.—*G. G. Bell—Horn.*

Dowager Viscountess Keith and Others, Real Raisers.—*Moir—Monro.*

Baroness Keith and Nairne (Countess Flahault) and Husband, Claimants. —*Sol.-Gen. Maitland—N. C. Campbell.*

Hon. Mrs Villiers and Husband, Claimants.—*D. F. Inglis—Moir—Monro.*

Parent and Child—Legitim—Clause—Succession—Election—Collation—Trustee.—An antenuptial contract of marriage contained provisions for the children of the marriage, after which this clause:—"Which portions above mentioned provided to the children of this marriage, in the respective events before specified, are and shall be in full satisfaction to them of all bairns' part of gear, legitim, executry," &c.;—*Held* (altering judgment of Lord Ardmillan), on a review of the whole deed, that the term "children of the marriage" included the heir, and barred all claim of legitim.

Terms of a marriage-contract in English form between parents, which *held* (*aff.* judgment of Lord Ardmillan) not to import a discharge of legitim by the children of the marriage, but *held* that a daughter, claiming legitim, was bound to elect between legitim and provisions under a subsequent universal settlement;—and that the fact that her rights under the universal settlement were contingent, did not entitle her to defer her election; and *held* (*aff.* judgment of Lord Ardmillan), that trustees under a universal settlement could not compel a party entitled to legitim to collate marriage-contract provisions, when collation was not demanded *inter liberos.*

Husband and Wife—Jus relictæ—Marriage-contract—Clause—Election.—An antenuptial contract of marriage in the English form between a Scotchman and an Englishwoman, both resident in England, provided an annuity to the wife, which she accepted "in lieu and full bar and satisfaction of the dower or thirds, which, at the common law or by custom, she can or otherwise might claim from the estates of" her husband; and also "in full bar and satisfaction of the terce" to which she is or otherwise might be entitled by the law of Scotland;—*Held* (altering judgment of Lord Ardmillan), (1) that the widow was not barred from her claim of *jus relictæ*, but (2) (*aff.* judgment of Lord Ardmillan) that she was bound to elect between her legal rights and testamentary provisions created under a universal settlement left by her husband; and (3) that in the event of her electing to take the *jus relictæ*, it was not to be reduced in amount by imputing thereto any sums provided in the contract of marriage, but that these, in so far as not already satisfied, must form a deduction from the free moveable estate.

Statutes 39 & 40 *Geo. III. cap.* 98 (*Thellusson Act*)—11 & 12 *Vict. cap.* 36, *sect.* 41 —*Intestate—Succession.*—*Held* (altering judgment of Lord Ardmillan), that under

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a trust-settlement, the truster having died in 1823, directions for accumulating the rents of heritable property in Scotland were not affected by the Thellusson Act or the 11 & 12 Vict. cap. 36, but (*aff.* judgment of Lord Ardmillan) that in so far as the deed directed accumulations of profits of heritable property in England, and moveables wherever situated, the Thellusson Act applied, and that accumulations having been made contrary to that Act, they belonged equally to the daughters by two marriages as intestate succession.

Homologation.—Dealings with trustees acting under a universal settlement, which *held* (*aff.* judgment of Lord Ardmillan), not to bar the parties from insisting after many years on their legal claims.

1st Division. Ld. Ardmillan. C.

On 9th April 1787, the Hon. George Keith Elphinstone—afterwards Viscount Keith—entered into an antenuptial contract of marriage with Miss Jean Mercer, which contract, after providing for an annuity of L.500 to Mrs Elphinstone, and containing an obligation to infeft her in lands to be afterwards purchased by Mr Elphinstone, in manner therein specified, contained the following provisions:—"And in the meantime, until such purchase or purchases are made, the said George Keith Elphinstone binds and obliges himself and his foresaids to pay and deliver to" various parties therein named as trustees, for the purposes thereinafter mentioned, "the sum of L.10,000 sterling, and that at and against the term of Martinmas next to come," "which sum is to be lent out upon bond or other sufficient security, heritable or moveable, and the securities thereof to be taken payable for behoof of the said George Keith Elphinstone and Jean Mercer, in conjunct fee and liferent, for the said Jean Mercer her liferent use allenarly, for security and payment to her of said annuity, and afterwards for security and payment, *pro tanto*, of the provisions after-mentioned to the children of this marriage; or otherways, the said George Keith Elphinstone binds and obliges himself and his foresaids, at and betwixt the said term of Martinmas next, to assign and convey to the said trustees such bonds or other securities as the said trustees shall be satisfied with,—the principal sums in which shall amount to the said sum of L.10,000 sterling, and that in trust and in the terms foresaid, for security and payment of the said annuity to the said Miss Jean Mercer, and of the provisions after-mentioned to the children of this marriage."

Farther provision was then made for the event—which did not happen—of Mrs Elphinstone surviving her husband; and after a clause, in which Mrs Elphinstone accepted the provisions as in full of all terce of lands and *jus relictæ*, and of all claims by her next of kin, there followed this clause:—"And farther, in contemplation of the said marriage, the said George Keith Elphinstone hereby binds and obliges himself and his foresaids, against the term of Whitsunday 1788, to provide and secure upon land or other sufficient security, the sum of L.16,000 sterling, in which sum is comprehended and included the foresaid sum of L.10,000, . . . and to take the rights and securities thereof, at the sight of, and with the consent of the said trustees, to and in favours of himself and the sons to be procreated of this present marriage, one after another, and to the heirs whatsoever of their bodies; whom failing, to the sons to be procreated of the body of the said George Keith Elphinstone of any subsequent marriage, one after another, and to the heirs whatsoever of their bodies; whom failing, to the daughters of this marriage, and the heirs whatsomever of their bodies, the eldest heir-female always succeeding without division, and excluding heirs-portioners; whom failing, to the said George Keith Elphinstone, and his heirs or assignees whatsoever; Providing and declaring always, as it is hereby expressly provided and declared, that the foresaid sum of L.16,000 sterling is provided to the heirs of this marriage in manner foresaid, not only with and under the burden of the foresaid provisions, to and in favours of the said Jean Mercer,

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but also under the burden of suitable portions and provisions to the children of this marriage or their descendants, other than the heir of the marriage succeeding as aforesaid, which provisions are to be proportioned by the said George Keith Elphinstone himself: But in case he shall fail or neglect to make such provisions, then and in that case it is hereby declared, that in case of one child, other than the heir of the marriage succeeding as aforesaid, the said sum of L.16,000 sterling, or lands to be purchased therewith, is hereby burdened with L.2000 sterling to such child: In case of two children other than the heir, the same is hereby burdened with L.4000 sterling, to the said two children equally among them; and in case of three or more children, other than the heir, the said sum or lands to be purchased therewith, is hereby burdened with the sum of L.6000 sterling, to the said three or more children equally amongst them; which sums the said George Keith Elphinstone binds and obliges himself and his foresaids, to pay to the said children, other than the heir of the marriage, in the proportions above mentioned, and that at the first term of Whitsunday or Martinmas after his decease, &c.: And farther, it is hereby expressly provided and declared, that in case the daughters of this marriage, or their descendants, shall happen to be excluded from the succession to the foresaid provisions, by an heir-male to be procreated of the body of the said George Keith Elphinstone of any subsequent marriage, then and in that case the said George Keith Elphinstone shall be bound and obliged to content and pay to the daughters of this marriage, and to their descendants who shall be so excluded, the respective sums after mentioned, viz.:—If one daughter the sum of L.5000 sterling, if two daughters the sum of L.8000 sterling, and if three or more daughters the sum of L.10,000 sterling, and that by such proportions and divisions as the said George Keith Elphinstone shall think fit to appoint, by a writing under his hand at any time of his life, in case of two or more daughters; and failing such division, the said sums in the respective events foresaid, shall fall and divide equally among them; and which provisions, in the events above mentioned, are and shall be payable to the said daughter or daughters at the first term of Whitsunday or Martinmas after the decease of the said George Keith Elphinstone, &c.; and which portions above mentioned provided to the children of this marriage in the respective events before specified, are and shall be in full satisfaction to them of all bairns' part of gear, legitim, executry, and everything else they can ask or claim by and through the decease of the said George Keith Elphinstone, their father, any manner of way, except further what he shall think fit to provide to them of his own good will: And it is hereby agreed on by both parties, that all execution needful shall pass upon this contract at the instance of the" trustees, "for implement of the provisions above mentioned in favour of the said Jean Mercer, and the children to be procreated of this marriage."

This marriage was dissolved by the death of the wife, leaving one child of the marriage—the claimant, Baroness Keith, Countess Flahault.

In 1808, Viscount Keith entered into a second marriage with Hester Maria Thrale, on which occasion an antenuptial contract under the English form of an indenture was entered into betwixt them. By that deed, each of the spouses conveyed to trustees a sum of L.25,500 for behoof of the spouses and the survivor in liferent, and to the child or children of the marriage in fee; and it was declared that "if there shall be but one child of the said George Lord Keith, by the said Hester Maria Thrale, who, being a son, shall attain the age of twenty-one years, or being a daughter shall marry with such consent as aforesaid, then the whole of the said trust-monies, stocks, funds, and securities shall be in trust for that one child, his or her executors, administrators, and assigns." The deed also contained farther provisions for Hester Maria Thrale, *inter alia*, an annuity of L.1500 "for or

in the nature of her jointure and in bar of her dower;" and it was farther No. 235.
provided that this jointure "is to be, and she, the said Hester Maria Thrale, doth hereby accept the same for her jointure, and in lieu and in full bar and satisfaction of the dower or thirds which at the common law, or by custom, she, the said Hester Maria Thrale, can or otherwise might claim from the estates of the said George Lord Keith; and also in full bar and satisfaction of the terce to which she is, or otherwise might be entitled, by the law of Scotland." July 17, 1857. Keith's Trustees v. Keith and Others.

Viscount Keith died in March 1823 without leaving any heir male of his body. He was survived by his eldest daughter, the Countess Flahault, and by his widow, the Dowager Countess Keith and by his only child by her, the claimant Mrs Villiers—a widow without children. The Countess Flahault never had a son, but had three daughters.

It was averred in this action by Mrs Villiers that Lord Keith was domiciled in Scotland at the time of his second marriage, and at the time of his death. For Lord Keith's trustees and the Countess Flahault the averment of domicile was not admitted.

Lord Keith left a trust disposition and settlement executed in the Scottish form on 9th July 1817, and a last will in the English form bearing the same date.

By this trust disposition and settlement he conveyed to the trustees the Lordship and barony of Kincardine and Tulliallan, and all other lands and heritable property in Scotland which he might succeed to, or acquire and die possessed of, excepting certain lands and securities which were to be sold, and which were dealt with in subsequent clauses of the deed. The truster directed, that the lands thus particularly and generally conveyed, should be entailed in manner thereinafter mentioned. He directed that his whole other heritable and moveable property, and the lands and securities therein appointed to be sold, should be converted into money, and the proceeds, after payment of debts, legacies, and expenses, be laid out in the purchase of lands in Scotland situated as near to, and as convenient as might be to one or other of the properties which he conveyed by the trust-deed; and that the lands to be purchased should be entailed in the same way as these properties. The trust-deed then set forth, that it was the truster's intention to execute of even date therewith a last will and testament, for the purpose of conveying to the trustees his whole real and heritable estates in England, and his moveable property wherever situated, in order that the free residue might also be laid out in the purchase of land in Scotland to be entailed. The truster then conveyed to the trustees his lands and securities in Scotland, which were excepted from the principal dispositive conveyance as being appointed to be sold.

The first purpose of the trust-deed regulated the deed of entail which Lord Keith directed his trustees to execute. It proceeded on the consideration that his Lordship had no heir male of his body, and that for reasons which seemed to him fit, he in all events excluded his eldest daughter (Countess Flahault) from all interest in, or benefit from, his estates heritable and moveable, her children only being entitled to succeed in the manner hereinafter specified, under certain conditions as to education, religion, and allegiance.

The entail was, in the first place, to be in favour of the heir male of his Lordship's body first attaining the age of twenty-one, and to the heirs male of his body; whom failing, to the other heirs male of his Lordship's body, and to the heirs male of their body. The parties then called to the estates were these—" whom failing, to the heirs male of the body of the said Margaret Mercer Elphinstone (Countess Flahault) capable of holding and inheriting real estate in the United Kingdom," and under the conditions above referred to, the Countess Flahault being herself excluded; " whom failing, to Georgina

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Augusta Henrietta Elphinstone (Mrs Villiers);" "whom failing, to the other daughters to be procreated of my body in the order of their seniority, and to the heirs male of their bodies; whom failing, to the heirs female of the body of any heirs or heirs male to be thereafter procreated of my body; whom failing, to the heirs female of the body of the said Margaret Mercer Elphinstone (Countess Flahault)," &c.

The second trust-purpose commenced thus:—"In the event of my leaving no heirs-male of my body as aforesaid, or in case I leave an heir-male of my body, if he shall die without any deed of entail having been executed in his favour, and in case I shall be survived by the said Margaret Mercer Elphinstone, I direct and appoint that the whole foresaid lands and others, directed to be entailed as aforesaid, together with those which may have been or shall be purchased by my said trustees for that purpose as aforesaid, shall be and continue under the direction and management of my said trustees until the death of the said Margaret Mercer Elphinstone, if she shall have no children; and during that period the said trustees shall levy and accumulate the rents and profits thereof, and lay out the same, after deduction of all expenses," thereinbefore "particularly specified for the event of an entail being executed in favour of an heir-male of my body, in the purchase of lands in Scotland, and entail the same in the same manner, and under the same conditions and others as is herein appointed to be done, with the free residue of my means and estate: But if the said Margaret Mercer Elphinstone shall have an heir-male of her body"—an event which has not occurred—then Lord Keith directed that, under certain conditions, upon such heir-male attaining the age of twenty-one, "and whether the said Margaret Mercer Elphinstone shall then be alive or not," the trustees should then execute and record an entail of the lands before mentioned "in favour of such heir-male and the heirs-male of his body; whom failing, to the other heirs-male of the body of the said Margaret Mercer Elphinstone; whom failing, to the other heirs of tailzie before mentioned called after them in the first above written destination in their order before specified."

The rest of the trust-purposes provided for various other contingencies as to the succession, and gave directions as to what should be contained in the deed of entail to be executed by the trustees, and regulated the terms and conditions on which the children of the Countess Flahault should be considered as institutes or heirs under the entail.

By his last will and testament executed in the English form, Lord Keith gave to the same trustees his whole real personal and moveable estate—the residue of which, after a bequest of furniture, or an equivalent of L.1500 in money (which was preferred) to the Dowager Viscountess Keith, was to be sold and applied in paying certain legacies, and the surplus to be invested in the purchase of land in Scotland, to be entailed with the principal estates. Besides his heritable property in Scotland, Viscount Keith left a large succession, consisting of personal or moveable estate in England and Scotland, of real or heritable estate in England, and of money secured over heritable estate in Scotland.

The trustees under the trust-disposition and English will, on his Lordship's death, entered into possession and management of the trust-funds and estates. They paid to the Countess Flahault—the only child of the first marriage—L.16,000, as the amount of the provision to which she was entitled under her mother's marriage-contract. Payments had also been made to the Dowager Viscountess Keith and Mrs Villiers in implement of the obligations under the second marriage-contract, and under the will; but questions having arisen, this action of multiplepoinding was raised in April 1848 in name of the trustees, by the Dowager Viscountess Keith, and others interested in the succession, for the purpose of having their respective

rights ascertained and determined. The Dowager Viscountess died in the course of the action, and her claims were taken up by her daughter Mrs Villiers.

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The Countess Flahault—now Lady Keith—had no sons, but three daughters. She was now between sixty and seventy years of age. Mrs Villiers had no family.

Assuming that all parties acquiesced in the truster's view that all rights of widow and children had been discharged, the trustees had accumulated, and from time to time purchased lands, which they would not and could not have done had they fully anticipated the claims now made, which were as follow:—

I. The Dowager Viscountess Keith claimed one-half, or at least one-third of the free value of the moveable succession of Viscount Keith as her *jus relictæ*, with interest, and that without repetition of the legacy received by her; and in the event of its being found that she was not so entitled, then she claimed right to make her election betwixt the legacy and her share of the goods in communion.

She pleaded;—That, as widow, she was entitled to her *jus relictæ*, and that it should be held to amount to one-half of the moveable estate in communion, unless it should appear that there was a subsisting right to legitim at the death of the husband. That the legacy of L.1500 was not incompatible with her claim of *jus relictæ*; at all events, she was entitled to her election, and this right of election was not barred by having received the legacy, as she did so in ignorance of her rights, and was ready to repeat the amount of the legacy in the event of electing to take her *jus relictæ*, and of her being bound so to repeat. That the claim of the Countess Flahault to legitim was barred by the terms of the marriage-contract betwixt her parents and the provisions therein made.

II. Mrs Villiers claimed "one-half of the whole free moveable estate and funds left by her deceased father at his death in name of legitim, with interest; or, in the event of its being found that her mother, the Dowager Viscountess Keith, was entitled to *jus relictæ*, then to one-third of the said whole moveable estate and funds, in name of legitim, with interest, and in either case without prejudice to the claimant's rights, or those of any children whom she may yet have, under Viscount Keith's English trust-deed and will, and to be found entitled both to legitim and to her rights of succession under the said trust-deed and will; these rights, or at all events the rights of her children, not being prejudiced by her taking her legitim; or otherwise, and in the event of its being held that she was not entitled to legitim, and her rights of succession under the said trust-deed and will, the claimant should be found entitled to legitim, her interest under the settlement and will being subject to compensation or allowance, so far as necessary to the party or parties prejudiced by her so taking her legitim, or to be found entitled to make her election. (2.) To be ranked and preferred on the whole fund *in medio*, in so far as consisting of rents, profits, or accumulations of Lord Keith's whole succession, or at least of the whole of said succession, excepting his Lordships heritable property in Scotland, from the expiry of twenty-one years from his Lordship's death. (3.) To be ranked and preferred on the fund *in medio*, in so far as consisting of or arising from rents, issues, profits, produce, or accumulations of Lord Keith's heritable estate in Scotland, from 14th August 1848, being the date of the Act 11 & 12 Vict., c. 36. (4.) To be found entitled to have an entail executed in her favour by the trustees, in the form and manner appointed by Lord Keith's trust-settlement, and that *quam primum*, or as soon as may be, with right to the rents, profits," &c.

Besides her general pleas applicable to her claim of legitim in addition to her rights under the will, or at all events of a right of election,

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Mrs Villiers pleaded;—(3.) The directions in Viscount Keith's trust-disposition for accumulating the rents, issues, produce or profits of his estate, heritable and moveable, are null and void (except as to his heritable property in Scotland), under the Act 39 and 40 Geo. III. c. 98, and the claimant, as one of his two daughters, and in respect of the terms of his marriage-contract with Miss Mercer, and of his trust-disposition and settlement, and of the foresaid Act, is entitled to the whole accumulations past and future, in so far as contrary to the said Act; and also to the accumulations arising from heritable estate in Scotland, from and after 14th August 1848, in respect of the Act 11 & 12 Vict, c. 36. (4.) The claim of the Countess Flahault to legitim is barred by the terms of the marriage-contract betwixt her parents and the provisions therein made. (5.) In respect of the application of the said Act (commonly called the Thellusson Act), in stopping the intended accumulation of a large part of the trust-fund, the directions to execute an entail must be held to have taken effect as at the date of the application of the said Act, and the claimant is entitled to have an entail executed in her favour, with right to the rents, profits, issues, &c., all in terms of her claim. (6.) Or otherwise, the claimant is entitled to have an entail executed as claimed, with right to the rents, issues, profits, &c., all as claimed, and that in respect of the statute, 11th & 12th Vict., c. 36.

III. The Countess Flahault claimed, 1. To be ranked and preferred upon the fund *in medio* for one-half of that part of Viscount Keith's succession falling to his children, in name of legitim; or for the whole legitim fund, in the event of Mrs Villiers electing to accept of her provisions under Viscount Keith's second marriage-contract and testamentary settlements, or not being found entitled to any share of the legitim. 2. To be ranked and preferred on the fund *in medio* for one-half of the rents, or accumulations of the heritable property which belonged to Viscount Keith, and fell under the Thellusson Act, from the expiry of twenty-one years after his Lordship's death; or to the whole of said rents, produce, and accumulations, in the event of Mrs Villiers electing to accept of her provisions under the second marriage-contract and testamentary settlements, or not being found entitled to any share of said rents and accumulations.

She pleaded;—(1.) That, as one of the two children of the late Viscount Keith, she was entitled to be ranked and preferred for legitim, and that she was not barred from claiming her legitim, and the accumulations, by the contract of marriage between her father and mother, the late Viscount Keith, and Miss Jean Mercer, or by his Lordship's testamentary settlements, or otherwise. The claim of Mrs Villiers was not maintainable with reference to the deeds and statutes founded on.

IV. The trustees claimed the whole fund *in medio*, for the purpose of being applied in terms of the still subsisting appointments and purposes of the trust-settlements, and pleaded;—"1. As the trust-disposition and other deeds were valid and effectual, and as the purposes of the trust were not yet fulfilled, the claimants were entitled to the whole fund *in medio*. 2. The claim of the Baroness Keith and Nairne was barred by the express discharge and renunciation of her right to legitim, executry, and other claims contained in the antenuptial marriage-contract of her parents. 3. The claim of Mrs Villiers is, as stated, incompetent and unfounded, with reference to its various hypothetical and inconsistent alternative branches. 4. The claims to *jus relictæ*, legitim, and accumulations respectively made by the Dowager Viscountess Keith, and the Honourable Mrs Villiers, are all discharged or excluded by the deeds condescended on. 5. More particularly, such claims at the instance of Viscountess Keith and Mrs Villiers are, in the circumstances above stated, discharged and excluded by the marriage-settlements executed on the occasion of Lord Keith's second marriage, the import and effect of which settlements fall to be determined according to the law of

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England, the *lex loci contractus et domicilii* of both the contracting parties. 6. At all events, none of the opposing claimants can maintain the claims stated by them, without deducting or collating the provisions settled upon them respectively by the several marriage-contracts of the truster. 7. The claims of all the claimants are barred by their homologation of Lord Keith's deeds of settlement, and by their acquiescence in the trust-management following thereon, which proceeded on the footing that no such claims existed, or required to be provided for. 8. Generally, the claims made by the other claimants are not, in the circumstances, maintainable with reference to the terms of the statutes founded on by them, and the deeds before-mentioned. 9. At all events, they are inconsistent with their taking the benefit under Lord Keith's marriage-contract and settlements."

The Lord Ordinary, on 26th May 1855, pronounced the following interlocutor: — " Finds, 1st, That there has been no such homologation of the trust-settlements of Lord Keith, or of the trust-management following thereon, on the part of the Dowager Viscountess Keith, or of the Baroness Keith and Nairne Countess Flahault, or of the Honourable Mrs Villiers, as to bar them from stating their respective claims, in so far as these are otherwise competent and valid: Finds, 2d, That the claim of the Dowager Viscountess Keith for *jus relictæ* is not barred or discharged by her marriage-contract of 8th January 1808, nor by her acceptance of the testamentary provision under the general settlements of Lord Keith in 1817, but that she must make her election between her said provision and her *jus relictæ*, she being first enabled to make such election advisedly by receiving from the trustees of Lord Keith due information in regard to his Lordship's moveable estate: Finds that the claim of *jus relictæ* extends to one-third part of the moveable estate of the said Lord Keith, *deductis debitis*, and that, in the event of the Dowager Viscountess electing to take her *jus relictæ*, she must repeat or impute in satisfaction thereof, *pro tanto*, the amount of the testamentary provision which she has already received: Finds, 3d, That the Baroness Keith and Nairne Countess Flahault, the only child of Lord Keith by his first marriage, is not barred from claiming legitim by the terms of the antenuptial marriage-contract between her parents in 1787, nor by the terms of the discharges granted by her on receiving payment of her succession under that contract; and that, in a question with her father's trustees, she is not bound to collate or impute, in satisfaction of her legitim, the sums so received by her under the said contract: Finds, 4th, That the Honourable Mrs Villiers, the only child of Lord Keith by his second marriage, is not barred from claiming legitim by the terms of the antenuptial marriage-contract of her parents in 1808; and that, in a question with her father's trustees, she is not bound to collate or impute, in satisfaction of her legitim, the provisions in her favour in said marriage-contract; but reserving for subsequent discussion any question of collation between the Countess Flahault and Mrs Villiers, if hereafter raised: Finds, 5th, That the trust-disposition and settlement of Lord Keith, taken along with his English will and deed of conveyance, form a general and comprehensive settlement of his whole heritable and moveable estate, and that the Honourable Mrs Villiers cannot take benefit under that general settlement and at the same time take her legitim by the operation of law, but must elect between her succession under the said deeds forming the general settlement and her legitim, she being first enabled to make such election advisedly, by receiving from the trustees of Lord Keith due information in regard to his Lordship's moveable estate; therefore sustains the claim of the Dowager Viscountess Keith for *jus relictæ* if she so elect, subject to repetition and imputation of her said provision, and sustains the claim of the Baroness Keith and Nairne Countess Flahault, and the claim of the Honourable Mrs Villiers, if she so elect, respectively, to that portion of Lord Keith's estate divisible as legitim, sub-

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ject to the said qualifications: Finds, 6th, That the directions in the trust-deed of Lord Keith, for accumulating the rents, profits, and issues of his estate, in so far as it consisted of heritable property in England, or of moveable property, wherever situated, are null and void under the Thellusson Act, the 39th & 40th of George III. cap. 98, from and after the period of twenty-one years from the death of Lord Keith, who died in March 1823: Finds, That the said directions for accumulation of the rents, profits, and issues of Lord Keith's heritable estate in Scotland, are null and void under the Thellusson Act, and under the Act 11th & 12th Victoria, cap. 36, sect. 41, whereby the exception in the Thellusson Act of dispositions respecting heritable property in Scotland is repealed, and the said Act declared to apply to heritable property in Scotland; but that the same are null and void only from the date of the said Act of Victoria (14th August 1848): Finds, 7th, That the Baroness Keith and Nairne Countess Flahault, and the Honourable Mrs Villiers, are entitled, equally between them, to the whole of the accumulations of the said heritable and moveable property, which have become void and null under the Thellusson Act and the said Act of Victoria, from the respective periods above stated, and in time coming: Therefore sustains the claims of the said Baroness Keith and Nairne Countess Flahault, and of the Honourable Mrs Villiers, to the said accumulated rents, profits, and issues, from the periods aforesaid, and in time coming, equally between them: Finds, 8th, That the trustees of Viscount Keith are not, *in hoc statu*, bound to execute an entail in favour of the claimant, the Honourable Mrs Villiers, as craved by her, but under reservation of her claim to have such entail executed when the trustees shall be in a condition to execute it according to the directions in Lord Keith's trust-deed, and of all answers thereto: Appoints the cause to be enrolled with a view to farther procedure in conformity with these findings: and reserves all questions of expenses." *

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* "NOTE.—The Lord Ordinary has not felt much difficulty in disposing of the question involved in the first finding. The plea of homologation or acquiescence was strongly pressed by the trustees, but it does not appear to the Lord Ordinary to be well founded under the circumstances. When such a plea is urged in bar of claims for their legal rights on the part of a widow and children, it must be clearly made out that the acts of homologation or acquiescence founded on were done in the knowledge of their rights, and of the value of the estate to which these rights related; and the Court have been in the practice of refusing effect to the plea of homologation where such knowledge was not established. If the legal rights were discharged by the deeds (a point which is separately disposed of), the question of homologation does not arise; and if they were not discharged by the deeds, then it was the part of the trustees to give full information, and to obtain, if the claimants were so disposed, a complete and valid discharge. The decision of the Court in the case of Ross v. Masson, 3d February 1843, 5 Bell and Murray, p. 483; and particularly the observations of the Lord Justice-Clerk, to the effect that this sort of plea is inadmissible on the part of the trustees of the husband and father, are directly in point. His Lordship says, 'the first duty of the trustees is to make themselves acquainted with the legal claims of widows and children. If these have not been discharged, the trustees must either obtain duly and properly such a discharge, or, as representatives, they are holding for the widow and children, who have legal claims to certain portions of the funds.' Lord Moncreiff, concurring with the Lord Justice-Clerk, says, 'The trustees are to be considered as managing for the widow, with the view to her ultimate election.'

"The claim of the Dowager Viscountess to her *jus relictæ* is not discharged by her marriage-contract, where there is not only no reference to her Scottish right of *jus relictæ*, which cannot be discharged by inference or implication merely, but where the terce is discharged, while the *jus relictæ* is not mentioned, a circumstance which the Lord Ordinary considers of importance, as shewing that her rights, accord-

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All parties reclaimed, and the case was argued at great length on the authorities referred to in the Lord Ordinary's note, and on the grounds there mentioned, and noticed in the opinions of the Court.

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ing to Scottish law, were in the view of the parties and within the scope of the deed. The effect given in England to clauses in such terms as those of this marriage-contract, even apart from the specialty arising from the introduction of the terce, is well explained in White and Tudor's Cases, vol. i. p. 247. But, taking the whole clause together, it seems plainly applicable to the claims of the widow against the heritable estate of her husband, and not to her *jus relictæ*. It was not seriously disputed that the Dowager Lady Keith must elect between her testamentary provision and her *jus relictæ*, and that, if she elect to take her legal right, she must repeat or impute the provision under Lord Keith's settlement, which she has already received.

"The construction of the marriage-contract of Lord Keith and Miss Mercer, the parents of Countess Flahault, as regards her claim for legitim, is attended with great difficulty. The Lord Ordinary has carefully considered this deed with reference to the authorities, and is of opinion that her right of legitim is not discharged by the deed.

"She is the heir, and the only child of the marriage. She takes nothing under the last settlements of her father, and is excluded from succession to the landed estate directed to be entailed. If the words of the marriage-contract do not discharge her right of legitim, then the subsequent discharges granted by her on receiving the sums paid her by the trustees, cannot have that effect, as there was no intervening consideration, and as the words of acknowledgment and discharge in these documents only extend to the sums received, and cannot prejudice her right to legitim if otherwise valid. Indeed, the very able arguments in regard to this question of discharge, were on both sides directed almost entirely to the terms of the marriage-contract.

"The legitim, or *legitima portio*, being that portion of the father's moveable estate which the law awards and determines as the 'bairns' part,' is founded on the natural obligation of parents to provide for their children, and arising *ex lege* from the child's relation to the parent, the right to legitim is so conformable to the law of nature, and so clearly recognised by positive law, that it cannot be discharged by presumption or conjecture, Stair, 3. 8. 45. Ersk. 3. 9. 23. Bankton, 3. 8. 16. In construing a deed said to contain a discharge of legitim, the presumption is against the discharge, and the words importing discharge must be clear and explicit. If, when read along with the whole deed, and by the light afforded by the structure and relative phraseology of the deed, the words founded on can reasonably and fairly bear a construction consistent with the claim of legitim, that construction ought to be adopted.

"Now, such a construction may be put on the marriage-contract of 1787, in so far as regards the heir of the marriage.

"The words more immediately to be construed are, 'which portions above mentioned provided to the children of this marriage in the respective events before specified, are and shall be in full satisfaction to them of all bairns' part of gear, legitim, executry,' &c., and it is necessary to consider the previous structure and language of the deed, in order to ascertain whether these words so apply to the Countess Flahault, and to her succession as heir of the marriage, as to discharge her legitim. Is she, within the meaning of this clause, included in the phrase, 'the children of this marriage,' or being the heir of the marriage, is she beyond the reach of the clause? Is her succession of L.16,000 one of the 'portions above mentioned?' Is it provided to her in any of the 'respective events above specified?'

"That the words 'children of the marriage' may include the heir, cannot be disputed. It was so decided in the case of Maitland v. Maitland, 14th December 1843 (6 B. and M., p. 244.) But whether in any particular deed they do include the heir or not, is a question to be resolved on consideration of the whole deed.

"In the earlier part of this marriage-contract, and while dealing with a sum of L.10,000, afterwards included in the sum of L.16,000, the words, 'provisions to children of this marriage,' seem to be used generally, and may include all the children. But afterwards, when specially dealing with the whole sum of L.16,000,

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the distinction between heirs of the marriage and children of the marriage, is clearly brought out. The word 'children' in the succeeding part of the deed, with reference to this sum, does not include the heir.

"Lord Keith binds himself to provide and secure on land, or other sufficient security, L.16,000, which he destines, 1st, to himself, and the sons of the marriage one after another, and their heirs; 2d, to his sons by any subsequent marriage, and their heirs; 3d, to his daughters by this marriage, and their heirs, the eldest succeeding without division, whom all failing, to his own heirs and assignees whatsoever. This destination is not confined to the children of the first marriage, for a son by a subsequent marriage might have succeeded: Then follows an express declaration, that the said sum of L.16,000 is provided to 'the heirs of this marriage,' not only under burden of the provision to the widow, but also 'under the burden of suitable portions and provisions to the children of this marriage, or their descendants, other than the heir of the marriage succeeding as aforesaid, which provisions are to be made and proportioned by Lord Keith at any time of his life.' Here it is to be observed, that the heir of the marriage takes the L.16,000 as a succession (the taking being described as 'succeeding as aforesaid,') not as a portion, while the children of the marriage other than the heir are to be provided with 'suitable portions and provisions to be made and proportioned by Lord Keith,' and which are secured by being created a burden on the succession of the heir of the marriage. What the heir of the marriage takes is a sum provided and secured, to which he or she succeeds; what the children of the marriage other than the heir take, is a suitable portion allotted by the father and charged upon the succession of the heir. Then follows a clause providing for the failure, on the part of Lord Keith, to make the provisions for the younger children effectual, by allotting 'suitable portions;' and throughout this clause, the distinction between the heir of the marriage and children of the marriage other than the heir, is carefully preserved. Then follows another clause, providing for the event of the exclusion of the daughters of the first marriage from their succession, by the birth of an heir-male of a subsequent marriage, declaring that, in such event, one daughter shall have L.5000, two daughters L.8000, and three or more daughters L.10,000, by such proportions and divisions as Lord Keith might think fit to make; and failing such division, the said sums, 'in the respective events foresaid,' shall fall and divide equally among them, and 'which provisions in the events above mentioned,' are payable at the first term after Lord Keith's death, with interest of the 'said portions' from the said term of payment. After this comes the particular clause above quoted, from which it is said the discharge of legitim by the heir of the marriage is to be gathered: and the words of the clause must be construed, with such aid as can be obtained from the previous part of the deed.

"But throughout this deed it is plain, 1st, that the term 'portion' is not applied to the whole sum of L.16,000, nor to the succession of the heir of the marriage; 2d, that the discharge by the children of the marriage is in respect of the said portions provided to them, while these portions constitute not the succession of the heir of the marriage, but the 'suitable portions' forming the burden imposed on that succession; and, 3d, that the portions so provided, and in respect of which legitim is discharged, are provided 'in the respective events above specified,' these words being applicable to the previous provision in regard to children other than the heir, and not applicable to the succession of the heir.

"On these grounds, and without questioning the rule laid down in the case of Maitland, where, with reference to the terms of that deed, the heir was held to be included among the children of the marriage, the Lord Ordinary is of opinion that, looking to the very peculiar structure and phraseology of this contract, the legitim of Countess Flahault is not discharged.

"In regard to Mrs Villiers' claim of legitim, there seems to be really no ground on which it can be maintained that it has been discharged by the marriage-contract of her parents.

seventh plea in law. The Lord Ordinary finds that no effect should be given to that plea as regards any of the three claimants here, viz., the Dowager Lady

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"The question of collation or imputation of the marriage-contract provisions must next be considered. It is a question of extreme nicety, and the circumstances under which it arises should be steadily kept in view. There are only two children of Lord Keith, and, of course, only two parties interested in the legitim. Neither of these children, who are heiresses-portioners, have hitherto stated the plea of collation or imputation of provision, and both concurred in maintaining the proposition that no such collation or imputation can be enforced. The plea is urged only by the trustees of Lord Keith, not for the purpose of distributing the legitim, in which they are not interested, but for the purpose of increasing the dead's part.

"The Lord Ordinary, after some hesitation, is of opinion that the plea, so urged, is not well-founded, and that neither of the sisters is bound to collate her marriage contract provision, or to impute it *pro tanto* in satisfaction of her legitim.

"*Collatio bonorum inter liberos*, has been introduced into our system of jurisprudence from the Roman law, for the purpose of preserving equality in the distribution of the legitim, (Dig. Lib. 37 cap. 6); and it is to be observed, 1st, That it applies to the distribution of legitim; and 2dly, That it is *inter liberos* only, and for the purpose of creating equality. There is no principle to support the application of collation to the ascertainment of legitim; it is only legitimately applicable to the distribution of legitim. In other words, collation prevails among the claimants competing for legitim, and has no place beyond the sphere of that competition. It is so laid down expressly by Lord Stair (B. 3, T. 8, sec. 45, 46) who says, 'Collation is only a remedy introduced in law to keep equality among the children, who have an equal interest in their father and his moveables.' Mr Erskine says, 'For preserving an equality in the distribution of the legitim among the younger sons entitled to it, we have adopted the doctrine of the Roman law,' (B. 3, T. 9, sec. 24;) and again, 'as this kind of collation was introduced that equal justice may be done to all who have a right to the legitim, it does not affect the rights of third parties,' (B. 3, T. 9, sec. 25.) Accordingly it has been decided, (Ross v. Kellie, 27th February 1627, Mor. 2366; Trotter v. Rochead, 12th January 1681, Mar. 2375; and Lady Balmain v. Glenfarquhar, 11th December 1719, M. 2378,) and is stated by all the authorities as settled, that a child is not bound to collate in a question with the widow so as to increase the *jus relictæ*. Lord Stair says, 'Collation hath no place as to the wife;' and again, "it was not introduced to keep an equality between the wife and the children;' and Erskine explains the law in the same manner, both in his Institutes and his Principles. (Prin. 3, 9, 10; Inst. *ut supra*.) So, in a case reported by Lord Kilkerran (Justice v. Justice's Disponees, 10th November 1737, M. 8166,) it was found that an heir is not obliged to collate heritage with disponees, because 'collation is a privilege personal and peculiar to the executor-at-law, and to no other.' This related to a collation by the heir in heritage, but the principle of restricting it to its appropriate sphere was fully recognised. In like manner, and for the same reasons, collation does not take place as to the dead's part. This was at one time doubted, but it is now so decided. If there be no demand for collation by a child entitled to legitim, then a trustee, or residuary legatee, of the father seeking to increase the dead's part, cannot enforce collation. This was expressly decided in the case of Wright's Trustees (Clark v. Burns and Stewart, 27th January 1835, 3 S. and D. 326,) where Lord Moncreiff laid it down as law, that 'collation does not take place as to the dead's part;' and in that part of his Note the Court unanimously concurred, though the Lord Justice-Clerk and Lord Medwyn differed on another point. In deciding the well-known case of Hog v. Lashley in 1804, Lord Eldon says, 'collation is only between those entitled to legitim. (Paton's App. Cases, v. 4, p. 642; and Lord Corehouse, in the Note to his judgment in the case of Andrews v. Sawer, 2d March 1836 (14 S. and D. p. 589,) says, 'if the defender is not entitled to legitim, no question of collation can occur in this process.' The effect of the defender not being entitled to legitim in the case of Andrews v. Sawer would have been to have only one claimant, and thus to exclude collation. In other particulars, this opinion of Lord Corehouse in Sawer's case, has been de-

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Keith, the Countess Flahault, and the Honourable Mrs Villiers. There was not much argument upon that point, and I shall content myself with expressing my entire concurrence with the interlocutor of the Lord Ordinary.

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prived of authority by the decision in Fisher v. Dixon; but in regard to limiting the plea of collation to those entitled to legitim it remains unshaken.

"But the decision in the case of Lord Breadalbane against the Marquis of Chandos, 20th January 1836, (14 S. and D. p. 309,) affirmed in the House of Lords, 16th August 1836 (2 Sh. and M'L. 377) is completely in point, and of the highest authority, having been a unanimous decision of the Court of Session, affirmed without hesitation by the House of Lords, the Lord Chancellor and Lord Lyndhurst concurring in the judgment. This decision settles the point that *collatio bonorum* is a plea *inter liberos*, and in distribution of legitim, and not a plea which can be maintained against a child by a party not sharing the legitim. It also decides that if there is no collation there is no other principle to support a plea of imputation of marriage-contract provisions to legitim.

"It is true that a different decision was pronounced in the House of Lords in 1726, in the case of Nisbet v. Nisbet, where the judgment of the Court of Session was reversed, (M. 8181, and Robertson's App. 594,) and it appears that the reversal by the House of Lords in the case of Nisbet was not referred to in the case of Breadalbane.

"But after anxious perusal of both cases the Lord Ordinary has arrived at the conclusion that the decision in the case of Breadalbane v. Chandos is in accordance with the true principles of the law of collation, and is of the higher as well as of the more recent authority. The limitation of collation to the distribution of the legitim, and the rejection of the plea, when urged by a party not entitled to legitim, is in conformity with the opinion of Lord Stair, Mr Erskine, Bankton, and many previous decisions.

"But if collation be held inapplicable then there is no solid ground for the plea that the provision must be imputed to the legitim. There are, indeed, traces in our law of a doctrine of imputation or advancement, apart from collation; and the doctrine rests on presumed intention, the maxim being '*debitor non presumitur donare.*' But, so far as the Lord Ordinary has been able to discover, there is no authority for sustaining a plea of imputation towards legitim, where collation for distribution of legitim is not demanded, and where the plea of imputation is urged for the purpose of increasing the dead's part, and by a party not entitled to legitim. The principle on which the case of Nisbet was decided in the House of Lords does not clearly appear from the report; but if it be read as a decision, that, without collation, and in a question with a third party, a marriage contract provision is to be imputed to legitim, so as to diminish the fund of legitim, then it is without support from any other authority of weight, and is directly opposed not only to the judgment in the case of Breadalbane, but to the opinion of Lord Eldon in Lashley v. Hog, and to other decisions. The maxim '*debitor non presumitur donare*' does not really apply to such a case. The father is not, during his life, in the proper sense, debtor to the child in the legitim. He may invest his whole funds in land. Lord Fullerton so explains it in his opinion in Fisher v. Dixon, 16th June 1840 (2 Dun. p. 1121.) He says, 'The relation of father and child in regard to the legitim during the life of the father, is not a relation of debtor and creditor at all. The father is not the debtor in any debt, either present, postponed, or contingent.' This explanation was concurred in by Lord Murray, Lord Mackenzie, and Lord Medwyn. On the other hand, the provision in the present case was made by antenuptial contract, before there was, or could be, in any view a debt due by the father. In these circumstances, there is no room for the application of the maxim, '*debitor non presumitur donare,*' nor for the doctrine of presumed imputation or advancement resting on that maxim.

"Since, therefore, there is here no demand for collation *inter liberos*,—since collation cannot be demanded by one not entitled to legitim, and has no place as to the dead's part,—since the maxim, '*debitor non presumitur donare*' does not apply, and the presumption on which the plea of imputation rests is thus excluded, there are no grounds for holding that Countess Flahault or Mrs Villiers must, in a question with the trustees, impute their marriage-contract provisions to legitim.

The second finding of the Lord Ordinary relates to the Dowager Viscountess Keith's claim for *jus relictæ*. She is now represented by Mrs Villiers, who insists

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"The fifth finding in regard to the election by Mrs Villiers, between her right of succession under the settlements of Lord Keith and her legitim, is not inconsistent with the previous findings in regard to the marriage-contract provisions.

"It is quite settled, by the cases of Henderson, 1782 (M. 8191), of Collier, 6th July 1833, of Lord Breadalbane against the Duchess of Buckingham, 5th March 1840, and of Fisher against Dixon, 6th July 1841, that where there is a general settlement of the whole estate of the testator, a claim of legitim is incompatible with such settlement; and a child cannot approbate the settlement by taking under it, and at the same time reprobate the settlement by taking legitim. A claim of legitim is incompatible with a total settlement. Such a settlement carries everything, including dead's part and legitim, unless challenged as regards legitim, by one having right thereto. But the party challenging cannot take benefit under the deed challenged. The English doctrine of equitable compensation, founded on by the counsel for Mrs Villiers, does not appear to the Lord Ordinary to be applicable to such a case as the present (case of Streatfield and other cases in White and Truror's Leading Cases, vol. i. p. 233), and it would be hazardous to attempt to introduce such a doctrine, the true import and application of which we do not fully understand, into the adjudication of a question on which the law of Scotland has been decided with such authority.

"The application of the Thellusson Act to the directions to accumulate in Lord Keith's trust-deed, also raises a question of importance. The object of this statute, as clearly expressed therein, was to prevent the accumulation of rents, profits, &c., whether of real or of personal property, for any period longer than the life of the granter, or twenty-one years from his death. From the general enactment by which this object is effected, there is an express exception in section 3, where it is provided, 'that nothing in this Act contained shall extend to any disposition respecting heritable property in Scotland;' and in this case the application of the statute is to be considered, 1st, In regard to the moveable estate wherever situated, and the real estate in England; and, 2dly, In regard to the heritable property in Scotland.

"With respect to the moveable estate and the English real estate, the Lord Ordinary is of opinion that the directions to accumulate, in Lord Keith's trust-deed, are void under the Act, from 1844, being twenty-one years after the death of Lord Keith. The trust-deed of Lord Keith, and the deed of conveyance and last will relative thereto, contain, when read together, a conveyance to his trustees of the whole estate, real and personal, in England or Scotland, of the testator, for the purposes of the trust; and one of the leading purposes of this trust was to accumulate the rents and proceeds of the residue of the estate, and apply the accumulations in the purchase of lands in Scotland, to be entailed, as directed by the deed, on the heir-male of the body of Lord Keith when he should attain majority, and in other events on a different series of heirs, as fully explained and directed in the deed. In the event, which has occurred, of Lord Keith leaving no heir-male of his body, and of his daughter the Countess Flahault having no male issue, then the direction to the trustees was to accumulate the rents and proceeds during the life of Countess Flahault, and thereafter to entail the purchased lands in favour of the Honourable Mrs Villiers, and the heirs-male of her body, whom failing, the other heirs of entail mentioned in the trust-deed. The test of the application of the rule, or of the exception, in the Thellusson Act, is to be found in the character of the property of which the rents and profits are directed to be accumulated. In this case it was a 'residue' of a general estate, heritable and moveable, in England and in Scotland. Lands in Scotland are to be purchased with the accumulated fund, and the rents of the purchased lands, or in other words, the annual proceeds of the produce of the accumulations, are to be again accumulated till the period arrive for winding up the trust and executing an entail of the Scottish landed estate. But the nucleus or centre of the accumulations, around which the rents and proceeds are to be wound as they annually arise, was the residue of the whole estate conveyed to the trustees; and, except in so far as regards the heritable property in Scotland so conveyed, this process of accumulation appears to the Lord Ordinary

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in the claim. This is a very important point in the case. The Lord Ordinary has held that the Countess Dowager had not discharged her right of *jus relictæ*, and

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to be opposed to the enactments of the Thellusson Act, and therefore to be only legal for twenty-one years after Lord Keith's death. The decision in the case of Ogilvie's Trustees against the Kirk Session of Dundee, 18th July 1846 (8 Bell and Murray, p. 1229) in which the Thellusson Act was applied by the Court, though heritable subjects in Scotland were conveyed to trustees as part of a general estate, of which 'the balance' was directed to be accumulated for a hundred years, is not opposed to the view now expressed. In that case the trustees had a power of sale which it was necessary to exercise, in order to create the balance, which formed what the Lord President called 'the nest-egg of the accumulations,' or 'the foundation of the fund.' The attempt to bring the case within the exception in the Thellusson Act failed, and the rule of that Act was enforced. In the present case the foundation of the fund to be accumulated, and that which gave a character to the subsequent accumulations, was (in so far as it did not consist of heritable property in Scotland) within the rule of the Thellusson Act; and if, in order to bring it within the exception, it were only necessary to provide that the accumulated funds should be invested in land in Scotland, of which the rents should continue to be accumulated, this would substantially be to set at nought the provisions of the statute. It is not from considering the object to which the accumulations are to be applied, but from considering the character of the property from which the accumulations are to be gathered, that any just criterion can be obtained for applying the rule or the exception in the Thellusson Act, prior to the recent statute of her present Majesty.—(Hargrave on the Thellusson Act, p. 19).

"In regard to the validity of the direction to accumulate the rents of the heritable property in Scotland conveyed by Lord Keith to his trustees, it is necessary to consider the provisions of the 11 & 12 Victoria, cap. 36. Before the date of that statute, passed in 1848, for amendment of the law of entail, the Thellusson Act applied to moveable property in Scotland, as well as elsewhere, and to real property in England; but 'dispositions respecting heritable property in Scotland' were excepted. By the 41st section of the 11 & 12 Victoria, the exception is simply repealed, and the Act declared to apply to heritable property in Scotland.

"There was no new law—no original legislative provision—but merely the withdrawal from the Thellusson Act of an exception to its general principle, leaving the Act in unrestricted operation. The effect of this is, in the opinion of the Lord Ordinary, to stop the accumulation of the rents of heritable property in Scotland in the same manner as the accumulation of the proceeds of moveable property wherever situated, and of the rents of real property in England, is stopped by the Thellusson Act. The accumulation under Lord Keith's deed in so far as regarded his other property, stopped in 1844, by force of the Thellusson Act, and would have then stopped in regard to his Scottish heritage, but for the exception. The withdrawal of the exception let in the rule, and stopped from the date of the Act (1848) repealing the exception, that accumulation which till then had been sustained by the exception against the rule. The phraseology of the two statutes differs, and the difference, which is plainly not accidental, tends to support the view now taken. The Thellusson Act is entituled 'An Act to restrain trusts and directions in deeds or wills, whereby,' &c., and its enactments take the form of restrictions on dispositions or deeds, while the exception relates to 'dispositions respecting heritable property in Scotland.' But the Act of Victoria, which was framed to amend the law of entail, and which, in many of its provisions, related to deeds executed prior to its date, repeals the exception in the Thellusson Act, and extends and applies that Act not to 'dispositions respecting heritable property in Scotland,' which might to some extent have supported the construction that it applied only to deeds subsequently executed, but to 'heritable property in Scotland,' thus dealing, not with the deed which directs the accumulation, but with the property of which the rents are directed to be accumulated. When considered as a relative Act, qualifying and amending a previous Act, by withdrawing an exception which restricted its application, the 41st section of the Act of Victoria, may receive effect from its date in stopping accumulation of rents of heritable property in Scotland, without infringing

was not barred by her marriage-contract of 1808 from claiming it. The conclusion at which I have arrived, after repeatedly perusing that deed, is in accordance with that of the Lord Ordinary. I am of opinion that, under that deed, the claim of *jus relictæ* is not barred or discharged. The deed is English in its structure and phraseology. It is executed in England between parties residing there, and who were contracting marriage there. The place of Lord Keith's domicile at that time is not made matter of admission. The trustees say that he was domiciled in England. The respondents deny, or at least will not admit that: The deed deals with Viscount Keith's estates—English and Scotch.

The clause founded on as a discharge of the Dowager Viscountess Keith's right of *jus relictæ* does not, in terms, discharge that right. The term *jus relictæ* does not occur in it. Now this omission—looking to the history of the deed, it being so much of an English deed—is remarkable, almost irreconcileable, if the framer of the clause was aware of the existence of that Scotch right, of its nature and effect, and had intended to exclude it. I do not think any Scotch lawyer would have so framed the clause, intending to exclude it. But it was contended that the clause contained words broad enough to exclude the right, whether these words were used with the design to exclude it or not. I do not so read the clause. I think that the clause was intended to have effect, as excluding rights that might be competent under the Law of England or under the Law of Scotland, and I do not wonder that the framer of the deed, obviously framing it as an English deed in structure and phraseology, and between parties residing in England, and contracting marriage there, did take care to introduce a clause that would be operative, with reference to the law with which he was acquainted, and the rights that might arise under it. But the clause deals with both laws, and deals with them in separate branches of the clause. The lady accepts of her jointure, and in lieu and full bar and satisfaction of the dower or thirds, which at common law and by custom she can or otherwise might claim "from the estates of Lord Keith," and also in full "bar and satisfaction of the terce to which she is or otherwise might be entitled by the law of Scotland."

Here the law of Scotland is brought in, in contradistinction to something called

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the principles generally regulating the construction of statutes. The case of Urquhart against Urquhart, 20th February 1851 (Ses. Rep. vol. xiii. p. 742), referred to by the trustees, which related to a different section of the Entail Amendment Act, whereby a new and important enactment, altering the previous law, was introduced, after *litis contestation*, is not in point, both because the repeal of an exception is different from the enactment of a new law, and because of the peculiar terms in which the 41st section of the Entail Amendment Act is expressed. (See also Phillips v. Hopwood, 5 M. & R., p. 15, and Dwarris on Statutes, pp. 534, 535, and the case of Webster, 6th December 1853, under the 16th and 17th Vict., cap. 53).

"If the Lord Ordinary is right in holding the Thellusson Act, and the 41st section of the Entail Amendment Act, applicable to this trust, from the respective dates of 1844 and 1848, the trust-management will still continue till the proper period for winding up the trust; for the trust is well constituted, though the direction to accumulate fails: but the result will be, that the whole directions to accumulate after these dates being null and void, the two claimants, the Countess Flahault and the Honourable Mrs Villiers, as the only children of Lord Keith, will succeed equally to these subsequent accumulations, and to the lands purchased or directed to be purchased therewith. Apart from the directions to accumulate, there is no conveyance to defeat their right. They are the nearest of kin, and so entitled to take up the intestate succession in moveables; and they are heiresses-portioners, entitled to succeed to the landed estate not otherwise disposed of; so that, in the absence of any effectual conveyance of the residue, a case of intestacy arises, and to that intestate succession the claimants have right equally, whether it be moveable or heritable.—(Hargrave on the Thellusson Act).

"Other questions in regard to the amount of the fund *in medio*, to the calculation of interest, and to the application of the costs of trust-management, &c., remain to be disposed of; but on these it would be premature now to offer any observations."

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the common law or custom. Therefore the common law or custom is meant to represent something else than the law of Scotland, and the object for which the common law or custom is called in is to exclude the right of "dower" or "thirds"—terms not applicable to the law of Scotland. "Dower" is not a Scotch law phrase. It is an English law phrase, and, moreover, is a right as to the nature of which there is great discussion. It certainly is not a Scotch law phrase in the sense in which it is there used. We sometimes use the phrase "dower," but never as covering *jus relictæ*. "*Dos*" or "tocher" is a different thing, but that also is totally different from the right of *jus relictæ*. "Thirds" is not a Scotch law phrase; I have seen the word in a matter of teinds prior to the annexation, but in nothing else that I recollect of. Therefore, in the first place, these two things are not Scotch, but English law rights, and, in the next place, they are to be excluded, as what would, if not so excluded, be claimable "by common law or by custom;" and lastly, common law or custom are introduced as something different from the law of Scotland, because common law and custom are referred to in regard to one thing, while the law of Scotland is referred to in regard to another. The right in reference to which the law of Scotland is brought in is the right of terce, and the right of terce alone. Therefore, as I read this clause, it does not touch the right of *jus relictæ*, and, being of that opinion, I concur with the Lord Ordinary in thinking that that right is not excluded under this clause.

The next point raised by the interlocutor relates to the Countess Flahault's right of legitim—whether it is barred by the marriage-contract of Lord Keith with his first wife in 1787. That is the question attended with most difficulty in this case, and for some time I was doubtful as to the conclusion at which I should arrive in regard to it. But, upon full consideration, I have come to be of an opinion different from that of the Lord Ordinary. I am of opinion that the right of legitim claimed by Countess Flahault is barred—that is, that she is included, and her interest is included in that clause, which provides that the "portions above mentioned, provided to the children of this marriage in the respective events before specified, are and shall be in full satisfaction to them of all bairns' part of gear, legitim, executry, and every thing else they can ask or claim by and through the decease of the said George Keith Elphinstone, their father, in any manner of way, except further what he shall think fit to provide to them of his own good will." The Lord Ordinary has put his judgment on this part of the case upon the reading of the clause of exclusion as not embracing the heir or heir's interest in the L.16,000, and very much on the nature of that interest as being one of succession, and not properly of provision. That element of its being a right to be taken by succession, in consequence of the destination in that part of the clause in which Viscount Keith binds himself to secure L.16,000, in which the L.10,000 is declared to be included —was a part of the case that pressed my mind very much. But, upon looking to the whole deed—and I think that is the proper way to deal with it—it appears to me that, in whatever form, it is a money provision made in the marriage-contract for the whole children of the marriage. That the term "children of the marriage" may include and ought to include the heir, the Lord Ordinary holds to be in conformity with the case of Maitland. But he thinks that the peculiar structure and phraseology of this deed excluded that construction. I think this is a money provision for all the children, including the heir, and although the terms of it make it a provision to the heir, burdened with certain rights in favour of the younger children, yet it is a money provision under the marriage-contract to all the children of the marriage, to the heir as well as to the younger children. They are all benefited by it. They are all creditors under the contract. That being so, the object of the clause now founded on is to exclude the right of legitim from all the parties who benefit by that provision. There are no limiting words in it. It affects all the children alike. A good deal of ingenious criticism was made on the variation of phraseology in different parts of this deed. There is no uniformity such as can be founded on as giving a meaning to the word "portion" in this part of the deed, different from the word "provisions"—viz., for all the children of the marriage, and, therefore, I have come to the conclusion that the Countess Flahault, the heir of the marriage, claiming this right, is within the scope of that clause I have referred to, and that being so, I differ from the Lord Ordinary as to the result. I think that right is barred.

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The next point is in regard to Mrs Villiers' right of legitim. It stands on a different footing altogether. The contract of marriage is different, and I do not think it necessary to go into that point at any length, for I see no ground for holding that her legitim is discharged.

But there is a question raised as to collation and imputing. Now, I do not think this is a case for collation. What is contended for is collation, not *inter liberos*, but as between Mrs Villiers and the trustees. That is an application of the principle of collation which I cannot recognise. It is quite contrary to the principle described in Stair and Erskine, and as fully recognised in the first case of Breadalbane in 1836. No doubt the case of Nisbet, decided in 1726, has been cited as an adverse authority; and as reported by the late Mr Robertson, who dragged it to light from its obscurity, it would appear to be a decision adverse, in some points of it, to the principle recognised by others with which we are familiar. On no point decided in the case of Nisbet have we full or satisfactory accounts of the ground of decision. But, however that may be, the case slumbered for a hundred years, and has had no effect on the law since the date of its discovery. It has been disregarded. It goes for nothing; and at this distance of time, after deliberate judgments, such as that in the case of Bredalbane, we cannot allow such a case to upset the law established both before its decision and for a century afterwards. But if we were to decide this point of new, I would go along with the decision in the case of Breadalbane. Therefore, on principle, I am not much moved by the case of Nisbet. I hold that there is here no room for collation.

Then as to imputing, I do not know very well what that was meant to represent as different from collation. Lord Keith had no powers over the rights of legitim. As between the children, I do not see wherein it is different from collation.

The next finding of the interlocutor relates to Mrs Villiers' right to elect, and her obligations to elect in reference to her interest under the general settlement. Upon that point I think that Mrs Villiers must make an election. She cannot take both legitim and the rights under the general settlement. There is no want of authority for that, and I go entirely along with the Lord Ordinary in his remarks upon the cases of Fisher, Breadalbane, Henderson, and Collier. The point is not now debateable. There is a whole chain of authority in regard to it.

The only remaining question is, whether Mrs Villiers is bound to make her election now? Being of opinion that she cannot take both legitim and the rights under the settlement, I am also of opinion that if she now, with her eyes open, takes legitim, she necessarily repudiates the settlement. She proposes to take it in the meantime, and that afterwards, if she finds it to be for her interest, she shall undo that taking of it. That will not do, for the meaning of election is, that she shall make her election now. The legitim is now exigible. It may be very inconvenient for her to make her election now, but that is of no consequence to the case. It is very inconvenient for every one else that she should not make her election, nor is there any reason why she should not do so. She says she cannot ascertain the measure of her future rights, that they are uncertain, and that it is hard to compel her to make her election before she knows the full value of what her interest may be under the settlement, which depends on a variety of circumstances, such as the duration of lives and other contingencies. These are all contingencies attached to the interest. There are very few interests that do not have inconveniencies as well as conveniencies attached to them. But the parties who are put to an option must balance these advantages and disadvantages as they best can. I see no reason for allowing the proposal of Mrs Villiers, which is quite novel, and, I think, inconsistent with principle; and, therefore, I think that Mrs Villiers must elect now. She will be entitled to every information which circumstances will admit of, to enable her to exercise her choice to the best advantage.

The application of the Thellusson Act raises a difficult question. I have had previous occasion to consider it, and I have felt some hesitation as to my previous impressions being correct. The Lord Ordinary has come to a conclusion different from what I have arrived at. It is quite clear that the Thellusson Act strikes at accumulations so far as regards heritable property in England, and so far as regards moveable property in either country, from twenty-one years after the death of Lord Keith. That period expired in 1844. The trustees contend that the accumulations from 1844 till 1848 stood in one predicament, and the accu-

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mulations from 1848 in another predicament, because of the passing of the Act 11 & 12 Vict., cap. 36, in 1848, which, it is contended, affected the accumulations of the rents of heritable property in Scotland from the date of the passing of that Act. From 1844 till 1848, the trustees maintain they had a clear right to the accumulations. The subsequent accumulations they do not so strongly contend for. The whole question, therefore, now to determine is, whether this Extension Act of the 11 & 12 Vict. strikes at accumulations going on under the direction of deeds previously executed; that is to say, whether it is directed against accumulations accruing after 1848 under deeds previously executed, or whether it is only directed against accumulations to take place under directions to be given by deeds executed after the passing of the Act? Now both Acts are rather peculiar in their structure and expression. The Thellusson Act excepted from its operation dispositions of heritable property in Scotland. It had no effect, and was not intended to have effect, as regards such heritable property. But it affected heritable property in England, and personal estate in Scotland; and, as it was an alteration of the existing law, and of the powers of parties over their rights, it contained this clause (sect. 4):—"That the restrictions in this Act shall take effect and be enforced with respect to wills and testaments made and executed before the passing of this Act, in such cases only where the devisor or testator shall be living and of sound and disposing mind, after the expiration of twelve calendar months from the passing of this Act."

Now this clause consists of two parts—first, a positive enactment to make the restrictions of the statute apply to wills and testaments executed before the passing of the Act; but, while making the restrictions by direct and positive enactment extend to such wills, it qualifies that direct and positive enactment by saying it shall extend to such wills "only where the devisor and testator be living and of sound and disposing mind, after the expiration of twelve calendar months from the passing of this Act."

The object of that exception is very obvious: Such deeds being under the control of the parties themselves, could be altered by them, and the statute gave them time and opportunity for doing so. If they did not alter the deeds, then it was to be presumed that they acquiesced in this statute being operative on the succession. Without positive enactment, I am not prepared to say that it would have reached such deeds at all. But there is the positive enactment, and the qualification with reference to the deeds to which it is to apply; and the reason of the positive enactment was perhaps to make it clear that it would extend to such deeds. The qualification, again, was to prevent the extension from operating unjustly, and to enable parties to bring their estates within it.

The Act of the 11 & 12 Vict. extends the operation of the Thellusson Act to Scotland in this way:—"Whereas an Act was passed (setting forth the Thellusson Act by title), by which Act it is provided and enacted, 'that nothing in this Act contained shall extend to any disposition respecting heritable property within that part of Great Britain called Scotland,' and it is expedient that the provisions of the said Act should be extended to heritable property in Scotland." That is the preamble. Then it goes on — "Be it enacted, that the said provision and enactment of the said recited Act shall be, and the same is hereby repealed, and the said Act shall in future apply to heritable property in Scotland." That is to say, heritable property in Scotland shall be no longer excepted from the prohibition against accumulations for a period beyond twenty-one years, and that parties cannot any longer keep their property out of the operation of that Act. But there is no positive enactment, as in the Thellusson Act, that it shall extend to deeds that have been already executed.

The general principle for construing statutes is, that they are not to strike against deeds already executed, and rights already created, and interests already settled and vested. There is here no positive declaration that the statute shall strike against such rights and interests; nor do I see any words to force us into such a construction, which I think would be a great violation of the general principle of construction; nor do I see any reason why the same course would not have been adopted here as in the Thellusson Act, if the statute had been intended to have that effect. There is then no declaration that it shall extend to deeds already executed; and, in the second place, there is no declaration that parties shall have a

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time given them for altering such deeds. There being neither positive enactment nor power given to arrange peoples' affairs, if the enactment were to be extended by implication to deeds previously executed, it would be a new mode of dealing with such matters and such interests; and, therefore, I have come to the conclusion that, although the provisions of the Thellusson Act are now imported into Scotland as regards heritable property, it only ties the hands of parties for the future from the date of the passing of the 11 & 12 Vict., cap. 36, and does not take away accumulations that have been made and perhaps applied in the way directed by a testator during the period that has intervened between the date of his settlement — perhaps many years old—and the passing of the Act. It is not to interfere with the declarations and directions made by previous deeds. Upon that principle, I am of opinion that the Thellusson Act does not strike against these accumulations.

The seventh finding of the Lord Ordinary deals with the accumulated sums in so far as the Thellusson Act does strike against them;—that is to say, the rents of the heritable property in England, or the proceeds of personal estate in either country. Upon that point, I agree with the Lord Ordinary that the interest there goes to both of Lord Keith's daughters equally among them. It is to be regarded very much as intestate succession. The trustees have no power to apply it in any way. It is excluded by the Thellusson Act; and, in that view, I think it must be regarded substantially as intestate succession.

Lord Ivory.—I agree in all the points to which your Lordship has spoken, but on some of them not without great difficulty. I start with the claim of the Countess Flahault for legitim,—with reference to which we have to consider the marriage contract of 1787. I am not moved by the verbal and grammatical criticism raised upon the words "portion" and "provisions" with regard to their *situation* and correlation to similar words in the previous part of the deed. This deed is not constructed in such an artistic and accurate manner as to make that which is never a safe rule of construction applicable here. But I adopt your Lordship's plan, and read the whole deed. It is a mutual contract, and I read it to learn the intention of parties in regard to all the clauses, and more especially in regard to the clause as to the discharge of legitim.

In that broad and general view, the first thing that strikes one is that the parties contract for two sets of provisions—one for the widow, another for the children of the marriage. It is specifically set forth in the most express terms that the provisions are for the children of the marriage,—that is, for the whole children of the marriage; making every individual member of the family a creditor in his share of the provisions—making the provision itself a debt against the contracting party in whatsoever way it shall be distributed, in portions or shares, among the family. Now, with reference to this, there are two passages in the beginning of the deed most important to be kept in view. There are L.500 to be secured to the widow, and there is an obligation to purchase lands or give other security for L.10,000, and that at and against the term of Martinmas next to come, which sum s to be secured "for the said Jean Mercer, her liferent use allenarly, for security and payment to her of said annuity," "and afterwards for security and payment *ro tanto* of the provisions after-mentioned to the children of this marriage."

Now, I think too much importance in one point of view cannot be attached to he expression that the security of L.10,000 is to be *pro tanto* of the provisions to he children of the marriage, because when you come to the sub-dividing of the um of L.16,000, with which we have afterwards to deal under another clause, the ery outside provision, the largest amount of the provision for the children other han the heir is L.10,000. But that sum, under the operation of the words *pro anto*, does not exhaust the *cumulo* provisions for "the children of the marriage." t is only *pro tanto*: Beyond the L.10,000 nothing could go to a junior member of ie family. All beyond that is a provision to the heir of the marriage. That ust necessarily be held. So the deed begins. How does it end with reference this matter? "It is hereby agreed that all execution necessary shall pass upon is contract at the instance of" the trustees "for implement of the provisions ove mentioned in favour of the said Jean Mercer and the children to be proeated of this marriage. That is, the same provisions with which the deed started. is for L.10,000 *pro tanto* of the larger provision, and it is for the larger provin to the whole children of the marriage in so far as the *cumulo* provision must

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necessarily exceed the sum of L.10,000,—beyond which nothing is given to the children of the marriage other than the heir. There is another passage which implies very much the same thing. That portion of the deed to which I am now referring deals with the event of there being no son of the first marriage, but of a second marriage, and that there shall be vested in him the larger provision of L.16,000, under certain burdens in favour of the daughters of the first marriage: And how is the L.16,000, the larger provision, dealt with? In case the daughters and their descendants shall be excluded from the succession to the foresaid provisions by an heir-male of any subsequent marriage, then certain sub-portions are to be given to the daughters so excluded. The son is to succeed to the L.16,000 in the character of trustee for these provisions. But it is the marriage contract provision to "the children of the marriage" that the deed is dealing with. Accordingly, the clause, which certainly is of a peculiar structure, rests on an obligation of the father to provide and secure upon land, or other security, the sum of L.16,000 sterling, and "in which sum is comprehended and included the foresaid sum of L.10,000." Now, the L.10,000 was previously declared to be for payment *pro tanto* of the provisions afterwards mentioned, and of course the meaning of that is, that the L.16,000, in which the L.10,000 is included, is equally to be dealt with as a provision for "the children of this marriage." That being the case, we have two sets of provisions—first, the general provision for the family of L.16,000, and, second, the smaller provision for the junior branches of the family, and which is to be made a burden upon the party in whom is vested the L.16,000. But that does not exhaust the provisions for "the children of the marriage," for all that remains after these sub-provisions are carried out of it is as much a portion of the L.16,000 as that sum is a provision which *in cumulo* for the family is a debt due by the contracting parent, and as a provision for the children of the marriage is as much a provision for the heir of the marriage as for the other members of the family, whose interest is to be carved out of it. In fact, the making the sub-portions to the younger children a burden upon the larger sum is a mere mode of distributing the provisions for the family. But the heir of the marriage is not excluded from the position of a child of the family. As a child of the family he is to have certain rights as creditor under the marriage contract, and the shape in which these provisions are given, although it may be by *cumulo* investiture in the whole sum for the family, is substantially a trust for the heir and the other children. They are to get what the father has carved out for them, and the heir shall have the remainder.

If the deed had rested there, and we had had nothing to do with the verbal and grammatical criticism I have referred to, it is impossible, when you read the clause —"which portions above mentioned are and shall be in full satisfaction to them of all bairns' part of gear, legitim," &c., it is impossible to exclude the heir of the marriage there any more than the rest of the children. "The children of the marriage" are general words, which are all the more important to be considered in that light, because when the interests of the other members of the family are being dealt with, they are distinguished as the "children of the marriage other than the heir;" but when they are not so distinguished, then they embrace the whole children of the marriage.

It was argued, that "in the events foresaid" does not apply to the heir of the marriage. But he is just as much affected by the events which affect the other children as the other children themselves. In the first place, he would be affected as regards what shall remain to him of the L.16,000, by the father's exercise of the power of distribution, which power might be exercised to the full extent of the L.16,000, only giving to the heir what shall be a *bona fide* reasonable distribution. In the second place, he is affected by the special clause in the deed, which apportions the subdivisions according to the number of daughters, so that the balance resulting to the heir is just as much affected as the interests of the other children. But there is one position in which the Countess Flahault might have been the heir of the first marriage, and not had right to the L.16,000. If there had been a son of the second marriage, he is specified as the trustee,—as I have called the heir,—for holding the L.16,000. Failing the sons to be procreated of this first marriage, and the heirs of their bodies, the L.16,000 is to be invested in "the sons to be procreated of the body of the said George Keith Elphinstone, of any subsequent marriage, one after another, and to the heirs whatsoever of their bodies." Now

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there is a portion of the deed specially applicable to the daughters of this marriage being excluded by a son and heir-male of the second marriage. It gives them certain subdivisions out of the L.16,000. But the heir of the second marriage is not the heir of the first marriage, and if the heir of the second marriage had been the distributor of this L.16,000, every child of the first marriage would have had a provision carved out of it; and so the heir of the marriage, if you can call the eldest daughter "heir," in the sense used in this argument, equally with her sisters, would have taken this provision out of the L.16,000, in this case invested in the heir of the second marriage, and this clause of exclusion of legitim would have applied to every one of them. If she had been one of the three or four children, she would get the sub-portion appointed. If she had stood alone, she would have got the larger subdivision appointed her. But whether a larger or smaller provision, she would have been considered a child of the marriage, and as such her legitim would have been excluded. Now that case has not happened. But it is only by noting it that we arrive at the next position, the case of the eldest daughter of the first marriage, failing a son of the second marriage. In that substitution, does the eldest daughter of the first marriage, failing the heir of the second marriage, take as heir of the second marriage? Not at all. She takes by force of this destination, and distributes the L.16,000 according to the instructions of the deed. It is distributed among the children of the marriage, of whom she is one. If she had been alone she would have taken the L.16,000. But whatever she takes, whether she takes the whole, without the burden, or not, she equally takes as a child of the marriage, and equally comes within the operation of the clause.

An argument was raised as to the meaning of the words "which portions." (After minutely criticising the deed, his Lordship thought that the word was synonymous with provisions). Upon the whole matter, therefore, his Lordship continued, I am clearly of opinion that the legitim of the eldest daughter of the first marriage is just as much excluded as it would have been if there had been a son of the second marriage.

With regard to the Dowager Lady Keith's claim for *jus relictæ*, and the claim of Mrs Villiers for legitim, I say nothing. The Lord Ordinary has explained the grounds on which these provisions are to be dealt with, and I agree with him and your Lordship in adopting that view. Therefore we come to this shape of things, that if the legitim of the Countess Flahault is excluded, the whole legitim must go to Mrs Villiers, and if the widow takes the *jus relictæ*, that must be a third of the entire estate.

It is needless, if such be our judgment, to ask what shall be the duty of collation between the two sisters—which the Lord Ordinary has reserved, for the only sister being Mrs Villiers, there is no person to collate with, and nothing to reserve.

With regard to the imputing of the marriage-contract provisions, *pro tanto*, in satisfaction of the legitim claimed by Mrs Villiers, or the *jus relictæ* claimed by the Dowager Lady Keith, I see no ground on which it can be maintained. The case of Nisbet, as I understand it, is in the face of every case in the Scotch law before and after it, and there it has lain buried for nearly a hundred years, not affecting a single deed made during that time. But, moreover, it is a judgment incompatible with the principle on which the law of legitim and *jus relictæ* now rests. Therefore I am quite clear, that so far as the trustees claim this to be imputed, they are not entitled to have that claim allowed.

The next question is;—The Countess Flahault being excluded, and Mrs Villiers entitled to take her own legitim and her mother's *jus relictæ*,—both she and her mother having had benefits conferred on them by those deeds which operate a universal settlement of Lord Keith's estate,—can they have both? They cannot, and that by force of all recent decisions, some in the House of Lords, and many in this Court. Mrs Villiers cannot take legitim without repudiating the settlement. She cannot keep alive her interest in the settlement without repudiating her legitim; and as the distribution of the estate must be made at the testator's death, she must now,—getting information, no doubt, so as to enable her to deal with all the elements of her option,—make her election between the one or the other. As to her difficulty in knowing how the contingencies under the deed may affect her, that may be said of every contingency. She has information sufficient to enable her to make an election, if she knows that there is such and such a contingency, and is

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informed what is its value. She is not entitled to delay her election until she sees whether she is to be more benefited the one way or the other. She must elect now, and the parties interested are not to be postponed by her.

The only remaining point is in regard to the Thellusson Act. There, too, I have found difficulty, but I cannot agree with the Lord Ordinary. I am not sure whether it was not admitted in argument that the Thellusson Act did not apply to deeds but to accumulations. I am of opinion that the Act does not annul deeds as deeds containing such directions to accumulate. They are not vitiated from that fault. But the Act annuls the directions for accumulations. A deed executed before the passing of this Act containing such a direction to accumulate the Act does not say shall be null. Whether the accumulations had been already made or not, if they were made under a deed executed before the passing of the Act, the directions in the deed would have an end. That is perfectly clear on a reading of the words of the first clause, but, taking along with them section 4, we have a glossary which renders it inevitable to put such a construction on the Act. The words of section 4 are, "That the restrictions in this Act contained, shall take effect and be in force with respect to wills and testaments made and executed before the passing of this Act, in such cases only where the devisor or testator shall be living, and of sound and disposing mind, after twelve calendar months from the passing of this Act."

Now, that clause distinguishes between the different classes of instruments which the first clause dealt with. The first clause dealt with deed or deeds, surrender or surrenders, none of which are wills or testaments. They are other matters altogether, and accordingly follow these words, "will, codicil," &c. Thus the first clause embraces deeds *inter vivos* already existing, and under which rights are affected. It applies also to deeds *mortis causa*. Section 4 deals with the last only. It provides that wills and testaments, made before the passing of the Act, shall take effect and be in force only when the testator shall be living within so many months after the passing of the Act. They are testamentary deeds of a kind which have no substantive existence as operative rights in the lifetime of the testator, and, therefore, are dealt with in such a way as that the statute shall reach them if the party lives within a certain time and does not alter them. They were then held equivalent to being executed at the time of his death. Now, that satisfies me that, except as regards testamentary deeds, the first clause must have meant that deeds executed before the date of the Act were not to be affected by the Act. Section 4 satisfies me that testamentary deeds, though existing then, should not be operative against the provisions of the Act only where the party survived a certain time after the statute, because he had power to alter them, and is to be held as having made the deed every moment of his life. The deed is held to be of continuous date, and as only operative at the testator's death.

Now, does the Act of the 11 & 12 Vict. make any change upon the matter in the sense in which I have been dealing with it? It sets forth the Thellusson Act, and provides that it shall apply to Scotland, as it would have applied but for the exception in it, and, therefore, under all the conditions and restrictions as to the deed being a deed executed after the date of the Act. This is an extension of the Act. It takes away the exception. But it does not mean to put the direction for accumulations in Scotland on a different footing from what it was in England. I think that the Lord Ordinary is wrong in so far as, in reference to Scotch heritage, he has held that the power of accumulation is to stop from the date of the Act of Victoria. The deed in question was executed before the repeal of the exception, and there is nothing in the manner of the repeal to give it a retrospective and retroactive effect. As the case stands, the entail cannot be executed until the death of the Countess Flahault. Therefore Mrs Villiers cannot take anything under the directions of the deed. She is not an heir of entail until the very moment when the entail is ordered to be executed. It is not like the case of a trustee being directed to entail from this moment, and where the heir during the period that it is impossible to purchase lands gets the interest of the money. She has no interest or legal right until the time that the trustees are directed to execute the entail, and they are forbidden to execute it until the Countess Flahault dies. The effect of that is, that the accumulated rents (which are now made null by force of statute) belong to nobody. They are intestate, and therefore must go to the two daughters. I entirely agree with the Lord Ordinary upon that point, and also with the con-

cluding clause of his judgment, which is auxiliary to it, that the entail cannot now be executed.

That exhausts the whole matter in the interlocutor of the Lord Ordinary. The case must be put on the footing that Mrs Villiers must now elect, and we must remit to the Lord Ordinary to take all necessary steps for bringing to that election the necessary information.

Lord Curriehill.—I am relieved from the necessity of going into a statement of the facts, as the details have been correctly and lucidly set forth by your Lordship. This is a process of distribution of the estate of a Scotch nobleman, who died domiciled in Scotland in the year 1823, leaving a general trust-settlement *omnium bonorum*, for the purposes therein set forth. The estate consisted of moveable funds of considerable amount—of heritage in England—and also of heritage in Scotland. The truster directed that the annual proceeds of the residue of all the trust-estate should be accumulated until certain contingencies (which have not yet taken place) should be purified; and that then the lands left by him in Scotland, and other lands to be purchased with the proceeds of the other portions of the trust-estate, and with the yearly accumulations in the meantime of the free yearly proceeds of the estate, should be entailed on the series of heirs therein set forth.

The claimants are four in number—1. The trustees on behalf of the heirs of entail, and others to whom the trust-estate is provided; 2. The truster's widow, the Dowager Lady Keith (now represented by her daughter Mrs Villiers); 3. His eldest daughter (Countess Flahault), by a former marriage; and 4. Mrs Villiers, his daughter by his second marriage. So far as these three last parties cannot establish special claims, the trustees, as general disponees, are entitled to the whole trust-estate, and to entail it in terms of the settlement. But it is maintained by the other claimants, that the directions in the trust-deed are ineffectual—1st, as to the accumulations of the annual income subsequent to the year 1844, being twenty-one years after the truster's death, in virtue of the statute 39 & 40 Geo. III. c. 98, which accumulations are accordingly claimed as intestacy by his daughters as his legal representatives; 2d, as to one-third of his executry claimed by his widow (now by her representative) as *jus relictæ;* and 3d, as to another third of that executry claimed by his daughters as legitim. We have now to judge whether, or how far, these objections to the settlement, and corresponding claims by the legal representatives, the widow, and the children, of the testator, are well founded?

The first question is, how far the directions as to accumulations are affected by the Thellusson Act?

The objection founded on that Act does not apply to either the heritage or the moveables which were left by the testator at his death, or to the accumulation of the annual proceeds thereof for twenty-one years thereafter. It is urged only as to the accumulations from 1844. And there is no question that the objection is well founded as to the accumulation of the annual proceeds of the heritage in England, and of all the executry. This being the case, what becomes of these accumulations? The answer is, that, as no effectual direction has been made regarding them, they are held for the testator's legal representatives, according to the rules of intestate succession—that is to say, for Countess Flahault and Mrs Villiers. It was pleaded that, under the case of Ogilvie's trustees, and the principle there recognised, the party in whose favour the estate was directed to be invested should now be held to be in the same position as if that investment were now made; and, consequently, that Mrs Villiers, the party in whose favour, as institute, the entail, if it had been executed in 1844, would have been granted, should be preferred to these undisposed of accumulations. The distinction between this case and that of Ogilvie's trustees is this:—In that case the accumulation was directed to take place merely for the purpose of increasing the amount of the fund; and, at the period when the accumulation was to cease, the fund was to be invested. But here that is not the case. The trustees are forbidden to make any investment until the arrival of an event which has not yet taken place; and it is still a matter of uncertainty who will be the institute under the entail when that contingency shall be purified. In the meanwhile, neither Mrs Villiers nor any other person can claim this yearly revenue under the settlement; and, there being no direction at all regarding them to which effect can be given, these fall to the legal representatives, as intestate succession. And, as in taking it they do not contravene any valid or lawful direction of the trust-

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deed, the effect is not to place them in the position of defeating any such direction of the truster; and the plea of approbate and reprobate cannot be maintained against them.

But although this was the case as to the annual proceeds of the executry and of the English heritage subsequent to 1844, the case is different as to the annual proceeds of the Scotch heritage after that date, because the third section of the Act provides "that nothing in this Act contained shall extend to any disposition respecting heritable property in Scotland." Hence the trust-disposition and settlement in question (the settlement being in the form of a disposition, as is requisite in such cases by the law of Scotland) was effectual to convey the annual proceeds of the Scotch heritage, even after 1844, to the trustees for behoof of the heirs of entail. Such was the position of things in 1848, when the 11 & 12 Victoria was passed; and the question arises,—had this enactment the effect of defeating the right which the heirs of entail had previously acquired to these accumulations? It is a fundamental rule in the construction of statutes that they are not to have a retrospective effect, nor deprive parties of rights already acquired and vested in them, unless there are express words to that effect. In this statute there are no words to that effect. As to the yearly income for the period between 1844 and 1848, it was already a fund in the hands of the trustees, and held by them as belonging to the heirs of entail; and the statute cannot be construed as forfeiting their right to this realised fund, and transferring it to the legal representatives of the truster. And as to the yearly income for the period subsequent to 1848, the beneficial right to that income, although it was prospective, had also vested in the heirs of entail; and as there is nothing to lead to the inference that such a vested interest was intended to be defeated, the Act cannot warrantably be construed as having produced this effect. No doubt this Act, in several cases, enables the party in right of an entailed estate for the time to defeat the rights of some subsequent heirs. But in all these cases the power to do so was conferred in explicit terms; and that power, moreover, could be executed only under the authority of this Court, and with the express consent of a certain number of the heirs of entail next in succession. But the granting of such powers to an heir of entail in possession, and subject to such conditions, raises no inference that the legislature intended to create a forfeiture of the rights of all the heirs of entail, without any such authority, or consent, in favour of the legal representatives of the original entailer.

Having thus ascertained how far the amount of the trust-estate is affected by the Thellusson Act, the next inquiry is, how far is it affected by the *jus mariti* and legitim of the testator's widow and children? These parties are unquestionably entitled to claim these legal provisions, unless it be shewn that their claims are barred by binding transactions. For whatever difference of statement may appear in the record as to the testator's domicile at some early period of his life, all parties are agreed that he died a domiciled Scotchman. Being so, the succession to his estate is regulated by the rules of the law of Scotland; and according to these rules the widow is entitled to the *jus relictæ*, and the children to legitim, unless it be shewn that they are effectually barred from enforcing their rights.

The trustees object to the widow's claim for *jus relictæ*, in respect it is barred, as they say, by the testamentary provision made in her favour by the trust-deed itself, and also by the clause in the second contract of marriage of 1808, referred to by your Lordship.

If the Dowager Lady Keith had taken finally the testamentary provision in her favour in the trust-settlement, she and her representatives would have been barred from claiming a part of the trust-fund as her *jus relictæ*, because by insisting on such a claim she would have defeated, to a certain extent, the general conveyance of the trust-estate for behoof of the heirs of entail, and she could not be allowed so to approbate and reprobate that settlement. But she had the option of taking either her testamentary or her legal provision; and she did nothing to preclude her from exercising that option. She accordingly did exercise it, by claiming her *jus relictæ*.

There is more difficulty in the question, whether her claim is barred by the condition in her marriage-contract, that her jointure was "in lieu and full bar and satisfaction of the dower or thirds which at the common law or by custom" she might claim from her husband's estates? If the parties had been domiciled in

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Scotland at the date of that contract in 1808, I think there might have been considerable difficulty as to the effect of that clause, because in that case the rights as to which the parties were transacting could not reasonably be held to be any other rights than those which arise to the widow of a domiciled Scotchman by the law of his domicile; and if Scots parties in their contract of marriage provide a conventional provision in lieu and full bar and satisfaction of what they denominate the dower or thirds claimable by the widow at common law, or by custom, I would have difficulty in holding that the right, as to which they so transacted, was anything else than that third of the goods in communion which is claimable as the widow's share of the goods in communion at the common law and by the custom of Scotland; more especially, as in the case supposed, the condition would admit of no other rational meaning, because the parties could not reasonably be held to have been transacting for a discharge of rights arising at the common law, or by the custom, of some other country to which they did not belong. I was impressed with that notion from the first time I read that clause; and as, when the case came before me in the Outer House, I thought the record was not sufficiently explicit on this point, I, on 27th January 1854, appointed the trustees to explain their denial of Lord Keith's domicile in Scotland at the date of the second marriage; and on 22d December 1854 the record was opened, of consent of parties, in order that their explanation might be embodied in it. And according to the record, as it was finally closed, and now stands, the trustees, in the 15th article of their revised condescendence, sect. 4, explicitly aver that Lord Keith was domiciled in England at the date of his second marriage and of this contract in 1808; and also that the daughter of that marriage was born in England in 1809, while both her parents were domiciled in that country. Hence the objection which the trustees are now founding upon this marriage-contract must be dealt with on the footing on which it is thus explicitly stated by themselves. And, on the same grounds on which I might have read what the parties denominated the dower or thirds claimable by the widow by the common law and custom, as being the share of the goods in communion belonging to a widow by the common law and custom of Scotland, if they had been domiciled in Scotland, I now read these words as describing only some right which might belong to a widow by the common law and custom of England, and which could not have reasonably been intended by them to apply to a right arising to widows by the law or custom of Scotland, or any other foreign country to which they did not then belong. Dealing with that as the proper construction of the deed, I can have no doubt that it does not bar the *jus relictæ*, and on this ground I concur in the result arrived at by your Lordship.

It was argued that a conventional provision in a marriage-contract is to be presumed to have been made in satisfaction of all legal provisions. This is not the rule of the law of Scotland. It is not so at common law, even as to terce; and so the Court held, in the case of Lady Craigleith, 25th January 1681, Mor. p. 6540. But the Court, while they held such to be the common law, remitted this matter (as is stated in the report) for the consideration of Parliament; and it then passed this Act of 1681, cap. 10, which provides that in future such conventional provisions should be held to satisfy the right of terce. Even this statute, however, does not apply to *jus relictæ;* and as Erskine (3, 9, 16) puts it, that Act confirms what was the rule before as to the *jus relictæ*, which was held to be *ex preposito* omitted from the enactment.

Again, as to the claim for legitim, we must distinguish between the cases of Mrs Villiers and of the Countess Flahault.

As to the claim of the former, several questions have been raised. One is, whether the conventional provision in favour of the issue of the second marriage by the contract of 1808 bars her right to legitim? But there is in it no clause that can possibly have this effect No such condition is expressed. Nor can any such condition be implied in that contract. It cannot be presumed that parties were bargaining as to a right which never could arise under the law of England; in which country, according to the condition of the argument, the contracting parties were domiciled when that contract was entered into by them. Therefore, as to the claim of Mrs Villiers for legitim, there is no doubt that, if she chooses to take her legitim, she must get it.

But she cannot be allowed both to reprobate the testamentary settlement

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by taking her legitim, and so to that extent defeating the general conveyance for behoof of the heirs of entail, and also to approbate it by eventually taking the testamentary provision thereby made in her favour—viz. a life interest as institute or heir of entail, in the event of the death of the Countess of Flahault without heirs-male of her body. She must elect between that testamentary provision and her legal provision of legitim. And she must make that election *now*. She maintains that she is entitled to take her legitim now; leaving the trustees, in the event of the succession to the entailed estate opening to her in her lifetime, in terms of the settlement to retain the possession of it, in order to indemnify the future heirs, by accumulating for their behoof the yearly income during her lifetime. But she cannot thus escape from the operation of the rule of approbate and reprobate. There would be but little probability that by this means the future heirs of entail would be indemnified for what they would be deprived of, consisting of one-third of all the moveable funds, with twenty-one years' interest thereof from the time of Lord Keith's death. And, at all events, this proposal could not be adopted without contravening the express directions of the settlement as to the *time* when the entail is to be executed.

The next question as to Mrs Villiers' claim of legitim is, whether, although she is not barred by her conventional provision in the marriage-contract of her parents from claiming legitim, she is not bound to collate the sum she will receive under that provision? Whether or not the plea of collation could be maintained by any other child entitled also to claim legitim, does not require to be considered by us, because we are all of opinion that such is not the state of the present case. And *the trustees* are not entitled to plead collation; that plea being competent only in a question as to division of legitim among the children themselves, and not being competent to the executors or general representatives of the defunct, to the effect of increasing the dead's part. Upon this point my opinion so entirely coincides with that expressed by your Lordship, that I do not add a word to what you have already said.

The trustees reproduce this argument in a somewhat different form, by maintaining that Mrs Villiers must at least *impute* what she will receive in virtue of the conventional provision, as satisfying *pro tanto* the claim of legitim. I do not understand the practical difference between such *imputing* and collation. Upon that point I entirely concur in what has been stated by Lord Ivory. The legitim consists of an equal half, or a third, as the case may be, of all the free executry, as it exists at the time of the death of the defunct. No father has it in his power to set apart as dead's part more than one-half or one-third, as the case may be, of his free executry. Although the right of children to legitim may be barred or excluded altogether, either by transactions between their father and them, or by an onerous agreement between their parents in an antenuptial marriage-contract, yet, if legitim be still claimable by any one or more of the children, its amount must be always one-third or one-half of the free executry, according as *jus relictæ* is or is not claimable by a widow; and, in short, the amount of the legitim, when it is claimable at all, must always be equal to the amount of the dead's part.

The only remaining question is, whether the legitim belongs wholly to Mrs Villiers, or is divisible between her and the Countess Flahault? And what the solution of this question depends upon is, whether the clause in the contract of marriage between Lord Keith and his first wife,—declaring that the conventional provision therein made in favour of the children of that marriage should be in full satisfaction of their legitim,—applies to the existing case of there being only one child of that marriage. I think that it does; because, in so many words, the parties, whose claim of legitim is so barred, are declared to be *the children* of the marriage generally, without the exception of any of them; and also because the object of such conditions in marriage-contracts is to fix the amount of what the wife and the issue are to have right to claim from the estate of the husband and father, leaving all the rest at his own disposal. The party, in whose favour the discharge of the legitim is intended to operate, is the father himself, and not any one of the children; and it would be a strange result, if a condition intended to relieve the father's estate from a claim of legitim, should leave his estate still subject to that claim, and merely transfer the right to it to the heir of the marriage. Such a construction cannot be put on such a clause, unless it will not fairly admit of a more reasonable reading. I

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was prepared to go more fully into this question in consequence of the Lord Ordinary having been of a different opinion; but your Lordship has so entirely anticipated anything I had to say, that I shall simply content myself by expressing my concurrence in your observations.

Lord Deas.—Although the pecuniary interests of the parties in this case are large, the general principles of law involved in it (apart from the applicability of the Thellusson Act) are familiar to every Scotch lawyer, and it is unnecessary to enlarge upon them. The difficulties which occur arise only upon the special terms of the deeds. The most convenient way of dealing with the findings of the Lord Ordinary is, I think, to take them, as your Lordship in the chair has done, in the order in which they stand in the interlocutor; although, in regard to several of them, very little need be said, especially after the full and lucid exposition of them given in the Lord Ordinary's note.

1. As to homologation, I think it clear there has been none, by any of the parties, to bar their legal rights; and, upon this point, I have not a word to add.

2. The question whether the claim of the Dowager Viscountess Keith to *jus relictæ* is excluded by the terms of her marriage-contract of 1808, is a question upon which I do not think it necessary to resort to the law of England. The deed was, no doubt, executed in England, where the parties then resided. It is disputed whether Lord Keith was then domiciled there, but I do not consider the fact material, because Lord Keith was admittedly a Scotch nobleman, possessed of Scotch as well as English estates, and it is clear enough, on the face of the contract, that the object of it was to deal with the rights of the contracting parties in both ends of the island, and that they had a view to the law of both countries. When we come, therefore, to consider a complex clause, such as we have here, by which the *jus relictæ* is said to be excluded, the question whether one part of that clause applies to English rights and the other to Scotch rights, is a question not more fitted for English lawyers than for Scotch lawyers. It is a question we must decide for ourselves, in the Court where it arises; and, if decided in the affirmative, the further question—what is the effect of that part of the clause which deals with Scotch rights upon the Scotch claim of *jus relictæ*,—is still more clearly a question for our own consideration and decision.

Now, it appears to me, that the first part of this complex clause has no relation to Scotch rights whatever. The language of it is obviously not Scotch law language; and, if it had stood alone, I should have said that we ought to have the opinion of counsel learned in the law of England before judging of the meaning and effect of it. But it does not stand alone. It is followed by the words, "And also in full bar and satisfaction of the terce to which she is or otherwise might be entitled by the law of Scotland." Why here, and not elsewhere, speak of the law of Scotland, if this part of the clause was not alone to regulate the widow's Scotch law rights? And why specify the terce alone, in speaking of her rights by the law of Scotland, if this was not the only Scotch law right which was meant to be excluded?

If, then, the *jus relictæ* be not excluded either *in terminis* or by general words (of which I can see none), which plainly cover it, the claim must receive effect, subject to the qualification (which is not seriously objected to) of electing between it and the testamentary provision.

3. The question whether Lady Flahault's legitim is excluded by her father and mother's contract of marriage of 1787 is one attended with more difficulty. I confess that, from the first, I doubted the soundness of the Lord Ordinary's view upon this point, although I admit I was considerably moved by the able argument of the Solicitor-General. That argument was to the effect, that the L.16,000, which was intended to be invested in purchasing land for behoof of the heir, was dealt with throughout as if it formed already a landed estate to be burdened with the portions of the younger children,—that the clauses which refer to the L.10,000, as to be held for security and payment of the widow's annuity, " and afterwards for security and payment *pro tanto* of the provisions after mentioned to the children of this marriage," do not (as was assumed on the other side) mean in security and payment of the provisions of the widow and of the whole children, including the heir, but only in security and payment of the widow's annuity (which corresponded to that capital), and of the provisions to the younger children,—that, consequently, the

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clause in dispute, which excludes the legitim, is not the only clause in which mention is made, in general terms, of the portions or provisions of the children of the marriage without meaning to include the heir, and therefore that the clause in dispute connects naturally, according to the structure of the deed, with the previous clause relative to the portions or provisions of the younger children only, and which were to form burdens upon the provision of the heir.

But the strength or weakness of this argument, obviously, depends much upon whether, in the previous part of the deed, the L10,000 be really spoken of as *pro tanto* for security and payment of the widow and younger children only, or likewise of the heir. Now, it appears to me that the L.10,000 is spoken of as for security and payment of the provisions, not merely of the widow and younger children, but of the whole children of the marriage. Suppose no further sum had ever been set aside or made forthcoming, and that Lord Keith had executed no further deed relative to the younger children's provisions, which, in that case, could, at the utmost, not have exceeded L.6000, would the balance not have gone to the heir in security and payment *pro tanto* of the L.16,000 provision? Most clearly it would. And if this be so, then, until we come to the clause in dispute, the provisions to the children of the marriage are never spoken of, throughout the deed, without the addition of the words "other than the heir," except as meaning the provisions of the whole children of the marriage, including the heir.

The excluding words used in the clause in dispute, if taken by themselves, are plainly calculated to include the heir as well as the other children. This throws upon the heir the burden of showing that the words are used in a sense different from that which, in themselves, they naturally bear. This cannot be done by saying they are used in a similar restricted sense in other parts of the deed, for of that, if I am right in the remark just made, there is no instance. On the contrary, we have the same words used (twice over) in a previous part of the deed, where they plainly comprehend the heir. It follows that in that previous part of the deed the word "provisions" is used as comprehending the L.16,000 provided to the heir; and although it is subsequently stipulated that the L.16,000 is to be burdened with the widow's provisions, and with suitable "portions and provisions" to the children of the marriage, other than the heir succeeding to the L.16,000, the words "which provisions" are immediately afterwards used as descriptive of what had thus been called "portions and provisions," in a way which shows clearly that the writer understood these words to be synonymous. The word "portions" in this clause, therefore, could not form an antecedent to the word "portions" in the clause in dispute, in any other sense than as being synonymous with provisions. Nor can any other construction be gathered from the clause immediately preceding the clause in dispute; for there the word "portions" is used only with reference to the portions of the daughters of the marriage, and the words "the said portions" refer back to the words "which provisions," in the very same sentence, as being words of synonymous import. Then, as to the remark that the clause in dispute refers to portions provided to the children "in the respective events before specified," it is obvious that the portion of the heir of the marriage fluctuates according to events as much as the portions of any of the other children; and, indeed, in one event, viz, that of there being only daughters or a daughter of the marriage, and a son of a subsequent marriage, the heir of the marriage was not to take the L.16,000 provision at all. Had that event occurred, there could have been no doubt that the legitim of all the children of the marriage would have been excluded, so that what must be contended for is not that the word "children," in the clause in dispute, is to be read as "younger children," but that we are to read the clause as if it bore, after the words "which portions above mentioned, provided to the children of this marriage," the further words, "other than the heir succeeding as aforesaid." I see no authority, whatever, for inserting these latter words, which the makers of the deed did not insert for themselves. Without them the clause expressly excludes the legitim of every one of the children of the marriage in the event which has happened, as well as in the other events contemplated by the deed; and the clause must therefore receive effect.

4 and 5. The next two findings do not require, from me, any additional remark. With reference to the fifth finding, I agree with your Lordships, that Mrs Villiers must make her election, and that she must make it now.

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6. The sixth finding, in so far as it holds the Thellusson Act applicable to the accumulated rents of the Scotch heritable estates, raises a question of novelty and importance. It appeared to me, at an early period of the discussion, that the Lord Ordinary had arrived at a somewhat startling result, even upon a statute dealing freely, as the Rutherfurd Act does, with vested interests; and, although I have not been unmoved by the argument, I am satisfied, upon full consideration, that that result is not warranted by the terms of these statutes.

It is necessary, in the outset, to see precisely what was done by the Thellusson Act. That Act proceeds upon the preamble that "it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained." Then comes the enacting clause:—"That no person or persons shall, after the passing of this Act, by any deed or deeds, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so, and in such manner that the rents," &c., thereof shall be accumulated beyond the periods therein mentioned. The word "dispositions" is thus used in the preamble as a general term, comprehending the various deeds and writings specified in the enacting clause. Shortly, therefore, we may express the substance of the enactment by saying that it strikes against all dispositions of real or personal property made after its date, in so far as these may direct accumulations contrary to the provisions of the Act. The exception in section 3 is in corresponding terms:—"Provided also, and be it enacted, that nothing in this Act contained shall extend to any disposition respecting heritable property within that part of Great Britain called Scotland."

Had the Act stopped here, I am not prepared to say that any disposition executed and completed prior to the passing of the Act, would have fallen within its operation. At all events, I am not aware that the Act has been construed as applicable to every disposition, although in operation for many years, or (it might be) for centuries previously. That construction, no doubt, would be conclusive of the present case. But it is not countenanced by section 4 of the Act. That section applies not to all dispositions, but only to a certain class of what the Act treats as dispositions, namely, "wills and testaments made and executed before the passing of this Act;" and it enacts that the restrictions of the Act shall apply to these "in such cases only where the devisor or testator shall be living, and of sound and disposing mind after the expiration of twelve calendar months from the passing of this Act." If wills and testaments made by persons then living were to stand good, although directing accumulation contrary to the Act, unless the makers remained alive and of sound mind for twelve months after the Act, it would be a strong thing to suppose that dispositions which the makers had no power to alter, and which had already taken effect, were to be struck at by the Act. The object of section 4 obviously, I think, was to apply the restrictions of the Act to those dispositions—namely, wills and testaments—which were still within the power of the makers, if, after full time and opportunity, the makers did not choose to alter them.

If this be a sound view of the Thellusson Act, it follows that the Rutherfurd Act, if it reaches Lord Keith's directions as to his heritable estates in Scotland, does much more than wipe away, from and after the passing of the Rutherfurd Act, the exception contained in section 3 of the Thellusson Act. But are there sufficient grounds for holding that it does more? I cannot discover that there are. The Rutherfurd Act narrates the 3d section of the Thellusson Act,—repeals that section,—and enacts that the Thellusson Act shall, *in future*, apply to heritable property in Scotland. If the enacting words had been, shall, in future, apply to *dispositions* of heritable property in Scotland, I cannot see that there could have been room for doubt about the matter. But I do not think that, by repealing the exception, and saying shortly that the Act shall, in future, apply to heritable property in Scotland, there was meant anything different than if the full phraseology of the excepting clause repealed had been adopted by saying that the Act shall, in future, apply to *dispositions* respecting heritable property in Scotland.

A construction which strikes against vested interests is not readily to be adopted in preference to one which saves them, and certainly not if this last be the natural construction, which I think it is here. Indeed, if the other construction were adopted, I think the consistent result would be, that the Rutherfurd Act would apply, whether

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the disposition had been made and executed before or after the passing of the Thellusson Act, and that the accumulation would be struck at from and after the lapse of the period prescribed by that Act, reckoning from the death of the granter, and not merely from and after the passing of the Rutherfurd Act. But the Lord Ordinary does not propose to carry his construction that length, and the view he takes is one which, I think, cannot be supported.

7 and 8. The remaining two findings do not require, from me, any observations; and, upon the whole, I concur in the views expressed by your Lordships, which will be best carried into effect by recalling and remodelling the interlocutor, although, with the exceptions which have been noticed, the judgment will be substantially an adherence.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor of the Lord Ordinary: And, 1st, Find that the claim in respect of legitim on the part of the Baroness Keith and Nairne, Countess Flahault, is excluded by the terms of the antenuptial contract between her parents in 1787: Repel the same accordingly, and decern: 2d, Find that the claim in respect of legitim on the part of the Honourable Mrs Villiers is not excluded by the terms of the antenuptial contract between her parents in 1808, but that the said claim is incompatible with the terms and provisions of the trust-disposition and settlement of Lord Keith and of his relative English will and deed of conveyance, which deeds constitute an universal settlement of his Lordship's whole heritable and moveable estate; and therefore, that the said Mrs Villiers must now elect between her legal provision of legitim and the testamentary provisions made and created in her favour under the said universal settlement, she being first enabled to do so advisedly by receiving from the trustees of Lord Keith all due and necessary information, in so far as not already given, and within their power to give: 3d, Find that the claim in respect of *jus relictæ* originally made on the part of the late Dowager Viscountess Keith, and now insisted in by her daughter the said Mrs Villiers, as in her right, is not excluded by the terms of the foresaid antenuptial contract 1808, but that the said claim is incompatible with the terms and provisions of the foresaid universal settlement of Lord Keith's whole heritable and moveable estate, and therefore, that the said Mrs Villiers, as in right of her said mother, must now elect between the said legal provision of *jus relictæ* and the testamentary provision in her mother's favour made and created under the said universal settlement, she first receiving all due and necessary information as said is from the trustees, in order that she may be enabled advisedly so to do: 4th, Find that the said Mrs Villiers, both as regards her own claim of legitim and as regards her mother's said claim of *jus relictæ*, is not barred by homologation or otherwise, whether on her own part or on the part of her said mother, from now insisting on her right to elect as said is, or from making good the said claims, or either of them, if she shall elect to take the same; but find that, in the event of her electing to take the *jus relictæ*, she must repeat and pay back the amount of the testamentary provisions made and created in favour of her mother under the universal settlement, in so far as the same has been already received: And farther, find as to both of said claims, that neither of them in the event of Mrs Villiers electing to take the same, is to be reduced in amount by imputing thereto any part of the sums provided in the contract of marriage 1808, whether to the said Mrs Villiers or her late mother, but that the said sums, in so far as not already satisfied, must form a deduction from the

free moveable estate left by Lord Keith: 5th, Find that in the event of the said Mrs Villiers electing to repudiate her legitim and to abide by the testamentary provisions in her favour under the universal settlement aforesaid, the trustees of Lord Keith are not at present, and so long as the said Baroness Keith and Nairne Countess Flahault shall be in life, will not be either entitled or bound to execute an entail in favour of the said Mrs Villiers: 6th, Find that the directions in Lord Keith's trust-deed for accumulating the rents, profits, and issues of his estate, in so far as it consisted of heritable property in England, or of moveable property wherever situated, are null and void under the Thellusson Act, the 39 & 40 Geo. III. c. 98, from and after the period of twenty-one years from the death of Lord Keith, who died in March 1823: But find that the said directions for accumulating the rents, profits, and issues of the heritable estate in Scotland are not affected by anything contained either in the said Thellusson Act or in the 41st section of the Act 11 & 12 Victoria, c. 36, but remain in the same full force which they possessed when the foresaid trust-deed first came into operation, and find that in so far as the directions to accumulate have been found null and void in manner now set forth, the accumulations made under and in respect of the same belong, and in respect of the matters found under the fifth head hereof will, down to the period when the trustees shall be entitled and bound to execute the said entail, continue to belong to the said Baroness Keith and Nairne Countess Flahault, and to the said Mrs Villiers, equally between them, as the parties in the absence of said entail entitled to succeed thereto *ab intestato*: with these findings, Remit the cause to the Lord Ordinary to be farther proceeded in as accords, and especially that his Lordship may take such steps as may be required for ascertaining *quam primum* to what effect the said Mrs Villiers elects between the legal and testamentary provisions, and this whether in her own right or in that of her mother."

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Steuart v. Johnston.

J. S. Johnston, S.S.C.—Dundas & Wilson, C.S.—Russell & Nicolson, C.S,—Agents.

No. 236.

Robert Steuart, Pursuer.—*E. S. Gordon—Broun.*
William Johnston (Dixon's Trustee), Defender.—*D. F. Inglis—Patton.*

Superior and vassal—Terms of feu contract.—A agreed to feu to B part of his ınd, under reservation of minerals;—*Held* (*aff.* judgment of Lord Ardmillan) that, ı the feu disposition, A was not bound to insert a clause of obligation to support ıe roof in the event of his working the minerals, nor to pay damages in the event f his failure so to support it.

Agent and Principal—Feu Contract—Relevancy.—A averred that an agreement › feu had been concluded between him and B, or those acting for B, with hom A treated in regard to various matters in which B was concerned, with B's ıll cognisance and sanction, but he did not aver or produce any contract with B, ›r written authority by him to contract for said feu, nor did he aver that B had lopted the proceedings of those alleged to have been acting for him;—*Held* (*aff.* dgment of Lord Ardmillan) that there was no relevant allegation of authority ven to any one to enter into a feu contract on B's behalf.

Proof—Parole Evidence.—Question, Whether an averment of verbal authority contract for a feu can be competently proved by parole?

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C.

Mr Dixon purchased part of Mr Steuart's property of Carfin, for the pur- ›se of working the coal and other minerals on the property so acquired by m. Thereafter, Mr Dixon applied for a feu of part of Mr Steuart's ad-

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joining property, which was granted, under reservation of the minerals—a condition inserted in all Mr Steuart's feus. Mr Steuart now averred that "Mr Dixon, or those acting for him, subsequently signified his wish to obtain another feu, and to this the pursuer also agreed on the same terms;" and that "although no regular feu-contract with regard to either of the feus was entered into, both transactions were legally constituted by the written communications and other actings of the parties;" that the defender having been appointed Mr Dixon's trustee, and, as such, infeft in the property purchased by Mr Dixon, objected to receive the first feu, without an obligation by Mr Steuart to pay any loss or damage which Mr Dixon might sustain by reason of the pursuer's coal workings, and that he repudiated the second feu altogether, as having been entered into without Mr Dixon's authority. The pursuer therefore brought this action against the trustee, to compel him to implement these feuing agreements, and to accept a feu-tack of each of the feus, under the conditions and reservations "originally understood and agreed on between the said parties, and being the same as those in the other feu rights granted by the pursuer," or alternatively concluding for L.500 of damages. And concluding also for payment "of L.70 sterling in respect of surface damage caused by the formation of the accommodation line of railway hereinafter condescended on through the pursuer's farms," and the farther sum of L.20 sterling per annum in time coming, or such other sum, for the time past and future, as shall be found by Neil Robson, Esq., civil engineer, to be the just compensation and damages due to the pursuer in consequence of the formation of the railway, and also to compel implement of the defender's obligations to fence the railway, or alternatively for damages for non-implement, and also for payment of L.116, 2s. 7½d., "being the annual feu-duties outstanding upon the first and second feus above-mentioned," &c.

The pursuer farther stated that he had arranged the first feu with Mr Dixon himself, under the usual reservation, and without the qualifications contended for by the trustee; and, with regard to the second feu, that he was "specially introduced and referred to Mr Marshall as Mr Dixon's manager, but in his absence Mr Marshall, with the full authority of Mr Dixon, left an assistant superintendent at Carfin to take charge of the various important matters there, both agricultural and mineral, requiring attention. The first resident superintendent was Mr Stenhouse, who was soon succeeded by Mr Hopper, to both of whom the pursuer was introduced and referred by Mr Dixon and Mr Marshall, and with both of whom, as well as with Mr Marshall himself, he accordingly treated with the full cognisance and sanction of Mr Dixon in reference to various matters in which Mr Dixon was concerned." He then detailed the communications, written and oral, that passed between him and Hopper as concluding an agreement. He averred that serious loss and damage had arisen from non-implement of the feuing agreements, and he therefore pleaded that the defender was bound to implement them, and to accept a feu disposition in regard to the first feu without any qualification. "Mr Dixon having induced the pursuer to believe Mr Marshall and Mr Hopper legally empowered to act in the matters in question, the defender, as his trustee, was barred from objecting to their authority, and more particularly since the pursuer acted on the faith of such authority, and matters were no longer entire." He also pleaded, that, Mr Dixon having admittedly taken and used the pursuer's ground for a railway, he was entitled to have the surface damages ascertained by a judicial remit.

The defender pleaded in regard to the feu No. 1, that he was entitled to receive a feu disposition which should not invert his common law right as proprietor of the surface to insist upon the owner of the underground strata supporting the buildings on the surface, or his paying damages in event of his failure to support them, and that Mr Dixon entered into the transaction

on the assumed obligation of the pursuer to do so. Further, that Mr Dixon gave no authority for entering into the second feu contract, and that the question as to surface damages was already the subject of arbitration. No. 236. — July 17, 1857. Steuart v. Johnston.

The Lord Ordinary, on 12th June 1855, pronounced the following interlocutor:—"Finds—1st, That the defender, as trustee for Mr Dixon, is entitled to receive, and bound to accept, a feu-disposition of the piece of ground referred to as feu No. 1. 2d, Finds that the defender is not entitled to compel the pursuer to insert in the feu-disposition a special clause of obligation in regard to the working of the reserved minerals, and the liability for damages; but that the disposition should be in the same terms as the other feu-rights granted by the pursuer in the immediate neighbourhood, where the working of minerals is reserved; but, in respect that the pleas of the defender and Mr Dixon at common law might be injuriously affected by the exclusion of the proposed clause, after its insertion has been demanded, Finds, specially, that the same is without prejudice to the defender's said pleas at common law, and under reservation thereof, and of the pursuer's answers thereto. 3d, Finds, with reference to feu No. 2, that no contract or agreement by Mr Dixon has been produced or alleged; that no special written authority by Mr Dixon to Marshall and Hopper, or either of them, to contract for such feu, has been produced or alleged; that no written factory to Marshall and Hopper, or either of them, has been produced; and that a power to enter into contracts of feu is not implied in the position occupied by Marshall and Hopper, or either of them, or in their relation to Mr Dixon: Finds that it is not relevantly alleged by the pursuer that Mr Dixon, by any act of his, recognised or adopted the proceedings of Marshall and Hopper, or either of them, in regard to feu No. 2: Finds, in point of law, that an averment of verbal authority to contract for a feu of heritable subjects cannot be competently proved by parole, in the absence of any real evidence, arising from the acts of Mr Dixon importing recognition and adoption of the contract: Therefore assoilzies the defender from the conclusions of this action, in so far as the same relate to feu No. 2. 4th, Finds, that in so far as this action relates to the pursuer's claim for damage done by the accommodation railway, it has been unnecessarily instituted, in respect that such question of damages falls to be settled by arbitration, in terms of the agreement of parties to refer the same to Mr Robson, civil engineer: Therefore, to that extent and effect, dismisses this action, without prejudice to the pleas of parties, and decerns: Finds the pursuer liable to the defender in expenses; allows an account thereof to be given in," &c. *

* "NOTE.—The question in regard to feu No. 2 has been strenuously and ably argued for the pursuer. No *rei interventus*, no act of adoption by Mr Dixon, has been alleged. The position of Marshall and Hopper was not one from which a power to enter into a feu-contract could be inferred. Neither of them was a factor, with the large discretion implied in that relation; and Mr Dixon himself has personally interposed in reference to feu No. 1, while his personal interposition in regard to feu No. 2 is not relevantly alleged. A mandate to a person in the position of Marshall and Hopper to enter into a feu-contract, cannot be proved by parole testimony in an action for constitution or for implement of the obligation. The cases in Baron Hume (Corbett, 5th March 1808, Hume, 346; Boswell, 9th March 1811, Hume, 350; and the case of Mudie v. Ochterlonie, 13th June 1766, . 12,403,) relate to a different question. These were not actions for the constitution of the contract, but merely actions for proof of authority, proceeding on the assumption that the proof was complete. The one was an action against a mandatory who had entered into a contract *contra fidem mandati*, brought by the mandant, who alleged the breach of faith. The other was an action by the heir of a purchaser, on the ground that a purchase of heritable property had been made for himself; and the defence was, that Mr Walker, the purchaser at a judicial sale, was the confidential agent of Colonel Fullarton, and bought for his behoof. The

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The pursuer reclaimed. At advising,—

LORD PRESIDENT.—I am of opinion that there is not here sufficient averment of authority by Dixon to Marshall or Hopper to enter into this contract. Therefore the demand for arrears of feu-duty can only apply to the first feu; and as to that, I see no reason why we should not give decree. There may be a question, however, as to the amount.

As to the rest of the case, it is contended that, having already been made the subject of reference, it should not have been made the subject of this action, and the Lord Ordinary has pronounced the fourth finding in regard to that. I do not think that the action is unnecessary, looking to the contention between the parties; but I think that the proper way of dealing with the matter would be to remit it to Mr Robson, civil engineer. Expenses had better be reserved until these points are disposed of.

LORD IVORY.—I agree. My only hesitation is in regard to the reservation of the defender's pleas at common law. The action is so brought, that I think the whole case ought to be decided; and I would be better satisfied without that reservation.

LORD CURRIEHILL.—I concur.

LORD DEAS.—I do not wish to be understood as assenting to the finding in the Lord Ordinary's interlocutor, "that an averment of verbal authority to contract for a feu of heritable subjects, cannot be competently proved by parole." Had the writings founded on instructed a concluded bargain between Marshall and Hopper, or either of them, on the one hand, and the pursuer, on the other, as to the feu No. 2, and had the written evidence of such bargain been coupled with a distinct averment that it was entered into by the defender's authority and for his behoof, I am not prepared to say that such authority might not have been proved by a reference to the defender's oath, or even by the testimony of witnesses. But what I go upon is, that, in the first place, the writings do not prove any concluded bargain, as to this second feu, between Marshall and Hopper, or either of them, and the pursuer; and, in the next place, that there is no distinct or substantive averment of authority by the defender to these parties, or either of them, to enter into such a bargain for his behoof, or anything equivalent to such authority. Just suppose that the pursuer had refused to grant the second feu, and that the defender had attempted to compel him, where was the concluded contract under which he could have done so? I can see none. But both parties must have been bound, or both free. The interlocutor, although substantially right, had better be remodelled.

THE COURT pronounced the following interlocutor:—"Adhere to the first two findings in the interlocutor of the Lord Ordinary reclaimed against: Recall *in hoc statu* the finding in that interlocutor as to

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subsequent conduct of Mr Walker and of Colonel Fullarton afforded real and presumptive evidence, which satisfied the Court, that the defence was well founded, and it was sustained accordingly. In both of these cases, the Act 1696, cap. 25, was relied on, as excluding proof by parole; and, certainly, a stricter view of the Act was taken in the case of Diggan v. Wight, March 2, 1797, M., 12,761, affirmed in the House of Lords 24th November 1797. The present case is one of a very different character. Here there is no question of trust. Here is no real evidence whatever, and no presumptive evidence, arising from the subsequent conduct of Mr Dixon, from which adoption of this contract can be inferred. There is no authority in the institutional writers, and no decision has been referred to by the pursuer, to support the proposition that an authority to the manager of mineral works to enter into a feu-contract of land can be proved by parole evidence. Had there been correspondence on the part of Mr Dixon, which might be susceptible of explanation by the proof of relative facts and circumstances, or had there been any act, in relation to this feu, which, when explained by a proof of facts and circumstances, might import adoption of the contract, a different question would arise; but looking to the averments of the defender on record, the Lord Ordinary is of opinion that it would be contrary to principle, and without the sanction of any decision or authority, to admit a proof by parole in this case."

expenses, and *quoad ultra* recall the said interlocutor: Find that the pursuer has neither instructed nor relevantly averred any binding and concluded agreement with the defender, or any one authorised by him, to purchase or feu the ground referred to in the record and relative plan as to the feu No. 2; Therefore assoilzie the defender from the conclusions of the action, so far as regards this last mentioned feu, and decern: Find that the pursuer is entitled to decree against the defender for payment of the arrears of feu-duty of the feu referred to as No. 1, with legal interest thereon; and remit to Neil Robson, Esq., civil-engineer, to examine the original missive letters of sale and acceptance referred to in the closed record, and to inspect the accommodation line of railway therein mentioned through the pursuer's farms of Hillhead and Hattonhill of Carfin, and to report what, if any, surface damages have been caused to the pursuer, by or through the formation of the foresaid accommodation line of railway, and what redress the pursuer is entitled to receive by the erection of fences, by pecuniary compensation or otherwise thereanent—such report to be given in to the Lord Ordinary: Remit the cause to the Lord Ordinary to proceed therein as shall be just, and reserve all questions of expenses."

No. 236. — July 17, 1857. Lockhart v. Ross.

THOMAS SPROT, W.S.—WALKER & MELVILLE, W.S.—Agents.

DAME EMILIA OLIVIA MACDONALD LOCKHART AND OTHERS, Petitioners.—*Sol.-Gen. Maitland—A. B. Shand.* No. 237.

SIR CHARLES W. A. ROSS, Bart., Respondent.—*D. F. Inglis—Penney—Young.*

Judicial Factor—Lunatic—Appointment of curator bonis—Cognition.—Along vith answers to a petition which had been presented, with concurrence of the iearest male agnate, for the appointment of a *curator bonis* to a person alleged to e insane, medical certificates of his sanity were produced. The application was efused. *Question,* Whether, where the nearest male agnate is a petitioner, cogniion be not the proper mode of proceeding?

July 17, 1857. — 2D DIVISION. R.

THIS was a petition for the appointment of a *curator bonis* to Sir Charles loss of Balnagown, Bart. It was stated that Sir Charles had been for ome time suffering from mental derangement, and was unable to manage is own affairs; and, in support of that allegation, there were produced cerficates from two medical men, who had attended him during the winter of 856–57, up to March 1857. It was also stated that the rental of his estates xceeded L.9000; that they had been for some time under the management two commissioners appointed by Sir Charles, who declined to continue to t, being advised that they were not in safety to do so; and that many nportant matters connected with the management were pressing. The tition was presented at the instance of Lady Lockhart, Sir Charles's eldest ster, the heir entitled to succeed to his estate of Bonnington; and the on. Augustus H. Moreton of Largie, as administrator-in-law for his chilen, who were all under age, and whose eldest son was entitled to succeed ter Lady Lockhart to the estate of Bonnington, with concurrence of James rquharson, Esq. of Invercauld, the nearest male agnate to Sir Charles, d heir next in succession under the entail of Balnagown.

Answers were given in for Sir Charles, stated to be with the approbation two of his sisters, residing with him at Balnagown. It was denied that was insane, or unfit to manage his affairs, and certificates were produced that effect from three medical men who saw him on 15th June 1857.

In support of the petition it was argued;—There was no doubt of the mpetency of the appointment sought. It was alleged that Sir Charles's

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state of mind was such that his property might be injured. Lady Lockhart, the sister of Sir Charles, was not in a position to sue in a process of cognition, and the appointment sought would not affix on him the character of insanity, nor affect the custody of his person. To refuse this application would have the effect of leaving the estates without that protection which the Court was in use to extend to the property of persons unable to act for themselves.[1]

The respondent did not dispute the power of the Court to make such appointments; but their jurisdiction was consuetudinary, and merely founded on the principle, that the power to prevent injury to the estates of parties unable to manage their own affairs, was inherent in the Court until they could be cognosced. Here the allegation of insanity was denied, and evidence produced in support of that denial. In such circumstances the respondent was entitled to have the question of his sanity tried by a jury, and the concurring petitioner had a right to bring a process of cognition.[2]

At advising,—

Lord Justice-Clerk.—If the Court had intended to proceed in this application, it would have been necessary to inquire further, there being conflicting medical certificates as to the sanity of Sir Charles Ross; but it is enough for me that Mr Farquharson of Invercauld, one of the petitioners, is entitled to cognosce; and I am of opinion that this petition must be refused.

Lord Murray and Lord Wood concurred.

Lord Cowan.—I am also of opinion that this petition should be refused. I go very much upon the medical certificates produced, with the answers, being certificates of Sir Charles's state at a period of more than two months after the date at which he appears to have been last seen by the medical men who granted the certificates founded on by the petitioners. I make this observation merely to save myself from being supposed to express an opinion that cognition was the only remedy in the power of the petitioners, supposing their allegations to be well founded.

Lord Justice-Clerk.—I do not wish to be understood as saying that cognition was the only remedy. I merely stated that it was enough for me that one of the petitioners was entitled to cognosce.

The Court refused the petition.

Melville & Lindesay, W.S.—Maclauchlan & Ivory, W.S.—Agents.

No. 238.

Alexander Steuart, Pursuer.—*Moir—Millar.*
The Duke of Argyle, Defender.—*G. Graham Bell—E. S. Gordon.*

Lease.—A canal was formed by the tenant of a coalwork through the grounds of a neighbouring proprietor to whom rent was paid for the ground so occupied. The lease having come to an end, the proprietor of the coalwork possessed the canal and paid rent until decerned to remove and found liable for violent profits in an action which did not conclude for decerniture to have the ground levelled or left in an arable condition. After this decree the proprietor of the coalwork and his successor continued to occupy the canal for several years, and paid as rent the sum fixed as due for violent profits—*Held*, that he was not bound on ceding possession to level the ground or make it fit for agricultural purposes.

July 17, 1857. — 2d Division. Ld. Benholme.

M'Dowall, the tenant of coalworks belonging to the Duke of Argyle, made a canal for the conveyance of coal through the lands of Moy and Drumore,

[1] Dewar v. Dewar, 21st Jan. 1834, 12 S. & D. p. 315; Macfarlane v. Macfarlane, 18th Dec. 1846, ante, vol. ix. p. 306; Speirs, 12th Nov. 1851, ante, vol. xiv. p. 11; Act of Sederunt, 13th Feb. 1730.

[2] Stat. 12 & 13 Vict. c. 51; Act of Sederunt, 13th Feb. 1730; Gordon v. Scott, 2d March 1784, unreported (see Arniston Coll. of Session Papers in Advocates' Library, vol. 175, No. 26).

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with the consent of the proprietors of these lands, he undertaking to remunerate them for the yearly damage done to their property, which was fixed by arbiters at L.4, 10s. sterling per annum, and to compensate the possessors of moss rooms through which the canal was taken for their loss. On the expiry of M'Dowall's lease in 1797, his representatives received from the Duke, L.1615 as the value of the canal, and the Duke and his tenants of the coal-work continued to use the canal and to make the yearly payments for the land in the same way as M'Dowall had done. In 1833, Campbell of Glensaddell, the then proprietor of Moy and Drumore, brought an action of removing under the Act of sederunt, 1756, against the late Duke of Argyle and his trustee as pretended tenants of that portion of the lands of Moy and Drumore occupied by the canal. It was pleaded in defence, that the Duke possessed the *solum* of the canal by a right of property, or at least of servitude, and not of tenantcy. This action was dismissed as incompetent by the Sheriff; the pursuer advocated, and at the same time raised an action of declarator, and for violent profits. The summons contained no conclusion to have the Duke ordained to fill up or level the canal, or to render the ground occupied by it fit for agricultural purposes. On 17th June 1836, the Court pronounced an interlocutor by which it was declared that the portion of the lands of Moy occupied by the canal belonged to Campbell of Glensaddell; the defender was ordained immediately to cede possession, and found liable in violent profits from the term of Whitsunday 1834, being fixed at the sum of L.20 sterling per annum. The Duke and his successors continued in the possession of the canal, and paid the proprietor of Moy and Drumore rent at the rate of L.20 per annum. Previous to Whitsunday 1856, the chamberlain of the Duke intimated to Mr Steuart, the present proprietor of Moy and Drumore, that the water would be drawn off the canal, and possession of the ground used for it would be ceded to the proprietor, on whose part intimation was given to the Duke that it was incumbent on his Grace to fill up the bed of the canal, level the banks, and perform any operations that were necessary to restore the ground to its previous condition or render it arable; and this action was raised, concluding for declarator that on ceding possession he was bound to do so. It was stated that the canal was partly filled with stagnant water, and left in such a condition as to be entirely useless as a canal, and unfit for any agricultural or other use without considerable outlay; and it was pleaded that M'Dowall was under an obligation at common law, on ceding possession, to restore the ground which had been used as a canal, which obligation had become incumbent on the Duke of Argyle on his acquiring possession of the canal, and was still binding on his successors, the damage having been occasioned not by the ordinary use of the ground, but by its use for the formation of a canal.

The Lord Ordinary pronounced this interlocutor:—"Assoilzies the defender from the conclusions of the action, and decerns: Finds the defender entitled to expenses; allows an account," &c. *

* "NOTE.—The Lord Ordinary cannot find any distinct or solid ground for subjecting the defender in the conclusions of this action. The pursuer pleads upon implied contract; but it is difficult to see how such implied contract should subsist between the pursuer, who, as proprietor of Moy, is a singular successor of the proprietor of that estate, at the time when the coal canal was formed, and the defender, who is not alleged to be the representative of Charles M'Dowall, who made the canal. The circumstances under which the canal was originally made, by the general concurrence of the proprietors and tenants interested, suggest great doubt as to the supposed obligation even of M'Dowall to do what is now required by the pursuer of the defender. But further, it appears that, by the judicial proceedings of a succeeding proprietor of Moy, and decree of declarator and removing taken against the then Duke of Argyle, all contract or implied contract between their pre-

No. 238. The pursuer reclaimed. After hearing parties,—

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LORD JUSTICE-CLERK.—I do not think it necessary to notice all the grounds on which the Lord Ordinary's judgment is founded. It is enough for me that an action of removing was raised by the former proprietor of the lands of Moy and Drumore in which decree was pronounced. By that decree the possession by the defender's predecessors under the original lease was put an end to. The pursuer in that action did not conclude that the defender should be decerned to fill up the canal, and there was no decerniture further than that the defender should remove and pay what was found due for violent profits. If the then Duke of Argyle ceded possession, that decree was implemented. After that decree the Duke continued to possess, but upon a different lease; he paid, no doubt, as rent the sum which had been fixed as due for violent profits, but that does not matter. I cannot get over the decree. I take the case as it stands. The Duke has had possession, and for that possession of the canal he has paid this full rent, and I do not see that his successors are bound to alter the nature of the subject they have so occupied.

LORD MURRAY concurred. The pursuer, or the then proprietor of Moy and Drumore, dissolved every connection between the defender's predecessor and these lands, without concluding that the latter should be decerned to restore them to their former condition. The then Duke of Argyle might in 1836 have removed without restoring them, and I do not see that any obligation to do so can be held to be incumbent on his successor, who has possessed till now upon a new agreement.

LORD WOOD.—Had there been any obligation upon Mr M'Dowall originally, and which had passed against the Duke of Argyle, of the description now insisted in, I should not have felt much, if any, difficulty in holding that the pursuer—as in place of one of the proprietors to whom, or to whose tenants it was at first undertaken—would have had a sufficient title to enforce it. But I am of opinion that any such obligation, assuming it to have previously existed, was put an end to by the proceedings which took place in 1836. It was under a new agreement then entered into that the Duke's subsequent possession was held, and which possession was of the ground occupied by the canal as it stood. He became tenant of the subject, in the condition in which it was, as at that date, at a rent of L.20 per annum, which he has since paid; and on the possession terminating, and the subject being given up, there were no farther liabilities to be discharged by the Duke.

LORD COWAN.—I am of the same opinion.

I was at first much impressed with the argument in support of the reclaiming note, which is noticed at the commencement of the Lord Ordinary's reasoning, and I am not yet prepared to acquiesce in that ground of judgment. But the case of the defender does not depend upon it. For there have been various important proceedings between the parties. There was in 1836 the action of removing at the instance of the pursuer's author, and the conjoined action of declarator at the defender's instance. The result of these actions was, that the right to this canal, as such, was held not to be in the Duke of Argyle, and that he was decerned to remove from it under this declaration—that in the event of his not removing he should be liable in a rent of L.20 per annum. This put the Duke at Campbell's mercy if the canal was necessary to the Duke or his tenants to carry on his coal-work profitably. Having obtained his decree of removing, Campbell might have compelled him to pay any rent he chose. A new agreement was then entered into.

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decessors as to this canal was ignored. Campbell, as a singular successor, shook himself free of all such implied contract, and vindicated his right, as feudal proprietor of Moy, to oust the Duke out of the possession of that part of the canal which passed through his property. Had that decree of removing been carried into effect, it is not easy to see how the present claim of the pursuer could ever have been brought forward by the pursuer of that action. What has since taken place set the relation of the two proprietors upon a very simple footing. Instead of removing, it was agreed that the Duke should remain in possession of the canal at the rent of L.20. The Lord Ordinary cannot see how that relation (the only one which appears to have latterly subsisted between the parties) infers any such obligation as is alleged against the defender by the pursuer, as the basis of the present action."

This is matter of admission in the record; and for twenty years prior to 1856, the Duke has possessed this subject as a canal at the rent then agreed on. In this new agreement there is no obligation undertaken by the Duke to restore what he got possession of as a canal, and paid rent for as a canal, to the state in which the ground was when the canal was constructed. This is the leading conclusion of the present action; and on the ground I have stated, I think it cannot be maintained.

THE COURT adhered to the interlocutor reclaimed against, and found the reclaimer liable in additional expenses.

JAMES DALGLEISH, W.S.—MORTON, WHITEHEAD, & GREIG, W.S.—Agents.

No. 239.

THE CHURCH OF ENGLAND LIFE AND FIRE ASSURANCE TRUST AND ANNUITY COMPANY, Pursuers.—*Penney—Gordon.*
GEORGE WINK (James Lang's Trustee) AND OTHERS, Defenders.—*D. F. Inglis—Horne—Hector.*

I. *Cautionary—Discharge of one of several co-cautioners*—19 & 20 *Vict. c.* 60, *sect.* 9.—*Held*, that sect. 9 of the Mercantile Law Amendment Act applied only to cases where the bond of cautionary has been executed subsequent to the passing of the Act.

Process—Conclusions—Conjunct and several.—Where a summons concluded against three cautioners, conjunctly and severally, for a certain sum, and the pursuer took payment from one of them of one-third of that sum, granting him a discharge both of the claim and of the action,—*Held* competent, on the sum in the conclusions being restricted to the remaining two-thirds, to pronounce decree against the two other cautioners, conjunctly and severally, for that balance.

Opinion, that the discharge did not affect the rights of the cautioners *inter se*.

II. *Rei interventus—Improbative writ.*—Where parties signed and issued as binding a bond of cautionry improbative in terms of the statute,—*Held* (*abs.* Lord Wood), that the fact that money was advanced on the faith of the writ, though not alleged to have been known at the time to the parties who signed it, constituted sufficient *rei interventus* to make it obligatory upon them.

SEE ante, p. 415. July 17, 1857.

I. This action, at the instance of the Church of England Life and Fire Assurance Trust and Annuity Company, and William Emmens, their secretary, concluded against James Leitch Lang and his trustee, George Hodges, John Lang, junior, and Robert Bruce Macadam, to have them ordained, "jointly and severally, to make payment" of L.480, being the balance esting due on a bond for L.800, in which James Leitch Lang had been ruly the principal, and the others cautioners, although taken bound as prinipals. Hodges and Macadam having denied all knowledge of the transacion, except their signature of the bond, which was an improbative writ, a roof before answer was allowed (as reported already) of the pursuers' verments, by which it was sought to establish such *rei interventus* as would ender Hodges and Macadam liable, notwithstanding the fact of the bond eing improbative. This proof was now reported. In the course of it, it ppeared that the pursuers had taken payment from John Lang (who had ot given in any defences to the action) of L.160, being one-third of the alance sued for, and granted him a discharge in these terms:—"Thereore, and in consideration of the said sum of L.160 now paid to me, the said Villiam Emmens, as secretary of and representing the said company, I do ereby exoner, acquit, and *simpliciter* discharge the said John Lang not nly of the foresaid sum of L.160 paid to me as aforesaid, but also of the aid action and whole procedure following thereon, in so far as he, the said ohn Lang, is concerned or interested as in a question with the pursuers hereof, and of all other and further claims whatsoever at the instance of the aid Church of England Life and Fire Assurance Trust and Annuity Com-

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pany, or the partners or office-bearers thereof, at or preceding the date hereof, in respect of the claims sued for in the before mentioned action; and the pursuers assign their claim to the extent hereby discharged, and all right, title, and interest therein, to the said John Lang, with the view of said John Lang operating his relief against the said James Leitch Lang and George Wink, or either of them: Reserving entire always the rights and claims of the said Church of England Fire and Life Assurance Trust and Annuity Company against the whole other defenders in the said action for payment of the balance of the foresaid principal sum, interest, and expenses." This transaction with Lang rendered necessary a restriction of the libel. A minute was therefore put into process, whereby, "as regarded John Robert Bruce Macadam and George Hodges, the other cautioners and defenders, the pursuers restricted their conclusions against the defenders, Macadam and Hodges, jointly and severally, to the sum of L.320, with the interest thereof from the 27th day of April," &c.

It was now contended for Hodges and Macadam that the effect of the discharge of Lang was to cut off the pursuers' claim against his co-cautioners. They founded on the 9th section of Mercantile Law Amendment Act, which provides, that "from and after the passing of this Act, where two or more parties shall become bound as cautioners for any debtor, any discharge granted by the creditor in such debt or obligation to any one of such cautioners without the consent of the other cautioners, shall be deemed and taken to be a discharge granted to all the cautioners; but nothing herein contained shall be deemed to extend to the case of a cautioner consenting to the discharge of a co-cautioner who may have become bankrupt."

In this case admittedly no consent had been given, and the section had a retroactive effect upon cautionary entered into before it passed. Its language was markedly different from that of section 8, which began, "Where any person shall, after the passing of this Act, become bound as cautioner," and then enacted that he was no longer to be entitled to the benefit of discussion. To have made that section retroactive would have introduced an essential change into the character and conditions of a contract already entered into. To make the 9th section retroactive would have no such result, but would merely change the effect of an act done after the date of the statute, the provisions of which must be assumed to have been in the view of parties.

The effect of the discharge was at any rate to relieve the defenders from liability under the present summons. Where one party was discharged it was impossible to retain an *in solidum* claim against the others, or to get decree under conclusions for conjunct and several liability. Each might remain liable for his own share, but no amendment was proposed restricting the conclusions to a several liability. No stipulation with Lang that action was reserved against Hodges and Macadam could possibly touch their rights, who were no parties to the deed, and the only case referred to where such a reservation was given effect to was in a discharge, not of a co-cautioner but of an insolvent principal, and that upon payment of a composition upon the whole debt. This objection was not a mere technical one—the rights of the co-cautioners had been seriously affected by the discharge. If decree went out against the present defenders, and the pursuers operated payment from one alone, they were not in a position by assignation to enable that defender to operate his relief against Lang, as the action as well as the debt had been discharged.

For the pursuers it was replied;—The terms of their reservation brought the case within that of Smith v. Ogilvies[1]; they were entitled to decree against the defenders under the present summons without any amendment;

[1] 23d November 1821, Sh. vol. i. N. S. p. 152; 7th June 1825, H. of L. W. & S. vol. i. p. 315.

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their discharge might affect the manner in which the defenders could operate their relief against their co-cautioner, by making a separate action necessary, but it did not affect, and no act of the pursuer could affect the rights *inter se* of the co-cautioner. The defenders' argument on the statute was unsound; the language of the 9th section was unambiguous, and therefore not liable to construction.

LORD JUSTICE-CLERK.—In the course of the execution of the commission for proof, it appeared that John Lang, one of the cautioners and co-obligants under the bond on which the action is founded, had paid to the pursuers one-third of the whole sum concluded for,—being his full share of the sum for which the action concluded against the principal debtor James Leitch Lang, and the three co-obligants or cautioners, of whom John Lang was one. Upon this fact the defenders, who have not made any payment, have most strenuously contended that the action cannot now be insisted in to any effect against them.

Various points have been made in the course of this discussion. In the first place, it was maintained that the discharge granted to John Lang, without the consent of the other co-obligants, had the effect under the Mercantile Law Amendment Act, 19 & 20 of the Queen, c. 60 sec. 9, at once to liberate the other co-obligants, and was a discharge of them all. Like many other sections of this general statute, this section may give rise to very many nice questions. It is in the following terms:—(reads.) It may be made a question (I give no opinion on the point), whether this section applies to the case of proper co-obligants, or only to parties who become *bound as cautioners* for a debtor. But whatever may be the effect of this section in other respects, I am of opinion that the enactment applies only in cases where parties *shall become bound* after the passing of the Act. This seems to me to be the plain and only admissible construction of the section. The expressions are not such as could have been employed, if intended to be applicable to existing contracts and obligations.

It was argued, that the place in which the words "from and after the passing of this Act," were introduced into this section, was different from the collocation of these words in other sections with like provisions introduced in these other sections. I do not think that the inference or conjecture as to the meaning of the Legislature derived from this comparison of this section with the others is even in any degree supported by the terms of these other sections. But even if the argument had any plausibility from such a comparison, it would only amount to a conjecture. The terms in the 9th section are expressly applicable to those who, *after the passing of this Act, shall become bound* as cautioners for any debtor, and on no such general inference could my mind be brought to hold, that the clause extends to all cases in which parties *are* bound before the passing the Act as cautioners.

Passing by this point, the next question is, Is there anything in this discharge from which a liberation of the other co-obligants can be deduced in point of law?—(reads terms of discharge.) There are no words whatever from which any liberation of a discharge of the other defenders can be deduced. On the contrary, the pursuers reserve expressly their whole claims against them.

But it is further contended, that the nature of the act done has, in law and by necessary consequence, the effect of liberating the defenders. Nothing very definite was pleaded to us upon this point. But let us see what is the character of the act, and what are its consequences. Payment is taken from one co-obligant of a part of the debt, being his full share as a third. To that extent the defenders are benefited, and the sum reduced for which the pursuers can insist. Then, in its consequences,—How are the rights of the other defenders injured, so as to form a ground for liberation? Their liability is not thereby enlarged. It remains exactly what it was, only the amount is diminished by this payment of one-third. If they both are solvent, they will each pay a third and no more. If one fails, and the other has to pay the whole, then his right of relief against Lang is not affected by this payment and discharge, and is not attempted to be affected. There is not a word in the discharge of Lang which could liberate him in a question with the other defender, who might have to pay two-thirds. The pursuers could not by any act of theirs affect the relative obligations to each other of these co-obligants, and, unless the pursuers had undertaken to bear the risk of either of the other defenders becoming insol-

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vent, no discharge of their claim against Lang could liberate him from the obligation towards the other co-obligants, merely because he paid at once his share.

But it is said, that he is discharged from the action, and that, in this process, if one of the other defenders had to pay the remaining two-thirds, that defender could not operate his relief by means of an assignation from the pursuers. I very much doubt, whether, on an assignation from the pursuers of what B might pay, a competent motion might not be made against him, as he has so worded the discharge that he reserves his right to operate his relief in this action as in right of the pursuer against the other defenders, and, therefore, is not out of the process. But whether B overpaying, owing to the insolvency of C., could operate relief from Lang in this action by an assignation from the pursuers, Lang, by the terms of the bond, is still a co-obligant with B, and the latter's right is in no degree impaired. He would have direct action against Lang. It might be more handy to operate relief in this action. But I know of no rule of law which compels a pursuer so to conduct his legal proceedings against the co-obligants, that he must, as the only condition on which he can accept payment from one debtor of his share of the debt, keep matters in such a situation that he shall be able to give an assignation of his right, in case of non-payment by another, which is effectual in that process. An assignation the pursuers can give, and the right of relief against Lang is complete and unimpaired, and the pursuers have in no respect liberated or attempted to liberate Lang. There is no ground, therefore, for finding that these defenders are liberated from their obligation.

But then a difficulty of a different description was raised. It was said: The summons concludes against the main party, and then these three co-obligants as jointly and severally liable. Now, after the discharge of one of the parties, the whole are not liable jointly and severally, and hence, it is said, the summons cannot stand. This is a very singular objection. John Lang had paid his share, and for that the defenders are no longer jointly and severally liable. But then, for what is not paid, they remain jointly and severally liable, just as if the main party had paid part of the sum concluded for. Then, why is the action not to proceed on that footing? If one of the co-obligants had been assoilzied on some special ground, the action would have remained good against the others as jointly and severally liable.

Further, it was argued, that, if the pursuers must now proceed against them as severally liable for their proportions of the debt, that is not competent under a summons concluding against them jointly and severally. I dissent entirely from that proposition. The pursuer in a simple action of this kind is not tied down to make out joint liability as the condition of success, or unable to succeed if he gives up, or is forced to abandon, joint and several liability. If the defenders are severally liable, he may proceed to that effect. No authority was referred to, to establish any such rule as to the construction of a summons, except an allusion to some opinions in the case of the Aberdeen Bank. But that case had no resemblance to the present, and the opinions are wholly misunderstood. It was held in that case, that the whole action was founded on the notion of joint and several liability arising out of the transactions set forth and described by the pursuers—that the admitted facts shewed that the notion of joint and several liability as to various defenders was inadmissible—and, therefore, as the foundation of the action wholly failed, the action could not be sustained to any other effect in a more limited view of the results of the averments. That was the special ground taken by some in that case, which affords no sort of precedent for the present action, or probably for any other that ever will be raised.

On these grounds I am of opinion that the Court must proceed and dispose of the case on the merits, as it now stands.

Lord Murray.—I entirely concur in your Lordship's view as to the interpretation of the statute.

Lord Wood.—I concur in the opinion your Lordship has delivered, and in the views you have expressed, both with reference to the Act of Parliament which was founded on, and the effect of the discharge granted by the pursuers to Lang, one of the three cautioners, on his making payment of one-third of the balance which remained due of the original debt, being his proper share of it. That discharge only discharges the cautioner of all claims against him at the instance of the pursuers, but it leaves completely entire all the rights of the pursuers against the

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other two cautioners, and their rights *inter se*, so that should the pursuers, in the exercise of their rights, recover from one of them the two-thirds of the balance of debts still unpaid, and the other is unable to pay his third, then the cautioner who has paid the two-thirds will, in virtue of his undischarged right, be entitled to recover the half of the one-third overpaid by him from Lang, so as thereby to throw the proper share of the insolvent cautioner equally on himself and Lang. In this state of matters, I am of opinion that the conjunct and several liability of the cautioner continues, and that there is no ground for an objection against decree to that effect being pronounced, in respect of the discharge granted to John Lang.

Lord Cowan.—We have to dispose of the pleas raised by the defenders upon the discharge granted to Lang, one of the three co-cautioners, so recently as April 1857.

By that deed, upon the narrative of the dependence of this action and of a decree in absence obtained against Lang for the sum of L.480, concluded for in the summons as the balance of the debt due to the pursuer, and in consideration of payment of the sum of L.160, being one-third of the debt sued for, the pursuer discharged the said John Lang not only of the sum of L.160, " but also of the said action and the whole procedure following thereon, in so far as he the said John Lang was concerned or interested as in a question with the pursuers thereof," and of all other and farther claims by them " in respect of the claims sued for in the before mentioned action." The deed further contains an assignation of the claim to the extent discharged, and reserves entire the rights and claims of the pursuer " against the whole other defenders in the said action for payment of the balance of the foresaid principal sum, interest, and expenses."

The conclusions of the action have been restricted in consequence of this discharge to two-thirds of the sums claimed in the summons; but in terms thereof decree is sought to that extent against the defenders, Macadam and Hodges.

The defenders first maintain, that the effect of this discharge is to liberate them from farther liability for the debt sued for, under the provision contained in the 9th section of 19 & 20 Victoria, ch. 60.

Although the application of the statute to cautionary obligations subsisting at the date of the Act were otherwise clear, I am not satisfied that it would have the effect of liberating the defenders, having regard to the circumstances in which the discharge was granted. It is not the discharge of one of several cautioners during the currency of the obligation of the debtor. He has become bankrupt, and been sequestrated; and the obligation of the three cautioners for the sum sued for in the action has become prestable. Their non-payment of the debt thus due by them has been the cause of these proceedings being instituted, and it is only during their dependence that his own proper share being paid by one of the defenders, the pursuers have granted to him this discharge of the debt. From that discharge no disadvantage, as regards their relation to the principal debtor, could possibly ensue to the other defenders; and it may be questioned whether, in this position of matters, the parties having become in truth co-debtors, the statutory provision is in any view pleadable.

But however this may be, the conclusive answer to the plea is, that in its terms the statutory provision has regard only to cases " where two or more parties *shall become* cautioners for any debtor from and after the passing of this Act." The cautionary obligation, to be within these terms, must have been entered into of a date subsequent to the passing of the Act. The statutory words have no application to obligations granted previous to, and subsisting at, the date of its passing. In all such cases the effect of a discharge of the co-cautioner must be judged of by the rules of common law, and not by the enactments of the statute which innovate upon those rules.

I do not think it of any materiality that some of the sections of this statute, which applies to a variety of matters quite unconnected with each other, may be read and construed as applicable to subsisting obligations. What we have alone to do with is the effect of this specific provision, which in clear terms contemplates future obligations as alone within its purview. I do not think the clause capable of a construction to bring within its operation subsisting cautionary obligations; and although it were, it appears to me to be of a character not to admit of such a liberal interpretation as would require in any view to be given to it to support the defen-

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der's plea. The Act is an innovation on the common law, not to be extended beyond its actual terms.

It may be somewhat anomalous to leave the position of co-cautioners in obligations undertaken prior to the Act to stand so differently from that of those who have entered on the obligation subsequent to the statute. But this anomaly cannot be corrected by judicial decision. The remedy must be sought for elsewhere.

But, secondly, it is alleged by the defenders, that this discharge has at common law the effect of doing away with the conjunct and several liability concluded for against them, and ought to lead to their absolvitor from this action.

Now, 1. I do not think it can in any view be alleged that the discharge entitles the defender to absolvitor. The separate liability, each for his own share, remains untouched, and decree may be pronounced with perfect competency against each for L.160, or one-third of the debt sued for. The case of the Aberdeen Bank is quite different.

2. The reservation in the discharge keeps entire to the co-cautioners their right to be relieved by the party discharged; but it puts an end to procedure at the instance of the creditor against that party in relation to this debt. Were its effect to keep the decree in absence in force so as to permit of its being assigned to either of the other defenders on payment of the balance of debt, then there would obviously be no innovation on the state of the interests of the co-cautioners. But holding, as I think must be held, that the decree against Lang cannot be assigned, and that the only effectual decree to be pronounced in this action is for two-thirds of the debt against the two defenders,—there is a difficulty attending the right of the pursuer to have that decree against the defenders conjunctly and severally to the full extent of the debt.

The pursuer was not entitled by any act of his pending the process to place the defenders in a worse position relating to their co-cautioner, Lang, than they stood in previously as co-cautioners at common law. Had there been no discharge, and had decree gone out against the three for the L.480, then any one paying would be entitled to have the decree assigned to him, so as to proceed against either of the other two to the extent of one-half of the debt. This remedy is denied to the one or other of the two defenders that may pay the whole L.320 remaining due, to the extent of one-sixth of the original debt of L.480. And probably the decree to be now pronounced against them jointly and severally ought to be qualified, to the effect that it should be enforced by the pursuer against the one or other only to the extent of one-half of the original debt, or L.240.

I do not, however, press this view, because practically, the parties continuing solvent, and the claim of relief against Lang competent to either of the defenders being entire, the first apportionment of this debt among the co-cautioners may be secured, should either of the two defenders fail to pay his proper share—by separate proceedings taken against Lang by the co-cautioner who pays under the decree to be pronounced. The only objection is, that if necessary for him to proceed against Lang, he is prevented by the act of the pursuer from doing so under an assignment to this decree, and runs the risk of Lang's continued solvency.

II. The case was now argued on the merits; and in so far as the argument went beyond the import of the proof, it was confined to an application of the views formerly pressed on the Court to the facts, as each party held them to be established by the proof.[1]

The facts, as held by the Court to have been proved, were thus stated by Lord Cowan:—"The proof establishes, that the bond was prepared in the English form in London—that it was transmitted to Glasgow on 23d October 1852 for the subscription of the borrower and of his sureties—that, after being executed by them, it was returned to London as a completed deed—and that, on the faith of the bond being thus complete, the pursuers

[1] Bell's Pr., sec. 86, p. 26; Johnston v. Grant, 28th Feb. 1844; Ballantyne, 21st Jan. 1842; Sutherland, 12th Nov. 1835; Hamilton v. Wright, 12th Feb. 1838, H. of L., iii. Sh. and M'L., p. 127.

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remitted the amount to the borrower in Glasgow on 1st November 1852. The proof farther establishes, that, in the negotiations for the loan, Lang, the principal debtor, was applied to for the names of his sureties—that the two defenders did both of them agree to become his cautioners—that the bond when transmitted from London was sent by Mr Baird, the Glasgow agent of the pursuers, to Lang for the signature of the parties—that Lang sent his clerk, after having himself subscribed it, to get it executed by the two defenders—that it was subscribed by them, in the knowledge, as must be held, of its contents and of its form—that it was thereafter sent by Lang to the agent of the pursuers at Glasgow, with the annexed receipt for the money—and that it was by him transmitted to London in order that the amount of the loan might be remitted to Lang, as was actually done, by the pursuers on the faith of the bond being complete.

Lord Justice-Clerk.—We have already expressed our opinions on the objection to the right of the pursuers to insist further in this action in respect of the payment by and discharge granted to one of the co-obligants, John Lang, and have held that the right of the pursuers to insist against the other defenders is in no degree impaired; and we are now to dispose of the proof adduced in support of the pursuer's plea of *rei interventus*, in order to give him right of action on the bond in question, although improbative by the law of Scotland. Of course we must revert to the opinions expressed by ourselves on the elaborate arguments on the points stated on both sides before the proof was allowed, and must carefully consider with reference to these points, whether the facts now proved really do amount to what is necessary to give effect to an improbative document by reason of *rei interventus*. In considering that matter, I need not say, after the opinion I expressed in Johnstone v. Grant, that I am in no degree disposed to go one jot further than the decided cases prescribe in sustaining that plea, so far as founded on facts belonging to the actual completion and fulfilment of the contract. And I wish to avoid any expression of opinion as to many of the simpler cases urged by the defenders at the former discussion, and more difficult for determination than the case before us.

First, as to the averment of the cautioner's knowledge of the facts which are founded upon as *rei interventus*,—I stated formerly that the averment of such knowledge might be very important, for such knowledge might give a very different character to the facts following the subscription of the bond from that which they might otherwise possess. But I carefully avoided any indication of opinion that the cautioner's or co-obligant's knowledge of what followed is at all necessary to enable the creditor to found on the facts which did follow the subscription as effectual *rei interventus*. I entirely dissent from the doctrine, if meant to be stated as a rule of law, that the facts must be known to the party signing the improbative document. I have some doubt whether the expressions of Mr Bell ought to be taken in that strict light. But, at all events, if such is their import, I am of opinion that he is there in error. The principle of *rei interventus* in such a case is in my apprehension this, viz., that the party signing such a document has given it over to the intended creditor to be used in the way, and for the purpose, intended, and that, if others have acted on the faith of it, and in reliance on it being given out by him for practical use as his obligation, and to be taken as such, he is not entitled to turn round and plead defects in point of form against those whom he has encouraged to rely upon his signature.

It is of no importance, in my opinion, that there may not be separate evidence, that the defender did not know that the money had not been paid, but was to be paid on the faith of their signatures. It is sufficient that the necessary presumption in the circumstances is, that they must have known that to be the state of the fact, when they signed the bond.

But, the bond bore before signature that the money was paid. But could any human being imagine and believe that the money was paid before any one signed the bond as liable for the debt, especially when the party to get the money was only to get it on the signature of others besides himself? Now, the bond was signed on the same day by the main party as well by the co-obligants, and one of the defenders signed at the same time with the main party to whom the loan was

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to be made, while there was a blank for the signature of the others. Any one signing must have known, just as much as if he had been expressly told it, that the money was only to be advanced when the obligation was signed by all who were to be bound. If, then, any knowledge of the fact that the money was to be paid after the bond was signed, could be required, I should hold that the presumption in the circumstances of this case was quite sufficient to satisfy such a requisite.

But I am clearly of opinion that such knowledge need not be separately and distinctly proved. The party gives forth the document with his subscription to and in favour of the creditor, in order that his subscription may be relied on, and the document used and acted on in the way which the nature of the writing necessarily implied that it should be so used and acted on.

Then, having carefully reconsidered the grounds of the opinion in which we all generally concurred after full deliberation on the pleas formerly discussed before us, we have now to consider what matters of fact have been proved. The result is this: A transaction for a loan having been proposed, and the security of co-obligants having been required, a bond is prepared in London, and is sent to the agent of the Company in Glasgow, that he may obtain the necessary subscriptions. He does so, but not in the Scotch form. Then, after it is so signed, the main party signs a receipt for the sum, which is added to the bond, therein trusting to the Company and its agent. The Company thus receive in London the completed document, and the receipt for the money, before one shilling is advanced. It was thus sent out of Scotland to English parties to be acted upon as an obligation for the intended loan. I look on this transmission to London, to parties not to be presumed to be acquainted with Scotch law, as a very material fact in the question of *rei interventus*. The parties could not but know, as they must be presumed to have known from the document which they signed, that they gave a document to English parties to be acted and relied upon.

When it is so received in London—the transmission to which place being the object contemplated, and the result of the joint act of all the co-obligants in so signing it—the Company then, on the faith (as the real facts prove, and as is expressly sworn) that they had received a valid and good document of debt from all these parties, send down the money to Scotland, and it is paid to the party to whom the obligants intended it should be paid. In the circumstances of this case I am of opinion that the payment of the money, after the bond was signed as described, and after its transmission to London, is *rei interventus* in the eye of law sufficient to show, that the party relied, and was entitled to rely, from acts for which the defenders are responsible, that they had no legal defence to plead against their own subscriptions, and against their obligation for the money.

In all the material facts, this case is much more favourable for the creditor than was the state of the proof in the case of Johnstone v. Grant. The equity to exclude the legal objection to the deed as improbative, seems to me to be in this case as strong as can well be imagined, pleaded as it is against the English creditor to whom the defenders allowed the bond to be sent as their personal obligation, in the eyes of Englishmen formal, complete, and binding. The Company were thus bound to pay on the faith of that document, and the defenders are clearly barred from saying our subscriptions are made in the form required by a Scotch statute.

I am, therefore, glad that no rule of law compels me to sanction the gross injustice which would result from this iniquitous attempt to resist payment of a just debt.

Lord Murray concurred, expressing his regret that the Mercantile Law Amendment Act had contained no remedy for the inconveniences and evils which spring from the diversity between the laws of England and Scotland as to the formal execution of writs.

Lord Wood was absent.

Lord Cowan.—The Court have now to dispose of this case on the proof allowed by the interlocutor of 12th February 1857.—(His Lordship then stated the import of the proof as given above).

The facts thus established by the proof are in my opinion sufficient in law to support the plea of *rei interventus*.

The nature of that plea—what requires to be made out by the party pleading it,—and the authorities bearing on the question—were fully discussed and considered,

when the case was advised and this proof allowed. It is unnecessary to do more, therefore, than to refer to the full report of our decision at that time, and to say that the proof by the pursuers is sufficient, as I think, to support their case. No. 239. — July 17, 1857. Finlay v. Allan.

The defenders say that the several acts and proceedings relied on have not been shewn by the proof to have been known to, and permitted by, them to take place on the faith of the contract. But all the assent and knowledge which it was necessary in a case like this to shew are made out sufficiently on the face of the proof. A party, who has been applied to to become cautioner in a transaction like this, and who has put his name to the written deed by which the obligation was constituted, cannot but be held to have given his assent to the completion of the transaction on the faith of it. One who has given a written mandate to another cannot be listened to, when the subject of the mandate has been executed, in repudiating the act on the ground of its not having had his special assent and sanction.

I hold the cases so fully commented upon in the opinions delivered when the proof was allowed, to be conclusive on this point. The cases of Henderson, of Brown v. Campbell, and of Balfour v. Thomson, were all decided upon the principle, that the informal cautionary obligation, given to the debtor for the purpose of being acted on, was rendered a complete obligation by the acts done on the faith of it by the creditor, without any farther evidence of knowledge or assent of the cautioner being required. And, as regards money obligations, the case of Grant v. Johnston is of great value, and in its application to the special circumstances of this case, of conclusive authority. The valuable observations by Lord Medwyn in his opinion in that case are strictly applicable to this cautionary obligation, and to the effect of what passed on the faith of it, as sufficient in law to support the plea of the pursuers.

The Court pronounced the following interlocutor:—"Repel the objections of the defenders founded on the discharge granted to John Lang; and find that facts and circumstances have been proved, amounting in law to sufficient *rei interventus* to enable the pursuers to proceed to enforce the obligation contained in the bond libelled on; and therefore find that the defenders, George Hodges and John Robert Bruce Macadam, are jointly and severally liable for the sum of L.320 remaining due under said bond, with interest thereon, as concluded for; reserving to them their right of relief against James Leitch Lang and his estate, or against John Lang, either in this action, in so far as competent, or in another process, and decern: Find the defenders liable in expenses," &c.

M'Brair & Parker, W.S.—Murray & Rhind, W.S.—Agents.

No. 240.

John Finlay, Suspender and Pursuer.—*D. F. Inglis—Hector.*
James Allan, Respondent and Defender.—*Macfarlane—A. B. Shand.*

Exclusive privilege—Patent.—An inventor patented improvements on fire-grates, of which the principal feature was an overhanging door of novel construction, causing a double draught. In his specification he claimed as part of the invention secured to him by the patent the "application and use" of a detent link or holder of a peculiar form to retain the door in its position, but which was proved to have been previously used and applied to grates without overhanging doors;—*Held*, that the use of a similar detent link, when applied to an overhanging door, but which did not produce a double draught, was not an infringement of the patent.

In October 1852, John Finlay, ironmonger in Glasgow, obtained letters patent for an invention of "improvements in grates and fire-places, or apparatuses for the generation of heat." In June 1856, he brought the present action of suspension and interdict for an alleged infringement of his patent. The invention was described in the specification as relating "to various improvements in fire-grates, for obtaining increased efficiency of draught therein, together with the better radiation of heat, and the accurate July 17, 1857. — 2d Division. R.

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and easy adjustment of the regulating details for modifying the draught, and the combustion of the fuel, and the consumption of smoke." After describing the nature of the alleged invention, and the manner in which it might be used, the specification concluded with the following summary of the particulars of his invention :—" What I consider to be novel and original, and therein claim as the invention secured to me by the hereinbefore in part recited letters patent, is,—1st, The application and use of an overhanging back door, for obtaining two separate vents or passages for the products of combustion. 2d, The system or mode of arranging and constructing fire-grates and fire-places, wherein the front or main draught, and the back or secondary draught, are simultaneously adjusted and regulated. 3d, The system or mode of carrying off the dense smoke and vapours of fuel by a back or secondary draught, as herein before described. 4th, The application and use of a detent link or holder, with undulating notches or holding surfaces, acting in both directions by the use of lateral or simple pressure only, as herein before described."

The case was sent for trial by jury on the following issues :—" It being admitted, that on 1st October 1852, the pursuer, John Finlay, obtained letters patent, bearing to be for improvements in 'grates and fire-places, or apparatus for the generation of heat:'

" Whether the pursuer caused to be filed a specification in terms of the proviso contained in said letters patent; and whether, during the year preceding 1st June 1856, or any part thereof, and during the currency of the said letters patent, the defender James Allan, senior, did wrongfully, and in violation of the said letters patent, within his manufacturing premises, or shops or warehouses or other premises occupied by him at or near Elmbank, or in or near Blytheswood Buildings, Bothwell Street, all in or near Glasgow, make or sell or use a grate or grates, having applied thereto, and used as part thereof, a detent link or holder, formed with undulating notches or holding surfaces, acting in both directions, by the use of lateral or simple pressure only, as described in the said specification?

Or,

" 1. Whether the application or use, in connection with a grate or grates, of a detent link or holder, with undulating notches or holding surfaces, acting in both directions, by the use of lateral or simple pressure only, as described in the said specification, was known and publicly used within the united kingdom prior to the date of the said letters patent?

" 2. Whether the application or use, in connection with a grate or grates, of a detent link or holder, with undulating notches or holding surfaces, acting in both directions, by the use of lateral or simple pressure only, as described in the said specification, was not an improvement of any public benefit or advantage?"

At the trial, which took place before Lord Neaves, the pursuer examined a number of skilled witnesses. It was proved that the grate protected by the pursuer's patent was so constructed that the back of the grate formed a door, hinged on pivots, near its lower extremity, which might be drawn forward so as to overhang the fire, without entirely closing the passage for smoke, whereby certain advantages were gained. The principal feature of the invention was, that the back was so arranged, that on being pushed back so as to open or enlarge the passage for smoke up the chimney, there was opened, not only what might be termed the front or direct draught into the chimney in front of the moveable back, but also a back draught, or secondary air passage, under and behind the moveable back, from near the level of the burning fuel, by which the denser smoke was carried off, and had no chance of escaping into the room. The moveable back was held in any required position, by means of a notched bar called a detent link or holder (mentioned in the 4th head of the summary of the specification),

naving notches so constructed as to admit of the movement of the back by lateral or simple pressure only, applied to the back, without any special adjustment of the detent. The grate complained of as an infringement of the patent had also a moveable overhanging back, which was held in its position by a detent similar to that used by the pursuer, but there was no double draught. It was proved that similar detents or holders had been used previous to the pursuer's patent. No. 240.

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The pursuer's proof being concluded, it appeared to the parties that the questions involved were more fit for the consideration of the Court than the jury, and the following verdict was therefore agreed to:—"Find for the pursuer, with leave to the defender to move the Court to enter the verdict for him upon any point of law, against the validity of the patent, raised by the evidence in the Judge's notes, so far as relates to the validity of the patent generally, or to the part of the patent said to be infringed upon, and so far as such objections could competently have been stated at the trial.—The defender agreed to withdraw his issues upon the understanding assented to by the pursuer, that in stating his case for the verdict being entered up for him on the evidence adduced, he was in no respect to be thereby limited or prejudiced."

It was moved for the defender, that the verdict should be entered up for him. It was argued:—The pursuer's patent was for an overhanging door and a double draught; the detent or holder was only claimed as part of and in combination with that invention. If the patent was for the application of a detent link or holder similar to that of the pursuer's, when not used in combination with such a double draught door, that was not a valid subject of patent, such detents or holders having been in use long previous to his invention. If prior use could be shewn of any part of what was claimed as a new invention, the patent was bad; the machinery was of the commonest description, and prior use of the detent or holder had been proved. A specification, where a novel use of an old invention was claimed, required to be clear and specific.[1] The specification was not of a new mode of applying and using the detent, but of "the application and use" of it (4th head of specification). No doubt it had not previously been used to hold the door at and before the perpendicular; but there was no novelty in the contrivance, or in the mode in which it was applied for that purpose; and, at any rate, there should have been a disclaimer of any exclusive right to use it for holding behind the perpendicular. It having been proved that a part of the invention, at least, was in use before the patent, the want of a disclaimer of its use to that extent was a fatal blot,[2] because it being law that a party using part of an invention is as much an infringer as one who pirates the whole of it,[3] the converse must hold that no man is entitled to a patent, unless the whole invention claimed be new.[4]

It was answered for the pursuer;—The argument of the defender against the validity of the patent could not be competently urged, as there was no plea to that effect on the record, and his issues were only as to previous use,

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[1] Coryton on Patents, pp. 135–296; Campion v. Benyon, 3d July 1821 (Common Pleas), III. Brod. and Bing. p. 5; Templeton v. Macfarlane, 23d Feb. 1848, ante, vol. x. p. 796, in H. L. 27th June 1848, I. Clark and Finelly (N. S.) p. 595.

[2] Hindmarsh, p. 115.

[3] Smith v. North Western Railway Company, 30th April 1853 (Q. B.), II. Ellis and Black., p. 69.

[4] The defenders also cited Losh v. Hague (1838), Webster's Cases, p. 202; Hill v. Thompson, III. Merivale, p. 622; Reg. v. Wheeler, II. Barn. and Ald. p. 349; Brunton v. Hawkes, IV. Barn. and Ald. p. 541; Minter v. Mower, Webster's Cases, p. 138.

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and as to the public utility of the invention.[1] Such objections to the pursuer's patent could not have been competently urged at the trial, and there was only reserved to the defender by the verdict his right to urge objections against the validity of the patent, "so far as such objections could be competently stated at the trial." The detent or holder, so far as regarded its application and use, was a part of the invention secured by the patent.[2] The patent was valid to protect this application of the detent, which was proved to be both new and beneficial—the two requisites of a good patent.[3] A patent might be for an application of previously known means to produce a new result, of new materials to produce a previously known result, or of old materials to produce a previously known result, provided there was some advantage in the manner in which it was proposed the old materials should be used or applied.[4] In applying the detent link to his grate, it was used to retain the door in a manner in which it had not been previously applied, and in such a manner as to be productive of advantage. It was of importance to observe that it was not claimed as a detent in connection with a double draft door, but as a detent to regulate the position of an overhanging door. It was of little consequence whether the patent was to be held as protecting two separate inventions of a detent or a double draft, or a single invention combining both of these. In the one case, an infringement of one invention might be subject of complaint as well as both, and, in the other, the complaint was of an infringement on a portion of an invention secured by patent, which was equally a proper ground of complaint.

Lord Justice-Clerk.—In the view which I entertain of this case, in common, I believe, with the rest of the Court, it will not be necessary to state at length any general principles as to patent law. I will only say, therefore, that I have been guided by and desire to adhere to the principles contained in the opinions of Lord Tenterdon in Brunton v. Hawkes, IV. Barnewell and Alderson, and in Kay and Marshall, and in King v. Wheeler,—of Lord Dunmore in Minter v. Mower,—of Lord Eldon in Hill v. Thompson, and of Lord Abinger in Losh v. Hague.

Taking the principles enumerated in these cases as my guide, let us see what is the point raised by the issue in this case. (Reads.) Plainly, what is complained of is simply the use of a detent link or holder acting in the way described. Then the first, perhaps I should say the only, question in this case is, what is it which this patent of Finlay's claims? Does it claim the use of the detent link in a general way, so as to comprehend the use of it as employed in the defender's grate, in other particulars essentially different from the pursuer's?

(Reads title and specification.)

I am of opinion that the detent link is only claimed as a part of the practical use or regulation of the door for double draught, and is not claimed separately for any other back of a grate.

Hence the defender's grate is no infringement of the pursuer's patent.

Lord Murray.—I concur.

Lord Wood.—The pursuer's patent bears in its title to be one "for improvements in grates or fire-places, or apparatus for the generation of heat;" and in the commencement of the specification it is stated that "my said invention relates to various improvements in fire-grates, for obtaining increased efficiency of draught therein, together with the better radiation of heat, and the accurate and easy adjustment of the regulating details for modifying the draught, and the combustion of the fuel, and the consumption of smoke." Then there follows the explanation or descriptiou of the invention, as previously set forth. And at the conclusion

[1] Losh v. Hague (1838), *ut. sup.*; Neilson v. Househill Company, 15th November 1842, ante, vol. v, p. 86.

[2] Hindmarsh on patents, p. 181.

[3] Smith v. North Western Railway Company, 30th April 1853, *ut. sup.*

[4] Crain v. Price, 13th June 1842 (Com. Pleas), Webster's Cases, p. 377; Kay v. Marshall, 8th May 1839 (Com. Pleas), 5 Bing. (N. S.) p. 492; Queen v. Cu[illegible] 2d December 1847 (2 B.), III. Car. & Kirwan, p. 215.

of the specification it is farther stated, "what I consider to be novel and original, and therefore claim as the invention secured to me by the herein-before in part recited letters patent, is." And then, under four heads immediately following, there is stated what is so claimed as the invention secured by the patent.

Now, taking the whole specification together, it appears to me that the thing which is patented is not one consisting of various parts claimed separately, but one of various parts in connection or combination, producing or obtaining the beneficial results mentioned in the specification. I cannot read it as a patent for an overhanging back-door in grates, apart from its being one so arranged as to be adapted "for furnishing" (to use the words of the specification) "a means of back draught or secondary air passage at a lower level." The overhanging door to which the patent applies is not simply an overhanging door leaning or inclining from the perpendicular to the front to be adjusted or regulated in its position in any of the ways explained, but referring to the first of the four enumerating heads at the close of the specification, it is "an overhanging back-door for obtaining two separate vents or passages for the products of combustion." This is the overhanging back-door, the use and application of which is that claimed, and the resulting beneficial and novel effects of it form in truth the real substance and merit of the pursuer's invention. The second head has relation to fire-grates or fire-places, wherein the front or main draught, and the back or secondary draught, are simultaneously regulated, and the third to the system or mode of carrying off smoke, and so on, by the back or secondary draught. All this is in perfect conformity to the preceding portions of the specification.

The 4th head of the claim is "the application and use of a detent link or holder, with undulating notches or holding surfaces, acting in both directions by the use of lateral or simple pressure only, as herein before described." Then going back to the previous description referred to, which follows immediately after the description of the back-door, it commences thus, "The adjustment of the draught door may be affected in various ways, as, for example"—and it then proceeds to give, among others, one for its adjustment by the use of what is called in the 4th head a detent link or holder with undulating notches.

Now as I read the specification, the only draught door, the adjustment of which is there described to be so affected, and to which, I conceive, it has exclusive reference—is a double draught, working both to the front and back of the perpendicular; that is, to take the words of the specification, a door which, "leaning or inclining backwards towards the chimney or wall in which the grate is placed, or which inclines forwards from its bottom joint towards the room."

I therefore think that the application and use of a detent link or holder is claimed solely in connection or combination with a double draught door, and not in relation to any adjustment of an overhanging back-door, not arranged to produce a double draught. In short, I am of opinion that the pursuer makes his claim, and has accordingly, in conformity to his claim and accompanying specification, obtained his patent for the whole inseparably, and not for distinct parts, except as combining to make such a whole as he describes.

Such being the nature of the patent, it is, I apprehend, a good patent; and there is no ground for maintaining its invalidity in respect of bad subject-matter. In this view it is unnecessary to inquire either whether or not there would have been ground for such an objection, had each part of that whole, which in connection is claimed as the pursuer's invention, been claimed separately; or whether or not, supposing there had been ground for the objection, it would have been open in the shape of the pleadings and terms of the issues to insist in it.

Then as to infringement by the defender of the patent right thus secured to the pursuer. If the defender has violated the patent, it is not by the use of a double draught door, or the adjustment of it by the application and use of a detent link or holder, for it is admitted that a door of that description forms no part of the grates made by the defender. Accordingly such infringement is not alleged or put in issue. What is put in issue, is, that the defender did wrongfully "make, sell, or use a grate or grates, by having applied thereto, and used as a part thereof, a detent link or holder, formed with undulating notches or holding surfaces, acting in both directions, by the use of lateral or simple pressure only, as described in the said specification." And the fact as established by the proof is, that what the defender

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does in the construction and management of his grates is, that there being placed therein a vertical draught door which has no opening at its lower edge to form a double draught, and by which, therefore, no double draught is obtained, but which works not only to the back but to the front of the perpendicular, he uses a detent link or holder to regulate the position of this door, and to fix it at any desired point throughout the whole space over which it moves.

The question then comes to be, is this construction and arrangement of the defender's grates an infringement of the pursuer's patent?

Now, I apprehend that the constructing a grate with a vertical door working from the perpendicular to the back of the grate, and having its position within that space regulated by a detent link or links, but producing no double draught, would be no infringement. It is an undisputed fact upon the evidence, that grates so arranged had been in use long before the date of the pursuer's patent. In such a construction, therefore, there could be neither novelty nor merit. It had become public property, and the adoption of it could not constitute an infringement of the patent. If, therefore, there be an infringement in the defender's mode of constructing his grates, the infringement must consist in this, that the vertical door—by which no double draught is obtained—works not only from the perpendicular to the back, but forward from the perpendicular to the front of the grate, and that, in this last part of its movement, as well as in the first, its position is regulated or adjusted by the detent link or holder.

Now, taking the patent to be such as I have already stated I hold it to be, it does not appear to me that this extension of the old use of the detent link for the adjustment of the vertical door when moved to the front of the perpendicular, and so coming to overhang the fire more or less according to the position in which it is fixed for the time, but without a double draught being produced, is a violation of the patent, the really material and essential part of the patented invention being a door by which a double draught is produced, and in connection with which alone it is that the use or application of the detent link or holder is described in the specification as a means of adjusting the position of the door, or is stated at the conclusion of the specification to form part of the pursuer's claim in the heads under which he sets forth "what I consider to be novel and original, and therefore claim as the invention secured to me by the herein before in part recited letters patent." I do not think that, according to a sound construction of the pursuer's patent, a door working in front of the perpendicular, but in that producing a double draught, regulated by a detent link or holder, is separated from one by which a double draught is produced, so as to be a separate and distinct invention, or arranged in grates and secured by the patent.

I am of opinion that, according to the sound construction of the pursuer's patent, a door working in front of the perpendicular regulated by a detent link, but with no double draught, is inseparable from one by which a double draught is produced, and that a door of that kind in connection with a detent link for its regulation, cannot be claimed as a separate and distinct part of the pursuer's invention in the arrangement and construction of grates secured by his patent, so as to admit of their adoption alone, without the production of a double draught, being stated to be an infringement of the patent.

But, granting that a door working to the front of the perpendicular, and adjusted by a detent link or holder, without a double draught, were separable from that part of the pursuer's invention which consists in the production of a double draught, I should be disposed to think that the patent had not been infringed by the defender, and that, having regard to the statements and pleas upon the record, and to the facts confessedly proved as to the prior use of the detent link for regulating doors in grates, the defender would have a good answer to the action.

Neither a single draught-door nor the application of a detent link to it is a new invention. Therefore, in constructing grates with a door working to the front of the perpendicular, regulated by a detent link, but without a double draught, the defender is only extending what was previously known and used in the manufacture of grates. It is only an old thing or contrivance applied to a new object, which is merely a double or new use or application of an art or invention previously well known: and not only so, but as far as I can see, it is a use and

application made without any new contrivance or mode of application being either necessary or resorted to, and by which no new and material part of the pursuer's invention, as described in the specification, is adopted by the defender either in combination, or not in combination with what is old.

But I abstain from enlarging upon this view of the case, not considering it necessary to the decision of the matter before the Court.

I am of opinion that the verdict ought to be entered up for the defender.

Lord Cowan.—I am of opinion that the verdict ought to be entered for the defender.

The leading question raised by the argument upon the Judges' notes relates to the construction of the specification, and of the letters.

An alternative view was submitted by the defender's counsel, either that the subject matter of the patent was to be taken as one invention, consisting of a combination of the four particulars set forth in the specification, and therein stated to be what the patentee considered to be novel and original; or, that the particular matters described, and especially the fourth, relative to the detent link or holder, were to be taken as separately claimed as the subject-matter of the patent. In either view it was contended that the pursuer had failed in his case, and the defence was established.

1. It seems to me that the more correct view is, that the several improvements claimed as new are set forth as forming in combination a grate of the improved description invented by the patentee, and that the specification admits of being read to no other effect. I need not go over the specification in detail. It is plain to me that the overhanging door with its hinge near its lower edge, so as to furnish a double draught to carry off the smoke and heated air, cannot be separated from the means by which the door is moved backward or forward, for the purpose of enlarging or diminishing the orifices at the top and bottom of the door, that causing the double draught into the chimney; in other words, from the detent link or holder by which the door is kept in position. The whole taken together constitutes the invention described in the specification.

In this view of the patent its validity cannot be impugned, but the result is that there is no infringement of the pursuer's right to justify this action against the defender.

The grate made and sold by the defender has no double draught door. There is used in it a detent link or holder for detaining the door so as to regulate the extent of the opening into the chimney at the desired position, whether in front of or behind the perpendicular; but there is no under opening or orifice to the effect of creating a double draft. There is thus an essential difference between the grate of the defender complained of, and the grate which is the subject of the pursuer's patent, in the view of the specification now mentioned.

2. Assuming, however, that the detent link or holder could be viewed as a distinct matter of this patent, the answer of the defender is no less conclusive. There is no novelty, having regard to the facts in evidence on the Judge's notes, to support the patent.

The detent link or holder is in no essential respect different from that proved to have been in use prior to the patent in Jobson's grate. There is a difference in the effect caused by the use of the one or other from the position on the grate to which it is attached, of the door which moves in the link or holder. In Jobson's grate the door opens only backwards from the perpendicular. In the pursuer's the door may be detained either in front of or backwards from the perpendicular. It is obvious to me that this arises not from any difference in the detent link or holder used in the one grate as contrasted with the other, or from the mode of its operation and its effect in detaining the door at the desired position, but from the mode in which the bottom of the door is attached to the under part of the grate. In Jobson's it is so fixed as not to be capable of being kept in front of the perpendicular. In the pursuer's the hinge joint is so placed relatively to the rest of the grate as to permit of the door being kept either before or backwards from the perpendicular. The link or holder affording the means of keeping the door at any precise point, is however the same in both grates. There is absolutely no difference. By lateral pressure on the door, whether in the one or the other, it is moved

No. 240. — July 18, 1857. Halliday v. Morison.

backwards or forwards, and kept in position by the same description of detent link or holder.

While on this alternative view I am of the opinion now expressed, I think it a better construction of the patent to hold the pursuer's invention to consist in the combination of the particulars in the specification, which does not disturb the validity of the pursuer's patent, though the result is, that verdict must be entered for the defender.

The Court pronounced the following interlocutor:—"Find that the grate of the defender is not an infringement of the pursuer's patent, according to the meaning and sound construction of the patent and specification on which the issue is founded, and therefore find that the verdict must be entered up for the defender: Find the defender entitled to the expenses of the discussion on these motions, and remit," &c.

Alex. Hamilton, W.S.—Macbrair & Parker, W.S.—Agents.

No. 241.

Mrs Isabella Graham or Halliday, Pursuer.—*F. W. Clark.*
Mrs Jean Carruthers or Morison, Defender.—*Pattison.*

Process—Amendment of record.—Leave to amend a closed record refused, where the alleged error was said to affect only the accuracy of statement and not the essence of the case.

Process—Diligence.—In a reduction of a disposition of house property on the ground of mental incapacity, issues having been adjusted, diligence granted to recover a valuation of the property, and a discharge of the bond.

July 18, 1857. — 1st Division. Ld. Ardmillan. C.

See supra, p. 929.

This case now came before the Court on the pursuer's motion for leave to correct an alleged error in the record. In her revised condescendence she had averred *inter alia* that previous to her mother's death part of the subjects in question had been let on a thirty year's lease "at a reduced rent of L.30 per annum," on certain conditions as to rebuilding the house by the tenant, and of the subjects reverting to the proprietors in the event of the tenant dying within a certain period, which statement was denied by the defender. The pursuer now proposed to substitute L.10 for L.30, which she alleged was a clerical error.

The defender denied that it was so. The L.30 had been all along founded on as the correct sum until the second issue proposed for the pursuer was refused.

Replied;—This does not go to the essence of the case, but only to the accuracy of the statement.

Lord President.—In that case it must stand. I thought it was proposed to correct it because it went to the essence of the case. You may tell the Judge and jury that it is a clerical error, and they will attach such weight to it as they please.

Motion refused.

The pursuer then moved for a diligence to recover a valuation of the subjects prepared after the death of Archibald Morrison, and a discharge of the bond for L.200 granted to Elizabeth Palmer. The existence of the valuation had only been recently ascertained, and it was of importance to prove the actual value of the property at the time this disposition was granted.

Objected;—The question to be tried was one of mental incapacity. The valuation of the property had nothing to do with that. Further, there was no date attached to this alleged valuation in the specification.

LORD PRESIDENT.—I see no great objection to this. Granting the commission will not make the document evidence. No. 241.

July 18, 1857. Blaikie v. Duncan.

DILIGENCE granted.

WILLIAM MACKERSY, W.S.—JOHN M'CRACKEN, S.S.C.—Agents.

SIR JOHN BLAIKIE, Knt., Pursuer.—*D. F. Inglis—Macfarlane.* No. 242.
JOHN DUNCAN, Defender.—*Penney—Moir.*

I. *Process—Jury trial.*—Motion by a defender to postpone a jury trial on the ground of his agent's engagements, refused.

II. *Process — Issues — Amendment of.*—*Held* competent to amend an adjusted issue by striking out certain words which had been inadvertantly inserted in it.

III. *Process—Appeal—Statute* 48 *Geo. III. c.* 151, *sect.* 15.—In an action for defamation, no issue in justification having been taken, the Court refused the defender a diligence to enable him to prove facts in mitigation of damages. Petition for leave to appeal against that judgment refused.

SEE supra, pp. 881 and 983. July 18, 1857.

1ST DIVISION. Ld Ardmillan. C.

I. On 17th July this case again came before the Court on the defender's motion for postponement of the trial, which had been fixed for the 24th curt. The motion was put on the ground that the defender's agent had been unexpectedly engaged in a justiciary trial from 30th June till 10th July, for eighteen consecutive hours every day, and that the issues having been adjusted only on the 4th July, he felt unable to do justice to the case within so limited a time—more especially as a considerable change had taken place in the preparation in consequence of the refusal of the diligence on the 11th curt. A great deal of inquiry and of precognition of witnesses was now necessary in the north of Scotland, which was not originally contemplated, and, in these circumstances, delay might make all the difference to the defender between success or failure.

Objected by the pursuer, that the motion was unprecedented. The defender had it in his power to employ another agent. Farther, between the 9th and 24th July there was ample time for preparation for a much more difficult case than the present, the only question involved in which, was the publication of the libel and its meaning.

LORD PRESIDENT.—This motion is certainly put on a novel ground. The affidavit does not allege any peculiarity in the defence, nor that there is any remarkable extent of inquiry necessary. Under these circumstances, to grant delay would be to establish a most dangerous precedent.

MOTION refused.

Of this date the case was again called, on the pursuer's motion for leave to correct the issue, and also on a petition by the defender for leave to appeal.

II. As to the correction of the issue, the pursuer moved to be allowed to delete the words, "at the date of instituting this action," in the second issue, a few lines from the end. These words were evidently an accidental interpolation. They had crept in inadvertently, and as a clerical error might competently be deleted.[1]

The motion was not opposed, and was granted.

III. The defender's petition for leave to appeal was directed against the interlocutor of 11th July refusing the defender's motion for a diligence, and was put on the ground that that interlocutor excluded the defender from the direct and appropriate proof of the averments which he had made in defence, and rendered it necessary for him to resort to secondary and more unsatisfactory proof thereof, whereby he conceived he would suffer great loss and

[1] M'Neill v. Caldwell, 24th March 1853, ante, vol. xv. p. 590; A B v. Skae, 8th July 1857, supra, p. 958.

No. 242. — July 18, 1857. Innes.

prejudice. He pleaded, that the point decided by the interlocutor in question, although it came before the Court in an incidental form, was of great importance, for the Court had virtually decided that where a party had not put a justification on record, he was not entitled to plead facts in mitigation of damages. This principle not having been previously established, the defender was entitled to take the opinion of the House of Lords upon it.[1] The matter excluded, here constituted the substance of the defence. In practice it had been held competent to prove such facts as shewed that statements complained of as calumnious had not been made recklessly and maliciously, but with some excuse or foundation.

Pleaded for the pursuer;—The judgment complained of was in accordance with the deliberate judgment in M'Neill v. Rorison, and with the practice following upon it. Further, it would be most unjust to the pursuer to allow this appeal, which probably would not be heard for three years, and during all which time the pursuer would be under the libel, and prevented vindicating his character.

Lord President.—This is a most unfavourable case for an application for leave to appeal. I do not think that a judgment on a motion for diligence would be a proper form to raise the general question which the defender refers to. It is certainly a very indirect mode of raising it. Farther, the refusing of this diligence involved other elements than the one general principle which the defender says the Court then for the first time decided. Therefore, that judgment cannot be taken as simply and purely deciding that question, which alone the defender says he wants to appeal. In every case it may be said that the refusal of diligence puts the party asking it to disadvantage in trying his case, and why should he not have the benefit of an appeal? Of all interlocutory judgments, this is the last that ought to be the subject of appeal, and therefore I am clearly for refusing this petition.

Lord Ivory.—I am of the same opinion. I was not present when the diligence was refused, but on reading this petition, I see no reason for granting it.

Lord Curriehill.—I am of the same opinion. The refusal of this diligence was placed on more grounds than one, and therefore this interlocutor does not fairly raise the general question.

Lord Deas.—There is no doubt of the fact that there not being an issue taken in justification was one of the grounds for refusing this diligence. But there were other grounds on which the Court went, and it is quite sufficient to say that although the judgment in M'Neill v. Rorison had been the reverse of what it was, there was good reason for refusing this petition.

The Court pronounced the following interlocutor:—"Allow the issue to be amended: Refuse the desire of the petition, No. of process: Find the petitioner liable to the respondent in the expense of opposing the same: Allow an account thereof," &c.

Murray & Beith, W.S.—Ranken, Walker, & Johnston, W.S.—Agents.

No. 243. — July 18, 1857. — 2d Division.

Daniel Innes, Petitioner.—*A. B. Bell.*

Poor's Roll. —The pursuer of an action of damages for adultery averred in his condescendence that he was in good circumstances. In order to carry on the action, he afterwards applied for the benefit of the poor's roll, and stated that he was a barber in Wick, sixty-five years of age, and had four children, the eldest of whom was thirteen years old; that his earnings amounted to L.28 per annum, and he had no other source of income.

The Court refused the application.

W. White Millar.—Agent.

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[1] M'Neill v. Rorison, 12th Nov. 1847, ante, vol. x. p. 15.

HELEN FOTHERINGHAM TAYLOR AND DAVID TAYLOR, Petitioners.—*Penney—Monro.* No. 244.

ROBERT HORN AND OTHERS (Taylor's Trustees), Respondents.—*Macfarlane—Millar.*

July 18, 1857. Taylor v. Taylor's Trustees.

Trust—Removal of trustees.—A truster provided for an annual payment to his widow and minor children out of the rents of his heritable estate, and also for the expense of management and payment of debts;—*Held* that a complaint by the beneficiaries that they had been abandoned to destitution, and also alleging specific acts of mismanagement, was not a sufficient ground for the removal of the trustees.

Process—Intimation.—Petition by testamentary trustees, with concurrence of the beneficiaries, for the appointment of a judicial factor without intimation refused, but intimation ordered, and the petition remitted to the Lord Ordinary on the Bills to make an appointment in vacation.

1st Division. C.

THE late William Taylor, shipowner in Perth, left a trust-settlement appointing trustees,—all of whom accepted. He died in July 1854, and was survived by his widow, who died in April 1856, and by a daughter aged 16 years, and a son aged 15 years—the present petitioners. The truster provided an annuity of L.40 to his widow, and L.40 to his daughter till she should reach 25, to be paid out of the rents of his heritable estate. The residue of the rents were provided to the son. The truster also provided for the expense of management and the payment of debts.

This petition was presented by the truster's children, praying for the removal of the trustees, and the appointment of a judicial factor. They detailed the management which they complained of, and shewed that, after deduction of every possible debt, even those allowed by the trustees, there would remain a surplus income of about L.140 a-year, but they stated that the family had been abandoned to a state of complete destitution—their bodily wants as well as their education being neglected; that the female petitioner had betaken herself for subsistence to the situation of a governess, while the son had become dependent on the charity of a maternal aunt, whose own resources were but slender. The petitioners attributed the mismanagement to adverse influences amongst the trustees, one of whom was agent for the Bank of Scotland, to whom a large payment had been made, as for a debt alleged to be due by the truster, but without any claim or account lodged by the Bank. Further, the petitioners complained that they had been unnecessarily plunged into litigation with the Bank, the result of which, however, was to shew that the trustees had not been warranted in these payments to the Bank. That the trustees had also allowed two large and doubtful accounts,—one for law business, commencing in 1826 and ending in 1853, and another for repairs to ships, by a person of the name of John Smith, commencing in 1836 and ending in 1854; and the petitioners stated that on 13th May 1857, there was presented to the Lord Ordinary on the bills, by the same agents and counsel who acted for the trustees, a petition in name of the alleged creditor John Smith, praying for sequestration of the estates of their late father as of a deceased debtor. That the trustees had averred their approbation of this act, and that it was adopted at the suggestion and request of their agent acting for them. "They thus confess their own inadequacy to the proper management of the trust-estate." The petitioners suggested the appointment of a judicial factor, "as the only course open to them for obtaining the means of education and subsistence from their father's estate, and of saving what remains of it for their use."[1]

The trustees lodged answers, in which they at great length justified themselves from the charge of having betrayed their trust. "The trustees have

[1] Macpherson v. A. B., 19th December 1840, ante, vol. iii. p. 315; Soutar v. Brown, 25th November 1852, ante, vol. xv. p. 89.

No. 244. — July 18, 1857. Taylor v. Taylor's Trustees.

not appeared in the application for sequestration, either to approve or disapprove; but although they have taken no part, they have their own opinion. Sequestration is now a recognised form of administering the estates of deceased debtors, and few cases can be figured in which the use of it would be more beneficial than the present."

The case was called on 4th July. The petitioners pleaded;—That the trustees, by signifying their approval of the sequestration, had virtually put an end to their office. It was not till they had thus attempted to subvert the trust that this application was made. Sequestration was inexpedient, because it would place the management of the estate in the hands of persons who had no interest in it. Farther, it was doubtful whether it was competent to sequestrate the estate of a party deceased when insolvency was not alleged.[1]

The trustees pleaded;—That the petition was incompetent. It was only when a trust had come to a dead lock, that the Court had been in use to interfere in the management of a trust.

Lord President.—The matters here disclosed, and the position into which this trust has come, may suggest to the trustees various reflections as to their responsibility in the future management of the estate. But I cannot say that a case has been made out for removing the trustees whom the truster appointed, and in whom he placed the management of his affairs. That would require a statement of a peculiar kind. I do not say that the Court have not power to remove them, but I do not think that a case has been made out for our interference. I also abstain from saying anything about the application for sequestration. Therefore we must refuse this petition.

Lord Curriehill.—I am of the same opinion. It requires a very strong case indeed for removing testamentary trustees, and I do not think that such a case has been made out here.

Lord Deas.—The grounds of complaint against the trustees amount truly to a difference of opinion between them and the beneficiaries as to their powers and mode of management. The trustees may be quite wrong; but, if so, the Courts of law will set them right, and may subject them in expenses. The remedy is to enforce what the beneficiaries think the sound construction of the trust-deed—not the removal of the trustees. The truster appointed them to manage his estate; and we are not entitled, on such grounds as are here stated, to set aside that appointment.

Lord Ivory absent.

The Court pronounced the following interlocutor:—"Refuse the desire of the said petition, and decern: Find the respondents, the trustees, entitled to the expenses incurred by them in these proceedings, and allow them to retain payment thereof out of the trust-estate under their charge."

Of this date the trustees presented a petition for the appointment of a judicial factor on the estate; or, otherwise, for an order on the accountant in bankruptcy to superintend the administration of the trust, in terms of the Bankruptcy (Scotland) Act, 1856, sect. 166. It would be for the advantage of all concerned if they were relieved of the trust, and they stated that this application was presented with the concurrence of the beneficiaries.

D. F. Inglis, for the trustees, moved for the appointment of a factor without intimation.

Penney, for the beneficiaries, consented.

Lord President.—This is a novelty. We may remit to the Lord Ordinary on the Bills to appoint *ad interim*.

D. F. Inglis.—The Court can give authority to the Lord Ordinary on the Bills to make the appointment, if there is no objection. This is no doubt a novel course, but the peculiar circumstances justify it. An appointment *ad interim* is not satisfactory.

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[1] Milne and Co. v. Milne, 13th June 1850, ante, vol. xii. p. 1007.

No. 244. — July 18, 1857. M'Gillivray's Executors v. Masson.

LORD DEAS.—This is a thing that I am not aware was ever done before, and it is a very unsatisfactory thing to do on the last day of the Session. There is no such reason here given for superseding the trust in this summary way as was ever before given effect to.

LORD PRESIDENT.—I see no practical difficulty in an interim appointment by the Lord Ordinary till the meeting of the Court. We understanding the nature of these proceedings, it would be matter of course to confirm the appointment.

THE COURT pronounced the following interlocutor:—"The Lords appoint this petition to be intimated on the walls and in the minute book for eight days: Farther, they remit to the Lord Ordinary on the Bills during vacation, with power to his Lordship, on expiry of the intimation hereby appointed, to consider the petition and the answers, if any, which may be lodged thereto, and to make an appointment *ad interim* of judicial factor on the trust-estate of the deceased William Taylor, mentioned in the petition, if his Lordship shall see fit so to do."

LAURENCE M. MACARA, W.S.—J. & J. MACANDREW, S.S.C.—Agents.

No. 245.

JOHN WALKER AND OTHERS (M'Gillivray's Executors), Pursuers.—*Penney—A. R. Clark.*

JAMES MASSON AND OTHERS, Defenders.—*Macfarlane—Millar.*

Landlord and Tenant—Personal and transmissible—Obligation—Heritable and moveable.—In a lease of a farm, the incoming tenant bound himself to pay to the outgoing tenant any sums he might be entitled to for meliorations, and the landlord bound himself, his heirs and successors, in respect thereof, to take the buildings on the farm at the expiry of the lease, on a valuation not exceeding a certain sum. The landlord having died during the currency of the lease,—*Held* (*aff.* judgment of Lord Handyside, *diss.* Lord Curriehill) that the landlord's obligation transmitted against his general representatives, and that the executors were not entitled to a declaratory judgment as against the tenant, that the personal estate was not liable.

July 18, 1857. — 1ST DIVISION. Ld. Handyside L.

MR LACHLAN M'GILLIVRAY of Dunnaglass died in February 1852, leaving certain testamentary writings, under which the pursuers were appointed his executors. Mr M'Gillivray died possessed of considerable moveable property, and also of landed estates, to which there were various claimants, but the heirs-at-law or of provision being remote and uncertain, the Court appointed a judicial factor upon the estates. Thereafter Mr John M'Gillivray, having shewn right *qua* heir of succession to the lands of Aberchalder, these lands were withdrawn from the operation of the judicial factory.

In April 1851, Mr Lachlan M'Gillivray had entered into a lease of Aberchalder with Mr Masson for twelve years By this lease, Mr Masson bound and obliged "himself and his foresaids (heirs, executors, and successors) to relieve the said John Lachlan M'Gillivray of, and pay to the outgoing tenant, any sum of money which he may be entitled to as meliorations for the houses on the said lands, and, in respect thereof, the said John Lachlan M'Gillivray binds and obliges himself and his foresaids (heirs and successors) to take the whole of the dwelling-houses, farm-offices, buildings, and dykes, on the said farm and lands at the expiry hereof, at the valuation of two neutral and competent persons to be mutually chosen, and to pay the amount of said valuation, not exceeding L.450 sterling, to the said James Masson and his foresaids."

The executors now raised this action against Mr Masson, Mr John M'Gillivray, and the judicial factor, to have it found and declared "that this obligation fell to be implemented, not by the pursuers as executors of the landlord, by whom the lease was granted, but by his heir in these lands, or other party in right thereof when the said obligation becomes exigible, and,

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accordingly, that neither the defender James Masson, nor those succeeding to him in the said lease, have or can have any claim against the pursuers or the personal estate of the deceased in respect of said obligation, and that John M'Gillivray, as heir in possession of the lands, should be ordained for himself, his heirs and successors in said lands, to free and relieve the pursuers at the hands of the said James Masson and all others, of and from the said obligation, and all the consequences thereof."

The defender, Masson, pleaded;—That the landlord's obligation transmitted against the late Mr M'Gillivray's heirs in general, and, therefore, that the defender was entitled to be assoilzied from the conclusions of the summons. No defences were lodged by Mr John M'Gillivray.

The Lord Ordinary, on 27th June 1855, pronounced the following interlocutor:—"In respect no defences have been lodged nor appearance made for the defender John M'Gillivray, Esq., of Easter Aberchalder, decerns as concluded for so far as he is interested; but, as regards the defender James Masson, sustains the defences, assoilzies him from the conclusions of the libel in so far as directed against him, and decerns: Finds him entitled to expenses," &c. *

The pursuer reclaimed.

Lord President.—This case is in some respects novel. We must look not only to the relative position of the parties as executors of the late landlord and the

* "Note.—This is rather a singular case, and the Lord Ordinary regrets that he should feel himself compelled to pronounce the preceding interlocutor; but it humbly appears to him, that the very precise and comprehensive terms of the conclusions directed against the defender Masson permit of no other course. Acknowledging that such a stipulation as is contained in the defender's lease, in respect to meliorations to be paid by the landlord at its expiry, passes along with the lands, and is exigible from the heir succeeding to them or from the purchaser of the estate, the Lord Ordinary is still not prepared to hold that the obligation undertaken by the granter of the tack, binding himself and his heirs and successors in general terms, may not be made good, if need be, against his general representatives. Now, what the pursuers ask, as the executors of the granter of the tack, is declarator, not merely that the obligation falls to be implemented when it becomes exigible by the successor in the lands, or the party who may be in right of the estate, and not by the pursuers, as executors, but that neither Masson the defender, nor those succeeding to him in the lease, 'have or can have any claim against the pursuers, or the personal estate of the deceased, in respect of said obligation.' The Lord Ordinary does not think such a sweeping conclusion to be tenable, and is not aware of any authority to support it. It may be difficult to conceive circumstances which should make it necessary for the tenant to resort to a claim against the general representatives of his original landlord; but it is also impossible to say that the obligation is altogether valueless, and that under no imaginable circumstances could it be made available. At any rate, he is in possession of an obligation sufficiently broad to bind all who represent the late Mr M'Gillivray, and which he naturally refuses to discharge. Unless, therefore, it shall be held that the division of the inheritance of a landlord between his heir and executor shall forthwith discharge his representatives in moveables from all responsibility as to payments under such a stipulation in a lease, and limit the tenant's action solely against the heir in the lands, and, farther, that the sale of the estate, discharges all right in the tenant except against the purchaser, the Lord Ordinary does not see how the pursuers can prevail in this action. The Lord Ordinary cannot of himself venture to affirm these propositions. If the pursuers had limited their action to being found entitled to distribute the estate realised by them as executors, the Lord Ordinary thinks they might possibly have obtained decree to that effect, and so have attained their object as explained on record. But, as already noticed, their conclusion is to exclude the defender from any claim which he has or can have against the personal estate of the deceased, thus calling on him to renounce all claim against those who shall obtain the residuary estate."

tenant in the lands, but also to the nature of the obligation which the late landlord undertakes. There are some points settled as between the landlord and tenant in regard to a lease. The heir of the landlord taking the lands is bound in the prestations and stipulations of the lease, and so is a singular successor in regard to the proper matter of the lease. The cases of Arbuthnot, Fraser, and others settled that. On the other hand, the heir of the tenant is bound to fulfil the tenant's obligations, and so also an assignee who has been received by the landlord. It is, in fact, a bargain in this form of transaction, that the landlord accepts him in all respects in place of the previous tenant, all the liabilities attaching to the former tenant being transferred.

Then, as to the effect of these changes, some points seem to be also clear,—for example, the landlord's heir is the party who is liable to the tenant, and so also the executors of a tenant are not liable in a question with the landlord. I think that is a matter settled on plain principle, because they derive no benefit from the lease: It is the heir of the party takes benefit from the lease. That point is settled law. So also, on the principle I have already alluded to, a cedent is not liable. But an assignee is taken in place of the cedent out and out. All these matters relate to proper stipulations as to land. In this case, it is not clear to my mind that the stipulation is of that kind. The executors here before the termination of the lease have brought an action of declarator to have it found that they will not in any event be liable to the tenant for the claim which he has against somebody in respect of meliorations, and they have obtained decree of relief against one of the defenders, who claims to be the heir of the landlord, and is alleged to be now the landlord. The question is, whether in this particular stipulation the tenant has now or can have any claim against the executors of the landlord. The incoming tenant undertakes to relieve the landlord of a debt owing by the landlord to the outgoing tenant. It was therefore a personal claim against the landlord which this tenant undertook to relieve him of, and in that state of matters I apprehend that it was in its own nature a claim which, if it was ever exigible at all, would, unless otherwise stipulated, be exigible against all the representatives of the landlord. In respect of that advance of money by the tenant for behoof of the landlord—for it was little else than that—the landlord obliges himself and his heirs and successors to take the whole of the buildings on the farm on a valuation, and to pay the amount of that valuation, not exceeding L.450, to the defender James Masson.

Now that is not necessarily a stipulation applicable to any operation that the tenant himself was to perform on these lands. There may be no such operations. It comprehends some advance for the landlord's convenience to the creditor of the landlord at the beginning of the lease, in so far at least as the present tenant has not himself by any mismanagement allowed the houses to become of less value than L.450. But it comprehends that sum.

That being the nature of the claim, it is not a claim arising from year to year in the course of the lease as part of the management of the estate, nor is it like the rents that effeir to a fixed period of possession, which points out the interest of parties in reference to them. But it is a sum advanced by the tenant for the convenience of the landlord—in short, an accommodation at the beginning of the lease. I think the tenant had a claim against the landlord and his representatives from the time he made that advance. The simple view of the matter is, that it is a debt contracted by the landlord to the tenant, and that it still subsists. Circumstances may afterwards make the debt greater or less in amount, but the original debt continues, and the representatives of the landlord—whoever they are—are liable for it; therefore, I am for adhering to the interlocutor reclaimed against.

Lord Ivory.—I am of the same opinion, and on the same grounds.

Lord Curriehill.—The view I take of this case is different from that which is embodied in the Lord Ordinary's interlocutor, and adopted by your Lordships.

The lease in question was entered into between the late Mr M'Gillivray and the defender Mr Masson, in 1851, for a period of twelve years thereafter; and by a condition of the contract, which has given rise to the present dispute, the latter engaged to relieve the former of any sum of money, to which the then outgoing tenant might be entitled as melioration for houses, and in respect thereof Mr M'Gillivray bound himself, his heirs and successors, to take the whole of the dwelling-houses, farm offices, buildings, and dykes on the farm at the expiry of the lease,

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at a valuation, and to pay the amount of such valuation, not exceeding L450, to the defender, and his heirs, executors, and successors.

Mr M'Gillivray died in February 1852, during the first year of the lease, and the pursuers are his executors-nominate; and the question raised by this action is, whether these executors, although they may be entitled to demand from the defunct's heir relief from the obligation to pay for meliorations at the termination of the lease in the year 1863, remain liable to the defender for performance of that obligation?

According to my view of the case, it would be proper, before deciding this question, to ascertain whether the other defender John M'Gillivray, against whom the pursuers have obtained decree of relief as being the heir of the defunct, has truly that character. This is not admitted by the defender Masson, and I might not be prepared to hold the executors of the defunct to be free from liability for even the future obligations in the lease, if his true heir has not taken his place as his successor in the landlord's part of the contract. But as the interlocutor holds that the executors must remain liable for performance of the obligation for meliorations at the expiry of the lease, even on the assumption of such being the position of the defender John M'Gillivray, we must now deal with the question on that footing.

This question is one of great and general importance in this country, where the practice long has been, and continues to be, almost universal, to let lands by leases of considerable periods of endurance, and where in a large proportion of these leases it is expressly conditioned that the tenants at the expiry thereof shall be reimbursed their outlays on the houses and fences, in so far as the subjects of the leases shall then be found to be thereby ameliorated. A condition to this effect forms one of the general regulations for letting the farms of many of the large estates in Scotland; and, indeed, such a condition is implied by usage without being expressed, in leases of land in large provincial districts of the country, as appears from the report of the case of Bells v. Lamont, 14th June 1814.

As in very many cases the landlords die, or sell their estates, during the currency of such leases, it will probably be a startling announcement that the executors of these deceased landlords may be called upon to perform obligations of this kind at the terminations of the leases, however long a period may have lapsed since the entire right to the lands may have passed to the heirs or singular successors of such defuncts; and that, consequently, such executors are not in safety to distribute the executry funds until the termination of the period of endurance of every one of the leases which may have been granted on this footing by the defuncts. Yet such, as it appears to me, must be the consequence of the doctrine on which the interlocutor proceeds. The Lord Ordinary accordingly expresses his regret that he felt himself to be compelled to pronounce that interlocutor. But what, I ask, renders it necessary to adopt such a doctrine? Is it any precedent? or the authority of the institutional writers? or any general principle in the law of location, or of landlord and tenant? I can find nothing of the kind.

The defender has not referred us to any decision in support of this doctrine. Nor have any *dicta* of our institutional authorities been quoted as requiring or warranting the adoption of such a doctrine. It is not alleged to be founded on usage. And so far as I know, this doctrine, if it is now to be adopted, will be introduced for the first time into the practice of Scotland.

The only ground of the judgment, as appears from the note annexed to it, is this: That the granter of the lease, having bound himself, and his heirs and successors, to perform the obligation, it must be held, it is said, that it is binding on all his representatives after his death; that his executors or heirs in mobilibus, and his heir-at-law, are equally liable for its performance to the creditor in that obligation, whatever may be their claims of relief upon each other; and that the former class of obligants, as well as the latter, must remain bound to their creditor, whatever inconvenience this may create to the executors.

If this view of the question were sound, it would be strange that it should be such a novelty in the law and practice of the country, considering how constantly it must have been presenting itself in daily practice for some centuries. But in this reasoning there is overlooked an important element in our law of landlord and tenant,—namely, that the contract of location of heritable subjects between such

parties is transmissible from the original contracting parties to their respective successors; and that, when such transmissions take place, the obligations in the contract are prestable,—not by or to the original contracting parties, or their legal representatives as such,—but by and to the parties who shall be in the respective positions of lessor or lessee, or landlord and tenant, at the dates when these obligations become prestable. In such cases, the transmission of the right either of the lessor or of the lessee, has the effect not only of rendering the successor directly liable for his author's obligations for the future possession, but also of liberating that author from liability for these obligations. This principle operates whether the successors of the contracting parties be their heirs-at-law or singular successors.

Take, first, the case of the lessee or tenant. If he assign his right (which he may do if it be destined to assignees, or even without such a destination if the subject of the location be an urban tenement, or if the lease be for more than the ordinary period of endurance), then not only does the assignee become in his place the debtor in the obligations imposed by the contract upon the lessee or tenant, but, further, the cedent is *ipso facto* freed from such of these obligations as had not become prestable at the time of such transmission. When one obligant is thus substituted for another, the liability of the original obligant is held to be extinguished *delegatione*. He is still liable for payment of the rents, or performance of the obligations, which became prestable before the assignation, and while he was still in the position of being lessee or tenant, but not for those rents and obligations which were not prestable until after the assignation, and when he ceased to be in that position. This is trite law. See Skene v. Greenhill, 20th May 1825, F. C.

Or if the original lessee dies during the currency of the lease, and his heir-at-law succeeds to his right, he is of course liable for payment or performance of the obligations thereafter payable or prestable by the tenant; but he incurs this liability, not as representing *passive* the original lessor or tenant, but as having himself been the lessee or tenant. What proves this is, that if, after his succession, he assign the lease, even he, according to the rule just mentioned, is no longer liable for the future payments or prestations, the assignee alone being under such liability. And even if such heir of the original tenant retain his right to the lease, the executors of the defunct are not liable for such of the obligations in the lease as are prestable for the period subsequent to his death. In the case of the Duke of Gordon v. Leslie, 8th March 1791, M. p. 5444, a landlord in such a case was held not only not to be a creditor of his deceased tenant's executors for such future rents, but not to be entitled even to retain, for payment of such rents, funds in his own hands, which belonged to the defunct.

Take next the case of a lessor or landlord. He is entitled to dispose of his part of the contract of location by alienating the property which is the subject of it. And when he does so, the disponee, as the party to whom he transmits the subject, takes his place not only as direct creditor of the lessee in those obligations which are created in favour of the lessor, but also as direct obligant to the lessee in those obligations which are created in favour of the latter, in so far as such obligations are prestable posterior to the date of such transmission. In particular this is the case as to an obligation such as that in question, to pay to the lessee the value of meliorations on houses which may be left on the farm at the expiry of the lease. The case of Arbuthnot v. Colquhoun, 5th February 1772, Mor. p. 10424, is the leading authority on this point; and this also is now a trite rule of law. And the effect of such a transmission of the lessor's right is not only to render his successor liable for the payment or performance of such future obligations, but also to liberate himself from his obligation for the same. This is attended with no hardship to the lessee, as he is entitled to retain the value of such meliorations out of the rent becoming due by him at, and immediately before, the term when such meliorations are payable to him,—as was found in the case of Stewart v. M'Ra, and Stewart v. Campbell, both decided on 12th November 1834. And in such a case the lessee, while he has the security of such right of retention, in addition to the personal liability of the successor of the original lessor, is no longer in the position of being the creditor also of that original lessor. In the case of Morrison v. Patullo, 3d February 1787, Mor. p. 10425, a tenant under a lease, whereby it was conditioned that on his making certain erections on the farm he should be remunerated to the

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extent of L.50 by retaining that sum out of the rent payable to the landlord, made such erections between Martinmas 1783 and Whitsunday 1784, and claimed retention of the L.50 out of the rent which was payable by him at the latter term to the lessor, for crop 1783. But he was found to have no right to retain the sum from the rent so payable by him to the original lessor himself, because the latter had sold the property which was the subject of the lease, with entry to the purchaser at Martinmas 1783, being the term before the erection was made, and consequently before the allowance became exigible. And since in such a case the lessee has no right even to retain the funds in his hands belonging to the original lessor and obligant, in payment of the allowance for meliorations unquestionably due to him, still less has he a personal claim on that party for payment thereof. His only debtor is the party, who, as purchaser, is in the position of being the landlord at the time when the allowance becomes payable; and his right of retention was operative only out of the rents subsequently payable for that year to the purchaser.

The principle which regulated all these different cases is, that when the right of either party to a contract of location of heritage is transmitted to another party either as his heir or his singular successor, not only is the successor directly liable to perform such of the obligations undertaken by his author as are to become due or prestable, subsequent to the transmission, but the author and his general estate are liberated from liability for these obligations. And that principle, as it operates to liberate the executors of the lessee from liability for such obligations as become due or prestable after his death, and after the lessee's right has been transmitted to his heir, must also operate to liberate the executors of the lessor from liability for such of the counter obligations as become due or prestable after his death, and after the lessor's right has been transmitted to his heir. And accordingly this principle has operated to this effect in practice, there being, as already stated, no example of, nor authority for, the executors of a landlord being subjected in liability for a claim of meliorations at the expiry of a lease, when during its currency the granter has died, and his right has been transmitted to either his heir or a singular successor. And keeping in view the operation of this principle in the Scottish law of landlord and tenant, the difficulty is obviated which prevented the Lord Ordinary from arriving at what he avowedly felt to be the proper decision in this case.

It has been suggested that, even assuming the soundness of the views I have stated, they are rendered inapplicable to the present case by these specialties,—that the obligation in question is extrinsic to the contract of lease,—and that its import is, that the tenant should be reimbursed at the expiry of the lease an advance made by him for the landlord at its commencement, in satisfaction of a debt which was owing by the landlord to the former tenant, and which therefore was a burden on the landlord's executry. But, assuming the general rule to be as I have stated, this case cannot be excluded from its operation on either of these grounds.

The obligation on the lessor to indemnify the lessee for his outlays on the subject of the contract, in so far as these are *in rem versum* of the former, is an express condition of this contract of location. Such a condition is a very wise and equitable one, and, accordingly, it is very generally embodied in contracts of this class. At all events, the parties to the contract in question bargained on the footing of this condition being a part of their contract; and it must be held that all its conditions were adjusted on the footing of this being the case. And such a condition in a contract of lease passes not only in favour of a singular successor of the tenant, but also against a singular successor of the landlord. It is no answer to this, to say that the debt is not made a real burden on the lands; because the obligation to pay that debt is made an express condition of the contract of lease, and as such a contract is by statute made binding on a singular successor, he is liable to fulfil the conditions therein expressly imposed on the proprietor. In the case, accordingly, of Arbuthnot v. Colquhoun, while the Lord Ordinary assoilzied the purchaser from such a claim on the ground, *inter alia*, "that the clause in question, although contained in the contract of tack, is an obligation distinct from the contract of tack," the Court altered that judgment, and found the singular successor liable, holding, as the report states, "that this clause was effectual against a singular successor in the lands." And in the cases before mentioned of Stewart v. M'Ra and Stewart v. Campbell, the right of the tenant to retain the rents owing by

him in satisfaction of his claim for melioration under such a condition in the lease, was found to be preferable to the claims of even heritable creditors duly infeft in the lands. And hence this case cannot be excluded from the general rule on an assumption that the obligation in question is not a proper condition of the contract of lease. The case might perhaps be different if the obligation to pay meliorations were not one of the conditions of the written contract of lease itself, but the subject of a separate contract not made known to a singular successor, as happened in the case of M'Leod v. Bruce (Shaw's App. Cases, p. 213). But, in the present case, the obligation is an express condition of the written contract of lease itself.

The other ground on which this case is supposed to be excepted from the general rule, appears to proceed on the assumption that the tenant is virtually in the position of an assignee to some claim of the preceding tenant for meliorations under the former lease, and that it is *that claim* which is to be satisfied by the landlord at the expiry of the existing lease. But this is not the case. We are not informed in the record what was the nature or extent of the claim of the former tenant; and the tack itself leaves it uncertain whether or not any such claim even existed; as it merely takes Mr Masson bound to relieve the landlord of "*any* sum of money which he (the outgoing tenant) *may be* entitled to as a melioration for the houses on the said lands." But, however that may be, the landlord's obligation to Mr Masson is—not to reimburse any such payment he might make at the expiry of the former lease—but to take off his hands at the expiry of his own lease, not only the whole of the dwelling-houses, but also the whole of the farm offices, buildings, and dykes, which might *then be* on the lands, and to pay their value as at that time, to the extent of L.450. The legal effect and operation of this condition of the lease are not rendered different from what they would otherways have been, merely because one of the counter conditions of that contract consists of this obligation of relief which was undertaken by the tenant.

Such being my views of this case, I cannot concur with your Lordships in affirming the interlocutor under review.

Lord Deas.—This case raises a question of importance. But I agree with those of your Lordships who think the interlocutor ought to be adhered to.

The lease was granted in 1851, to endure for twelve years. The outgoing tenant had a claim against the landlord for meliorations on the buildings, which the incoming tenant undertook to pay on condition that the landlord should, at the expiry of his lease, reimburse him to the extent of what might then be the value of the buildings, not exceeding L.450. The landlord died in 1852; and in 1854 his executors instituted the present action against his heir and against the tenant, to have it found and declared that the obligation to pay for the buildings will fall exclusively on the heir or other party who may be in right of the lands when the obligation becomes exigible, and that no claim lies, or can lie, against the pursuers or the personal estate of the deceased. The heir (who is said to be in Canada) has entered no appearance, and has consequently been decerned against. But the tenant resists the action, and the Lord Ordinary has found him entitled to absolvitor.

To determine the question whether the tenant has been rightly assoilzied, it is not necessary to decide whether, in a question of relief, the heir or the executors will be ultimately liable. The heir is not raising that question, nor has the proper time for raising it arrived. The whole question at present is, can the tenant, in no event, have a claim against the executors? In my opinion he may, and this in respect of the plain terms of the contract by which the landlord bound himself, his heirs and successors (and consequently his executors) to implement the obligation. I see nothing in the nature of the obligation, or in the circumstances, to entitle one set of the granter's representatives to be instantly relieved from it more than another. I do not say that although an heir-at-law has entered into possession, and drawn the rents, the landlord's executors must nevertheless remain under every obligation undertaken by the landlord to the end of the lease. But in this matter we must distinguish. There are obligations incumbent respectively on landlord and tenant, inseparable from the nature of the right, such as the obligation to pay rent, on the one hand, and to maintain the tenant in possession, on the other; and it may very well be that the heir and the tenant, who assume towards

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each other the relative position of landlord and tenant, may become alone responsible to each other in such obligations. Nor do I say that no course of dealing between the heir and the tenant will extend the same rule even to an obligation like the present. But there is no specialty of that sort alleged here. It is not even stated what has become of the past due rents—whether they have been paid to the judicial factor, or to the heir, although I assume that, if the heir has not got them, he is entitled to get them. The question arises upon the death of the landlord, while matters are still entire, and it relates to an obligation which appears to me to be peculiarly favourable for the plea of the tenant. For how does it arise? The landlord was owing a debt to the outgoing tenant. Instead of paying it himself, he got the incoming tenant to pay it—engaging to reimburse him at the end of the lease. Why should such an obligation not be binding on executors? Is it less a personal debt undertaken by the landlord because embodied in the contract of lease than if contained in a separate obligation? Would a personal bond be binding solely upon the heir if embodied in the contract of lease? I cannot take that view. We must look to the nature of the obligation irrespective of the contract into which it has been imported. It may be inconvenient for personal representatives to be burdened with an obligation not prestable for years. But the way to avoid that is for the landlord not to come under such an obligation, or for the executors to buy it off. The landlord may grant a lease without creating postponed claims of this kind easily enough. I am not sure that I appreciate the force of the remark, as bearing upon this question, that a lease is a mere personal contract. If it were so, the difficulty in holding the executors relieved would, I think, be all the greater. But a written lease, with a definite ish, is a real right, and not a mere personal contract. Such has been its character ever since the statute 1449, c. 18. Lord Stair, accordingly, treats of tacks (2. 9. 4.) "First, as personal rights. Secondly, as, by the statute, becoming real." And he says (2. 9. 7), "As a tack becometh a real right, it must necessarily be clad with possession, and requireth no seisin, nor instrument, nor other solemnity." In entail law accordingly all leases are regarded as, strictly speaking, alienations; and agricultural leases of ordinary endurance are held excepted only because they are necessary acts of administration. But obligations may be engrafted upon a lease (as upon any other deed) which are extrinsic to its character as a real right, and not even essential to its objects as a contract. Such obligations are not necessarily to be dealt with in the same manner with the proper and inherent subject matters of the tack. It is said there is no case affirming the liability of executors. But there is the express authority of Lord Braxfield in Taylor v. Bethune (1 Bell's 8vo Cases, p. 214), and there is no case or authority the other way. Lord Braxfield's opinion goes even to the executors' ultimate liability, and I am not to be understood to question its soundness to that extent, although it is not necessary to go into that point here. The case of Webster v. Farquhar, decided about the same time with the case of Taylor (Ibid, p. 207), and following the case of Blythswood, goes deep into the principle. It was there held that an obligation to pay at the end of the lease for houses built by the tenant was not prestable from the next heir of entail, but solely from the representatives of the granter of the lease, although the houses were quite necessary for the estate, and went to increase its value. Now this could only have been because the obligation was deemed extrinsic to the lease, for the heir in possession had full power to grant a lease with all clauses and obligations properly incidental to a lease. I am not moved by the cases of Arbuthnot, M. 10,424; Bell v. Lamont, 14th June 1814, F. C.; and Fraser, 2 Sh. Ap., 37; in which singular successors were held liable to the tenant in meliorations stipulated by the lease or due by the custom of the country. The rule is *caveat emptor*. Purchasers are bound to ascertain the terms of all current leases; and if they buy with postponed obligations patent on the face of the leases, or notorious by the custom of the country, it is no great stretch to hold that they have taken upon themselves these obligations. Whether the tenants must take the purchasers alone as their debtors may depend upon circumstances and the course of dealing which has followed upon the purchase. I do not see that that question was raised in any of the above cases. The tenants were contented with any one debtor sufficiently responsible, leaving sellers and buyers, as it is expressed in the report of Bell v. Lamont, "to settle their liability as they could." The case of Bruce, 8th

July 1822 (1 Sh. Ap. 213), illustrates the observation that it is the lease (which the purchaser is bound to know and is understood to adopt) that forms the connecting link between him and the tenant;—for it was there held that a separate known obligation, although it bound the purchaser to the seller, did not bind him to the tenant. That the heir of the tenant, "after being acknowledged by the landlord as tenant," is alone liable for the rents of those years of which he reaps the crops, as was found in the case of the Duke of Gordon, 8th March 1791, M. 5444, does not in the least militate against the principle I am now going upon. Nor is that principle affected by the decision in the case of Skene, 20th May 1825, assuming it to be a sound decision. Its soundness has been questioned elsewhere, but I am not disposed to question it without full argument. If the landlord chooses to grant an agricultural lease in favour of assignees which by law would not pass to assignees (and therein differs from an urban lease and from every other deed or contract in which there is no *delectus personæ*), and afterwards recognises and accepts of the assignee as a sufficiently responsible tenant, I see, at present, nothing inconsistent with the rule affirmed in the cases of Millar (1 Macqueen, 345) and the Royal Bank of Scotland (Ib., 362), that contracts continue binding upon the contracting parties and their representatives, in holding (if the reasons for so holding be otherwise sufficient) that the landlord has no longer any claim against the original tenant. Of course, if this were otherwise, it would be all in favour of the result I arrive at in the present case. But that result does not require me to impugn the case of Skene, or to hold the judgments of the House of Lords in the cases of Millar and of the Royal Bank to be inconsistent with it; and I do not rest my opinion upon any such supposed inconsistency.

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The Court adhered, with additional expenses.

Graham Binny, W.S.—Sang & Adam, S.S.C.—Agents.

No. 246.

James Latta, Petitioner.—*Mackenzie.*
Andrew Bremner, Respondent.—*Munro.*

Bankruptcy—Sequestration—Statutes 1 *and* 2 *Vict. c.* 118; 19 *and* 20 *Vict. c.* 79—*Pension.—Held* that a pension payable by the Lords Commissioners of the Treasury to a deceased Judge's clerk did not fall under the provisions of the Act 19 & 20 Vict. c. 79, sec. 149, by which provision is made for ordering payment of portions of salaries and pensions paid by certain departments of Government to the creditors of persons who may become insolvent.

July 18, 1857. — 2d Division.

This petition at the instance of the trustee on the sequestrated estate of the respondent was presented to the Lord Ordinary on the bills, for the purpose of obtaining in the manner pointed out in the 149th section of the Act 19 & 20 Victoria, cap. 79,* an order appointing part of an annuity of

* By the 149th section of the Bankruptcy Scotland Act, 1856, it is enacted, that "The Lord Ordinary or Sheriff may order such portion of the pay, half-pay, salary, emolument, or pension of any bankrupt, as on communication from the Lord Ordinary or Sheriff to the Secretary of War, or the Lords Commissioners of the Admiralty, or the Commissioners of the Customs or Excise, or the chief officers of the department to which such bankrupt may belong, or may have belonged, or under which such pay, half-pay, salary, emolument, or pension may be enjoyed by such bankrupt, or to the Court of Directors of the East India Company, they respectively may, under their hands, or under the hand of their respective chief secretary or other chief officer for the time being, consent to in writing, to be paid to the trustee, in order that the same may be applied in payment of the debts of such bankrupt; and such order and consent being lodged in the office of Her Majesty's Paymaster-General, or of the Secretary of the said Court of Directors, or of any other officer or persons appointed to pay or paying any such half-pay, salary, emolument, or pension, such portion of the said pay, half-pay, salary, emolument, or pension as shall be specified in such order and consent, shall be paid to such trustee until the Lord Ordinary or Sheriff shall make order to the contrary."

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L.100 per annum, paid by the Lords Commissioners of the Treasury to the respondent, in the capacity of the clerk of a deceased Judge in the Court of Session, to be paid to the trustee for behoof of his creditors.

The application was resisted on the ground that it was uncalled for in the circumstances of the bankrupt, who was 67 years of age, the father of two young children, his wife being in very delicate health, requiring constant medical attendance. The only fund she possessed, exclusive of his *jus mariti*, yielded little more than L.20 per annum. It was, besides, argued that the section of the statute on which the application was founded did not authorise any such order as was asked for, where the pension was paid by the Lords of the Treasury. The purpose of the Act clearly was to give power to the different departments of Government to consent that the pay of their officers or servants should suffer a deduction for the benefit of their creditors. That the respondent held his office from and at the pleasure of a Lord of Session; he had not been in the employment of, and did not receive his pension from any of the boards enumerated, or from any department of Government, the same being payable out of funds accumulated and set apart for certain special purposes in terms of the Act 1st and 2d Vict., c. 118; and though the same was paid by the Lords Commissioners of the Treasury, they were merely trustees appointed to administer the fund, and the respondent was not an officer appointed by or enjoying emolument of or under the Treasury. That the statute of 19 and 20 Vict., c. 79, manifestly referred to persons under the controul or in the service of state departments, and it was not intended to give any control to such departments not previously possessed by them.

The Lord Ordinary reported the point. It was argued for the petitioner;— The statute of 19 and 20 Vict., c. 79, sec. 149, clearly was intended to apply to all salaries paid by the Treasury, which was a department of Government, and the Lords Commissioners were as clearly comprehended under the words "the chief officers of the department," as would be the Postmaster General. This provision was borrowed from the analogous provision of the Insolvent Debtors Act in England, under which the practice was in favour of the petitioner.[1]

Lord Justice-Clerk.—I do not enter into the question of what may have been the reason for leaving out the Lords Commissioners of the Treasury in the enumeration in the statute. I think the words "any department" are intended to include the departments enumerated, or any analogous department, but cannot comprehend the Commissioners of the Treasury.

The Court refused the petition.

Robert Ainslie, W.S.—Smith & Kinnear, W.S.—Agents.

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[1] Grindsell, 3d Sept. 1849, Insolvent Court, xiii. Law Times, p. 548.

THE END.

CASES

DECIDED IN

THE HOUSE OF LORDS.

1856–7.

SIR ROBERT MENZIES, Bart., Pursuer and Appellant.—*Sol.-Gen. Sir R. Bethell—Sir Fitzroy Kelly—Rolt, Q.C.—Anderson, Q.C.* No. 1.

June 10, 1856. Menzies v. Macdonald.

LIEUTENANT-GENERAL MACDONALD, Defender and Respondent.—*Lord-Adv. Moncreiff—Roundell Palmer, Q.C.*

Property—Loch—Common Property—Disponee.—Two proprietors had a joint right or common property in a loch;—Held, *that one could dispone part of his lands, and communicate to the disponee a common right in the loch; and that the other proprietor had no right to interfere, provided the disponee and his author together did not exercise their right of property in the loch beyond the extent to which the disponer was entitled to have exercised his right.*

Division.—Opinion, that there is no reason why co-proprietors of a loch should not have it divided.

(IN the Court of Session, 10th March 1854. Ante, vol. xvi. p. 827.) Lord Cranworth, C.

Sir Robert Menzies was proprietor of the barony of Rannoch. His titles contained an express grant of the loch of that name. Robertson of Strowan was proprietor of the barony of Strowan, comprehending "omnes et singulas terras, molendina, silvas, piscationes, lacus, aliaque particulariter subscripta;" and in a judgment pronounced in 1799, in conjoined declarators, at the instance of the proprietors of the two estates, it was found that they "have a joint right or common property in the loch of Rannoch, and a joint right of" "exercising all acts of property thereupon."

In 1828 Robertson sold a part of the barony of Strowan, called Kinloch, to General Macdonald, in whose disposition the lands were described as "All and whole the five-merk lands of Kinloch, of old extent, with castles, towers, fishings, lakes, forests, and pertinents of the same."

In an action at the instance of Sir Robert Menzies, the Court of Session held that these words conveyed to General Macdonald a right of common property in the loch.

The appellant contended;—(1.) That the ownership of the lake was a *jus individuum*, incapable of severance; and that, where there are two joint proprietors of such a right, one could not without the other's consent introduce a third. (2.) That, at all events, the conveyance by Strowan to Macdonald was not conceived in terms fitted to carry such a right.

No. 1.
June 12, 1856.
Magistrates of Renfrew v. Hoby.

The Lord Chancellor moved that the judgment of the Court below should be affirmed. He was aware of nothing in the law of Scotland to prevent the owner of a loch, whether he possessed it under direct grant, or as part and pertinent, from alienating any portion of it he might think fit. If alienation by one co-proprietor led to any limitation of the other's full enjoyment of his moiety, that would entitle him to take steps for having the use of the lake regulated, a right he would have even if there were no alienation. Neither co-proprietor could, by alienating, give away more than his own share; but if he kept within that limit, the other co-proprietor had no right to complain. It was admitted in argument that the right to the lake must have been divided, in the event of the estate going to heirs-portioners. The right of alienating, in whole or in part, was an incident of property generally, and attached equally to a lake and a muir. With regard to the second branch of the argument, his Lordship's opinion was, that the judgment of 1798 had fixed Strowan's right to the use of the loch; that the description in his conveyance of Kinloch was substantially the same as that in his own charter; therefore, that General Macdonald, as disponee of part of the barony, got as pertinent thereto the same right to the loch in respect of the lands of Kinloch, which Strowan previously had in respect of the whole barony."

APPEAL dismissed, with costs.

No. 2. THE MAGISTRATES OF RENFREW, Appellants.—*Sol.-Gen. Sir R. Bethell—Anderson.*

JAMES WARD HOBY AND OTHERS, Respondents.—*Rolt.*

Appeal—Competency—Expenses.— Where the presiding Judge at a jury trial "of consent discharged the jury without a verdict, and in order that the case might be decided by the Court upon the notes," appeal against the judgment of the Court dismissed as incompetent, on the ground that it must be looked upon as a verdict by the jury. The House of Lords remitted to the appeal committee to decide who should pay the costs of discussing the competency of an appeal.

June 12, 1856.

Lord Cranworth, C.

(IN the Court of Session, January 18, 1854, ante, vol. xvi. p. 348.)

The question was, whether the Magistrates of Renfrew had right to levy certain harbour dues from the defenders at a certain pier, and an issue was sent to trial, whether they had, under a certain royal "charter (dated 1703), levied a duty of twopence per ton upon goods loaded or landed within the bounds of their grant." After evidence had been led, the case was withdrawn from the jury in terms of the following entry in the notes of the presiding Judge, the Lord Justice-Clerk:—"In respect that, at this stage of the trial, both parties concurred in the view that there was no proper question of fact which the jury could be called upon to decide, the Lord Justice-Clerk, with the consent and at the desire of the parties, discharged the jury without a verdict; and in order that the cause might be decided by the Court upon the notes, each party being entitled to raise any question of law which the notes and record suggest."

The Court thereafter, on 18th January 1854, "Having heard parties' procurators on the questions of law raised by them on the notes of the

:e taken at the trial, and reserved for the Court,—Find that the No. 2.
oved of twopence per ton on goods loaded or landed," &c., "was June 16. 1856.
law a levy of proper harbour dues by the burgh of Renfrew, in Caledonian Railway Co. v.
of the charter of 1703," "and therefore find that such levy cannot Sprot.
ıy warrant for the exaction," &c.; and assoilzied the defenders.

Magistrates of Renfrew having appealed, the defenders presented on, stating that the case had been withdrawn from the Jury Court urt of Session, and referred to the Judges of the Second Division, trators; that the appeal against their interlocutor was therefore etent, and praying therefore for its dismissal, with costs. The committee reported that they thought the question of competency be argued at the bar.

Lord Chancellor remarked,—"The only distinction attempted to be etween this case and that of Dudgeon v. Thomson (ante, vol. xvii. p. 22) is, that the learned Judges in their finding say, that they point of law. If the jury had said, "We find in point of law that ıot a levy in pursuance of the charter," that would not have made n truth a finding in point of fact, and not of law. It is not a ques- law at all. The question to be decided was one of fact, whether ıuance of the charter the dues had been levied? That being the to be decided by the jury, the parties agreed that it should be :ed to the Judges. The Judges found that the dues were not levied suance of the charter, and then no doubt all matter of law is d. What would be the consequence of those tolls having been if not in pursuance of the charter, is an open question; but the n, whether the Judges properly came to that conclusion? is a ques- ıich is not open, but which must be taken to have been found by y, although not found by the jury, but the Judges."

:E appeal was dismissed as incompetent, and the question of costs was referred to the Appeal Committee.

CALEDONIAN RAILWAY COMPANY, Defenders and Appellants.— No. 3.
Sir F. Kelly, Q.C.—Rolt, Q.C.—Anderson, Q.C.

K SPROT, Pursuer and Respondent.—*Sol.-Gen. Sir R. Bethell— R. Palmer, Q.C.—Broun.*

—Reservation of minerals—Clause—Statutes 7 *Geo. IV. c.* 103; 9 *&* . *c.* 329 (*Garnkirk and Caledonian Railways Acts*); 8 *&* 9 *Vict. c.* 19 *Clauses Act*); 8 *&* 9 *Vict. c.* 33 (*Railway Clauses Act*).—*A proprietor d to a railway company, reserving the minerals and liberty to work them. ıe proposed to exercise this right, the Company objected, on the ground, lly true in point of fact, that it could not be done compatibly with the safety ne.* Held (*reversing the judgment of the Court of Session*), *that the passing eneral Railway Acts subsequent to the date of the conveyance did not enlarge rietor's rights, and that he was neither entitled to work the minerals nor to ıation for their loss, as in every conveyance of surface there was at common implied conveyance of a right to a subjacent and adjacent support adequate urpose for which the surface was conveyed, and the reservation could only r as the working could be carried on consistently with the grant. ion.—That, as the surface was sold for the construction of a railway, it*

No. 3. *made no difference that it had been transferred to a company on whose line the traffic was much greater than had been contemplated at the time of the original transaction.*

June 16, 1856. Caledonian Railway Co. v. Sprot.

Lord Cranworth, C. Ld. Brougham

(SEE ante, vol. xvi. pp. 559, 955.)

The Garnkirk and Glasgow Railway was constructed under the Act 7 Geo. IV. c. 103, and two subsequent Acts of the same reign, which empowered the Railway Company to appropriate such lands as should be necessary, on making compensation to the proprietors. By section 11, owners had power to reserve the minerals; which, however, were not to be wrought without good security being found for any loss or damage to the Railway occasioned by the working of them. By section 89th, it was provided that, if at any time any person should sustain damage by the execution of the powers given by the statute, and for which no remedy was therein provided, in such a case the recompense for such damage should "from time to time" be so settled and ascertained in such manner as was directed in respect of any other recompense specified in the Act. The Railway passed through the lands of Garnkirk, the property of Mr Sprot, the respondent in the appeal. The ground necessary for their works, extending thirty feet on each side of the Railway, was taken by the Company; and in consideration of a sum of L.624, made up of several items, none of which was specific compensation for mines or minerals, Sprot executed a conveyance of the ground taken, "reserving the whole mines and minerals of whatever description within the said lands hereby conveyed, and full power and liberty to us, or any person or persons authorised by us, to search for, work, win, and carry away the same," &c. By subsequent statutes the Company were empowered to extend their line of railway, and call it the "Glasgow, Garnkirk, and Coatbridge Railway," and to alter and widen the gauge of the Railway, so as to unite it with other lines, and under the Act 9 & 10 Vict. c. 329, the line was transferred to the Caledonian Railway Company.

There exists in the lands of Garnkirk a field of fireclay, lying under and on both sides of the ground occupied by the railway; the clay and other minerals were being worked by Mr Sprot, when an engineer's report was transmitted to him, stating that the workings could not be carried on within sixty feet of the railway without endangering its safety. He sometime after gave notice to the Railway Company, in terms of 8 & 9 Vict. c. 33, sect. 71, that he intended to work the minerals under the railway; to which they replied, that they did not object to his doing so, as soon as security was given that the railway would not thereby be injured. He then raised this action, concluding for declarator that he had right to work the minerals under and adjacent to the railway, unless the Company agreed to purchase them, or compensate him for his loss through leaving them unwrought, and for damages for having been compelled to leave them unwrought for some time. The Court, altering the interlocutor of the Lord Ordinary, found that the pursuer had reserved the minerals in and adjacent to the lands disponed to the Railway Company, with full power to work them, under the reservations specified in the convey-

ance, and expressed in the statute 7 Geo. IV. c. 103. That in the circumstances it was not incumbent on the pursuer to find security to the defenders before working any of the minerals reserved by his conveyance, or the adjacent minerals, and that he was entitled to work these minerals, subject only to the provisions of the Railway Clauses Consolidation Act, and Lands Clauses Consolidation Act—which Acts enable railway companies, if they object to mining, to prevent it by purchasing the mines, or compensating landlords for their loss in not working them.

No. 3.
June 16, 1856.
Caledonian Railway Co. v. Sprot.

The Lord Chancellor moved that the judgment be reversed, reading an opinion in which Lord Brougham concurred. His Lordship remarked,—In the conveyance of the ground for the purpose of constructing a railway, though under reservation of mines and minerals, and liberty to work them, a right to all reasonable subjacent and adjacent support was necessarily implied, and rested on grounds common to the Scotch and to every other system of jurisdiction; just as under a conveyance of the upper story of a house, reserving all below the upper story, the purchaser would have right to prevent the owner of the lower stories from interfering with the walls and beams on which the upper story rests. If, while the Acts of Geo. IV. were the only Acts in force, Mr Sprot had proceeded to work the mines, he was bound to have done so in such a way as would not have interfered with his implied warranty; and if he found he could not win the minerals because his doing so would interfere with the necessary support of the railway, he had no more right to complain, than if he was prevented by being unable to do so without sinking a shaft in the middle of the railway; that is, in the land actually conveyed. The inability to win minerals under the lands conveyed to the railway was not a new damage arising out of the execution of the company's powers, but one arising out of the obligation implied in his conveyance, which he was bound to consider at settlement of the price paid for his lands, in calculating which, the circumstance that he was to convey not merely the surface, but an implied right to support for the land disponed, must be held to have been necessarily taken into account.

There were several statutes passed subsequent to the date of the conveyance by Mr Sprot, but it appeared from an examination of them that the rights acquired by the original company, by virtue of Mr Sprot's conveyance, remained unaffected up to the time of their final transfer to the Caledonian Company. The Judges of the First Division, his Lordship thought, had overlooked, or not given due weight to the effect of the conveyance of 1834.

That the traffic on the railway originally contemplated would not have equalled the present traffic, did not affect the case.*

INTERLOCUTORS of Inner-House reversed, and that of the Lord Ordinary affirmed.

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* CALEDONIAN RAILWAY CO. v. LORD BELHAVEN. June 5, 1857.

Lord Cranworth, C. Lord Wensleydale.

IN this case the Court of Session, on the same grounds on which they had decided the case of Sprot, refused to interdict the Earl of Belhaven from working mines and minerals under the line without at first giving security.

The Lord Cranworth and Lord Wensleydale were of opinion that this case was

No. 4. — June 19, 1856. Caledonian & Dumbartonshire Railway Co. v. Helensburgh Harbour Trustees.

THE CALEDONIAN AND DUMBARTONSHIRE RAILWAY COMPANY, Defenders and Appellants.—*Sol.-Gen. Sir R. Bethell—R. Palmer, Q.C.*

THE TRUSTEES OF HARBOUR OF HELENSBURGH AND SIR JAMES COLQUHOUN, Pursuers and Respondents.—*Sir F. Kelly—Anderson, Q.C.*

Railway—Joint-Stock company—Obligation by projectors of a company—A committee of the projectors of a railway agreed to erect a quay, &c., to be vested in the magistrates of a burgh. The magistrates, on the other hand, agreed to support the undertaking, and give certain facilities for carrying the railway through the burgh. The agreement was not embodied in the Act of Parliament. Held (*reversing the judgment of the Court of Session*), *that the railway company was not bound by the agreement of its projectors to apply their funds to a purpose not sanctioned by the statute incorporating the company.*

Lord Cranworth, C. Ld. Brougham

(IN the Court of Session, 2d Dec. 1852. Ante, vol. xv. p. 148.)

A quorum of the Committee of Management of the then projected railway called the Caledonian and Dumbartonshire Railway, in 1846 entered into an agreement with the Magistrates of Helensburgh and Sir James Colquhoun, the superior of the burgh, whereby, in consideration of the Magistrates supporting an application for an Act of Parliament for the formation of the railway, and permitting rails to be laid through certain streets to the harbour and a quay which the Magistrates were going to apply for powers to erect, the committee of management undertook that the Railway Company should defray the cost of obtaining the Act and of erecting the quay,—L.3000 of the expense to be a burden on the quay. In May 1846, the Act was passed for making the quay and harbour, which was vested in the Magistrates, and in June following the Railway Company obtained their Act, which sanctioned a branch to Helensburgh from their main line. The Railway Company did not proceed to form the Helensburgh branch. The Magistrates and Sir James Colquhoun raised this action, concluding for declarator, that the agreement made by the committee of the projectors of the railway was binding on the Company; that the Company should be decerned to implement the same, and specially should be decerned to repay to the pursuers the expense of preparing for and procuring their Act of Parliament; and also of the expense already incurred, and to be incurred, in erecting the harbour, &c., L.3000 always remaining a burden on it.

The Court, adhering to the Lord Ordinary's judgment, decerned in favour of the pursuers. The defenders appealed.

The Lord Chancellor moved, with concurrence of Lord Brougham, that the judgment be reversed, remarking, that agreements made by the projectors of an undertaking did not bind the Company afterwards empowered by statute, unless such agreements were embodied in the statute. The legislature, providing for the public advantage, could only be held to sanction what was contained in the statute. Giving effect to agreements as bind-

all fours with that of Sprot, except that here the Banking Company were moving as pursuers, whereas they were defenders in the previous action, in conformity with the principles laid down in which

THE INTERLOCUTORS appealed against were reversed.

ing on shareholders, which were not embodied in the Act, might be admitting a fraud upon Parliament, who might not have sanctioned the undertaking on such conditions. The fact that committees of both Houses of Parliament frequently did not require agreements brought under their notice to be embodied in the Act, could not affect the legal import of the Act when passed. Capitalists, when investing their money in the stock of a railway, were entitled to rely upon the funds being devoted strictly to purposes within the Act. If secret terms were to be held binding on those who took shares, the result might be ruinous to those who acted on the faith of the legislative incorporation. No. 4. July 15, 1856. Cuming v. Boswell.

A committee of management could not be considered as agents for the Company owing its existence to their exertions, to the effect of binding the Company to fulfil contracts. Neither was a railway company, when established by Act of Parliament, in substance though not in form a body succeeding to the rights and coming into the place of the projectors—a principle clearly held by Lord Cottenham in deciding Edwards v. the Grand Junction Railway Company (1 Railway Cases, p. 173), Stanley v. the Chester and Birkenhead Railway Company (1 Railway Cases, p. 58), and Lord Petre v. the Eastern Counties Railway Company (1 Railway Cases, p. 462). But although that doctrine was held in these cases, the circumstances were different from those in the present one, which they could not therefore be held to rule. In all of them the agreement founded on, though not incorporated in the Act, had regard to something the doing of which fell within the powers and objects of the Act. But in this case the projectors agreed to advance funds to build a harbour and quay—objects entirely beyond those for which the Company was incorporated, and to carry out which the shareholders subscribed. The effect of the judgment in the Court below "is to compel the appellants to do an act which they have no authority to do, in performance of a contract entered into not by themselves, but by others who had no authority to bind them."

THE appeal was sustained, the interlocutor of the Court of Session reversed, and the appellants assoilzied, with expenses in the Court below.

The Hon. Mrs JANE LESLIE CUMING, Claimant.—*Sol.-Gen. Sir R. Bethell* —*Rolt, Q.C.* No. 5.

Mrs J. D. BOSWELL, Claimant.—*Lord.-Adv. Moncreiff*—*R. Palmer, Q.C.*

Trust—Vesting—Substitution—Conditional institute—Accumulation of annual profits—Bank stock—Bonus.—On the construction of a trust-deed, Held *(affirming judgment of Court of Session),* 1. *That on the death of the institute without issue, the whole residue of the trust-estate went to an heir-female, not to the institute's representatives;* 2. *That accumulations of annual proceeds, including interest and bonuses on bank stock, during the institute's minority (he having survived majority), did not fall under the term "residue," they having been the absolute property of the grandson, and now going to his representatives.*

(IN Court of Session, 27th Jan. 1852, ante, vol. xiv, p. 363.) July 15, 1856.

The clauses on which the first branch of the case depended will be found quoted *ad longum* in the Court of Session report. The clause on which the second point turned, was an instruction by the truster to his trustees Lord Cranworth, C.

No. 5. "to lay out and employ the residue" of his estate "for the use and behoof of George Cuming, and the heirs of his body," "in such way as may seem most expedient to them, till he or they may arrive at majority, when they are to denude thereof." George Cuming attained majority, but when he died the trustees had not denuded.

July 18, 1856. Hutchison v. Skelton.

It was remarked, That the testator meant to say that the grandson was to be the person entitled, though he was not to claim possession from his trustees till he attained majority. The trustees were in the meantime to manage his property for him. That was a postponement for convenience, from his want of capacity as a minor to manage his property, but he did not mean at all to interfere with his right and interest which should then accrue.

The judgment in regard to the bonuses did not interfere with the English rule, that such profits must be added to capital, and do not go to tenants for life, which was also the rule in Scotland, as settled in Irvine v. Howie. But that was the case of a liferenter. Here the person entitled was absolute fiar. He was no more a liferenter during minority than after majority. After attaining 21 he became entitled in his own right; before that age others were entitled as his trustees, and with the same incidents as would have attached to him had he been of age. Among these *bonuses* must be reckoned.

No. 6. ROBERT HUTCHISON AND OTHERS, Appellants.—*Sol.-Gen. Sir R. Bethell—Rolt.*

SKELTON AND OTHERS, Respondents.—*Sir Fitzroy Kelly—Munro.*

Testament—Construction—Fee and Liferent—Discharge.—A testator directed his trustees to set apart L.1500 *for each of his daughters in liferent, and their children respectively in fee; but provided that any sums already paid at the date of the settlement, or that he might afterwards pay to any of them, should be held as paid to account of the above provision. The residue of the estate was to be divided equally among the sons. One daughter predeceased her father, leaving issue. She had, before the date of the settlement, received from him* L.1000, *for which she granted receipt as "in part of patrimony;"*—Held (*reversing judgment of Court of Session*), *that the children were entitled to the* L.1500, *only under deduction of the* L.1000.

July 18, 1856. (IN Court of Session, 18th March 1853, ante, vol. xv. p. 570).

Lord Cranworth, C.

John Hutchison, in a settlement executed in 1840, directed his trustees as follows:—"That they shall set apart and secure to each of my daughters Mary, A, B, C, and D, in liferent, and their children respectively in fee, the sum of L.1500 sterling," but always under the provision that it should be strictly alimentary, &c., "that they shall pay and divide the free remainder and residue of my estate amongst my sons, equally between them, share and share alike; it being understood, and hereby specially provided and declared, that whatever sum or sums have been already paid, or may in lifetime hereafter be paid to any or either of my said children, whether sons or daughters, and vouched by receipt or other written document, or entered to their debit in my ledger or other account-book, shall

be held and accounted as so much of the provision falling to such child or children under this deed of settlement," &c. In 1823 the testator's daughter Mary had married, and he had settled L.1000 on her and her heirs and assignees whomsoever, and for this sum she had granted a receipt as "to account, or in part of patrimony." The sum was also entered in her father's books as advanced to her. She died in 1837; the testator in 1843. In the division of the estate the residuary legatees claimed that from the L.1500 legacy to Mary and her issue, L.1000 should be deducted. On behalf of the children, it was maintained that a separate interest had been created in their favour in the legacy of L.1500, which could not be affected by the payment to their mother, and this view was adopted in the Court of Session. No. 6. July 29, 1856. Dixon v. Bovill.

The residuary legatees appealed.

In giving judgment the Lord Chancellor remarked,—"Is the sum of L.1000 advanced to Mary on her marriage to be taken in reduction of the L.1500, or is it not? The Court below decided that it was not; because, they said, that that was to be deducted from her life interest, and not from the ultimate interest of the children." She was herself dead, so that in her case there would be no deduction. But the same principle would apply to the other daughters. Now, in the first place, it is obvious that the intention of this will was to give equal legacies to all the daughters, and equal shares of the residue to all the sons. But the intention of giving equal legacies to the daughters would be defeated by the construction which has been adopted by the Court below; because, if there had been any daughter to whom L.1500 had been advanced in her lifetime, the consequence would be that eventually that daughter's family would take L.3000. But further, how is the gross sum which has been advanced in the lifetime to be apportioned and set apart against the life interest in the legacy given by the will? The whole arrangement would be so extremely inconvenient, that if there be any other possible construction that will not militate against the language used by the testator, I think it is the duty of the Court to arrive at such a construction. I think that suggested for the appellants is perfectly rational construction. The testator calls it "the provision falling to such child or children." If a man by his will gives L.1500 for his child to have the benefit of it during his life, and afterwards to go to her children, she being a married woman with a family, is not that legitimately described as a provision falling to children? It appears to me clear that it is so."

INTERLOCUTOR reversed.

WILLIAM DIXON AND ANOTHER, Defenders and Appellants.—*Sir Fitzroy Kelley—Rolt.* No. 7.

GEORGE HINTON BOVILL AND OTHERS, Pursuers and Respondents.—*Sol.-Gen. Sir R. Bethell—Anderson—Bovill.*

Competency of appeal.—This case had been sent to a jury. At the trial no parole evidence was offered, and the following minute appeared on the Judge's

No. 7.
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July 29, 1856.
Dixon v. Bovill.

notes:—" In respect that the parties concur in holding that there is no question of fact on which the opinion of the jury could be taken, and that the case on the facts, as now proved, turns wholly on questions of law for the Court, the Lord Justice-Clerk discharged the jury in order that parties may bring the whole case before the Court for judgment, each party being entitled to state any questions of law which the facts raise;"—Held, *that the judgment ultimately pronounced by the Court of Session was subject to appeal.*

Writ in re mercatoria—Scrip-note—An obligation to deliver iron blank in the name of the creditor;—Held *(reversing judgment of Court of Session),* (1.) *to be invalid in the hands of a third party; but,* (2.) *that by virtue of correspondence between the third party and the ironmaster, the latter had become liable to deliver the iron to the third party, in terms of the document.*

Lord Cranworth, C.

(In the Court of Session, 21st Feb. 1854, ante, vol. xvi. p. 619).

Smith & Sons purchased 1000 tons of iron from Dixon, and in exchange for a bill for the price, received a delivery note in these terms:—" *10th July* 1854.—I will deliver 1000 tons pig-iron when required after 10th September next, to the party lodging this document with me." Thereafter, Smith & Sons sold to Balls & Son. Balls & Son having experienced some difficulty in getting delivery of the iron, a good deal of correspondence took place between them and Dixon, in the course of which Dixon wrote to them on 4th September,—" Messrs Smith & Son purchased the 1000 tons pig-iron, as I understood, for their own use, and on the undertaking being lodged with me, I will ship the iron, as required, in the usual way."

Before the iron was delivered, Smith and Son became bankrupt, and their bill not having been paid, Dixon refused to deliver the iron, pleading retention as against Smith and Son—contending that the iron delivery note was invalid in itself, and at all events could not pass by indorsation. These pleas were repelled. Dixon carried the case by appeal to the House of Lords, who, after disposing of the question of competency noticed in the rubric, heard the case on the merits.

The Lord Chancellor, in giving judgment, remarked, " If the question had turned exclusively upon the validity or invalidity of this document, I am bound to say that I should not have concurred with the Court of Session. I think that the document is invalid. The effect of such a document, if valid, is to give a floating right of action to any person who may become possessed of it." " No evidence was given to shew any general mercantile usage affecting such instruments as that now in question," " there is nothing in the law merchant to warrant what is now contended for." Bills of lading afford no analogy whatever. They are mere symbols of property. " No right of action passed by indorsement previously to the Act 18 and 19 Vict., c. 111." " Independently of the law merchant and of positive statute, within neither of which classes do these scrip-notes range themselves, the law does not, either in Scotland or in England, enable any man by a written engagement to give a floating right of action at the suit of any one into whose hands the writing may come, and who may thus acquire a right of action better than the right of him under whom he derives title."

But on a view of the dealing and correspondence between Dixon and

Balls and Son, his Lordship was of opinion that the Court was perfectly right in adopting the view that there had been a clear adoption by Dixon of Balls and Son as the parties to whom he undertook to deliver the iron, and to whom he did deliver some. He entered into a distinct engagement —his Lordship specially founded on the letter of 4th September—that he will hold the iron disposable to the order of Balls and Son.

No. 7. July 29, 1856. Mackenzie v. Dunlop.

It was found that, by virtue of the correspondence, Dixon became liable to deliver the 1000 tons of iron to Balls and Son, and therefore appeal dismissed with costs.

JAMES MACKENZIE, Pursuer, Appellant.—*Lord-Adv. Moncreiff*—*Sir Fitzroy Kelly*. No. 8.

DUNLOP, WILSON, AND COMPANY, Defenders, Respondents.—*Rolt*—*Blackburn*.

Proof—Usage of trade—Iron scrip.—The holder of an iron scrip-note having demanded delivery of iron manufactured at a foundry not specified on the face of it;—Held, 1. *That it was incompetent to prove that the scrip had been issued to the party from whom the holder had purchased, in fulfilment of an obligation to deliver iron of the said manufacture;* 2. (Alt. *opinion of Court of Session*) *That it was competent to prove that, " according to the true construction of the notes, the iron mentioned can, according to the usage of the trade, be said* ex facie *to mean iron of the species demanded;"* 3. *That as general usage of trade can be proved only by multiplication of particular usages, it was competent to prove that parties dealing with the defenders understood their scrip-notes to imply an obligation to deliver iron of the species called for; although,* 4, (aff. *opinion of Court of Session*), *Evidence of such particular course of dealing on the part of the issuers of the scrip could not in law suffice to control the terms of the note.*

Process—Jury trial—Verdict—Record.—It is incompetent to support a motion for a new trial on objections to the formality of proceedings at a jury trial which do not appear from the Judge's notes.

A jury having returned a verdict for the pursuer, but with power to the Court to enter up the verdict for the defenders, and to give judgment in the cause if the Court shall be of opinion," &c. &c.—Observed, *that the jury had no power to return such a verdict except of consent, but that, although the record did not bear " of consent," and counsel at the bar denied having given such consent, it must be assumed that it had been given.*

(IN the Court of Session, 7th Dec. 1853, ante, vol. xvi. p. 129). July 29, 1856.

In this case the pursuers moved for a rule on the defenders to shew cause why there should be a new trial, " in respect that the verdict, as it appears on the notes of the Judge furnished to the parties, was not declared by the chancellor or foreman of the jury in open court, and taken down by the clerk of the said court before the jury was discharged."—The motion was refused. The pursuers appealed, but the judgment was affirmed, the Lord Chancellor remarking, that that question could not be entered into, the Court being bound to take the record as they find it, " therefore that matter is entirely out of the case."

Lord Cranworth, C.

The notes of the presiding Judge bore that he had left the question to the jury, " under a full reservation to the defenders of all their pleas in law, and on the condition that if the Court should hold, &c. &c., and if the Court farther thought the question under the second issue turned wholly on a point of law for the Court, the Court should be entitled to

No. 8. give judgment at once on such point, without the case being again sent to a jury." The verdict was in these terms:—"The jury, as directed by the Lord Justice-Clerk, find for the defenders on the first issue. On the second issue, they find for the pursuer; but with power to the Court to enter up the verdict for the defenders, and to give judgment in the cause if the Court shall be of opinion," &c. &c.—here followed several points reserved for the opinion of the Court.

Feb. 19, 1857.
M'Ewan v. Campbell.

The Lord Chancellor remarked,—"The jury have no business at all to say what the Court is to do. The jury have to find facts. They may find *simpliciter* for the pursuer, they may find for the defender, and they may find a special verdict, but having found for the pursuer or for the defender, they can give no authority to the Court to enter up a verdict in any other way. That can only be done by an arrangement between the Judge at the trial and the parties. And the difficulty here is in understanding exactly what did pass at the trial, and what was the course really taken, because unquestionably, except by the consent of the pursuer, the learned Judge had no right to do more than state the law to the jury, and to tell them, upon that state of the law—Find for the pursuer, or find for the defender. I confess that my interpretation of this would be, that this was done with the consent of the parties. But then the Lord Advocate says that that was not the fact. There one is embarassed. But, at the same time, I must treat the Judge's notes as being notes adequately and properly representing what passed, and I think I must, therefore, in dealing with the case, assume that by consent in some way or other an arrangement, which was the most rational that could be suggested, was come to, because it really saved the expense of another trial."

THE judgment of the Court below, entering up the verdict for the defenders, and assoilzieing them, was affirmed, and the appeal dismissed with costs.

No. 9. WILLIAM M'EWAN, Pursuer and Appellant.—*Rolt, Q.C.*—*Roxburgh.*
SIR JAMES CAMPBELL Bart. AND OTHERS, Defenders and Respondents.—*At.-Gen. Sir R. Bethell—Anderson, Q.C.*

Process—Summons—Revised condescendence—Agent and principal—Provisional committee.—Held, (*affirming judgment of Court of Session*), 1. *That the relevancy of an action is to be judged of on the original, not on the revised condescendence, which cannot add to the grounds of action.* 2. *That individual members of a provisional committee for promoting a railway do not, as such, incur a conjunct and several liability for all the work done by a person who acted as secretary to the committee.*

Feb. 19, 1857. (IN Court of Session, 6th Dec. 1853, ante, vol. xvi. p. 117.)

Lord Cranworth, C.
Ld. Wensleydale.

On the allegation that the defenders *inter alia* constituted a provisonal committee for promoting a railway; that the provisional committee, or their law agents, as authorised by them, employed the pursuer as their secretary, and that, as such, he did certain work; he raised action concluding against them as conjuctly and severally liable for all the work he did. The Court of Session, affirming an interlocutor of Lord Curriehill, dis-

missed the action as irrelevant. On an appeal, the Lord Chancellor remarked that, as members of the provisional committee, no such liability as was contended for attached. The case of Bright v. Hutton[1] had settled the law. If the pursuer had any special case against the individuals, an amendment was required. His revised condescendence had slightly amplified, but not altered, the grounds of action—indeed, this last would have been incompetent. His Lordship concurred with all the Judges in the Court below, who thought that on the construction of the Act 1849, the original condescendence so clearly stood in the place of the original ground of action in the summons, that if that original condescendence did not state a valid ground of action, it could not be eked out by a revised condescendence.

No. 9. Feb. 23, 1857. Philip v. Edinburgh, Perth, and Dundee Railway Co.

Lord Wensleydale remarked, that it was formerly supposed that a provisional committee constituted a partnership, in which each individual gave a mandate to the others to act in all affairs concerning that committee, and that they were liable as co-partners. The whole frame of the condescendence is to make out that the defenders were in fact, or were with their sanction, represented to be members of the provisional committee, and therefore responsible. In that point of view there was no relevant cause of action against the defenders.

APPEAL dismissed with costs.

No. 10.

ROBERT PHILIP, Pursuer and Respondent.—*Lord Adv. Moncreiff—Rolt, Q.C.*

EDINBURGH, PERTH, AND DUNDEE RAILWAY COMPANY, Defenders and Appellants.—*Att.-Gen. Sir R. Bethell—Anderson, Q.C.*

Contract—Condition—Railway company—Construction.—Purchase by a railway company of lands, part of which were required for a proposed line, which held *to be conditional on the execution of the railway.*

(IN the Court of Session, 14th July 1854, ante, vol. xvi, p. 1065.)

Feb. 23, 1857. Lord Cranworth, C. Ld Wensleydale.

A Railway Company introduced a bill to enable them to make a branch. Pending their bill, they, in order to obtain the assent of a proprietor, did "agree to acquire the whole ground" belonging to him, through part of which it was intended that a railway should pass, and "to make payment of the" price which was fixed: A separate article in the same writing bore, the company "became bound to pay the said sum at the first term" "after the said company on obtaining their Act of Parliament shall have begun to execute any part of the said railway," &c. The Act was obtained: it contained the usual clause, limiting the power of execution to seven years. The railway was never made. Held (differing from the Court of Session), that on the construction of the contract the purchase was not absolute, but that the execution of the railway was a condition of it, and imported more than a *morata solutio* of a completed sale; and therefore (as the House were of opinion, in point of fact, that the execution of the railway had never been commenced, while the power to execute

[1] House of Lords Cases, vol. iii. p. 341.

No. 10. had expired), that the Railway Company could not be compelled to pay the price.

Mar. 12, 1857.
Baillie v.
Cochrane.

INTERLOCUTOR reversed, and case remitted, with a declaration.

No. 11. A. D. R. C. W. BAILLIE, Pursuer and Respondent.—*Att.-Gen. Sir R. Bethell—Rolt, Q.C.*

MISS C. M. E. COCHRANE, AND OTHERS, Defenders and Appellants.—*Anderson, Q.C.—J. Boyd Kinnear.*

Entail—Marriage-contract—Procuratory—Obligation—Prescription— 11 *&* 12 *Vict. c.* 36, *sect.* 43.—*A marriage-contract, commencing with an obligation to entail lands, contained "for that effect" a procuratory of resignation, in which the conditions were not set forth* ad longum, *but only by reference to another entail;*—Held (aff. *judgment of Court of Session*), 1, *that a good entail had not been executed.*

2. *That a charter of resignation, bearing to follow on this procuratory, but containing the conditions* ad longum, *not being conform to the procuratory, did not form a valid entail.*

3. *That though a deed of entail might be good* inter hæredes *under the old law although defective, it was struck at by the* 43*d section of the Entail Amendment Act, if defective in any prohibition.**

4. *That the subsequent execution of a strict entail was* ultra vires *of the heir then in possession under the entail in question, as it it was good* inter hæredes.

5. *That in the marriage-contract the procuratory was intended by the parties as implement of the obligation to entail, and therefore that no obligation to execute any other deed of entail had been constituted.*

Question, *Whether, if there had, in the original contract, been a good obligation to entail, it would have been cut down by the negative prescription?*

Process—Entail.—Question, *Whether it is necessary for an heir-substitute possessing under an imperfect entail to bring a declarator, in order that he may enjoy the estate as absolute fiar?*

Mar. 12, 1857. (IN the Court of Session, 9th March 1855, ante, vol. xvii. p. 659.)

Lord Cranworth, C.
Lord St Leonards.
Ld. Wensleydale.

In 1715 an heir in possession of an entailed estate bound himself, in his daughter's marriage-contract, to settle certain other lands on the heirs of the marriage under the fetters of the entail of his entailed lands; and "for that effect," in the contract, he and his daughter granted a procuratory of resignation, referring merely to the fetters of the entailed lands. In 1772 a charter of resignation was expede, containing *ad longum* the fetters referred to. Soon after, the heir then in possession (1786) executed a new entail, complete, in terms of the statute, and recorded it, but it was not feudalised. The heir now in possession made up his titles as heir of the marriage, under the contract and charter. Two cross actions were brought, one a declarator by the heir, to have it found that the entail was defective, and therefore that he was entitled, under the Entail Amendment Act, to the estate in fee simple; the other against the heir, and to have it found that even though the entail were defective, he was not entitled to take advantage of the

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June 12, 1857.
Lord Cranworth, C.
Ld. Wensley-

* DEMPSTER v. DEMPSTER.

THIS point was again decided, of this date. There was no other question involved in this case.

Act, but on the contrary, as the obligation in the marriage-contract was to execute a good entail, he, the heir of the marriage, was now bound to do so. No. 11. Mar. 20, 1857. Martin v. Kelso.

In both actions the Court decided in favour of the heir. In both an appeal was taken. The decision of the case was held to turn upon the view that the deed bore to implement itself, and therefore contained no obligation that more should be done than was done by the deed, which parties had intended to contain execution of its purpose. There was thus no covenant but what had been performed; and it was observed by the Lord Chancellor, that if there had been, it could not affect heirs-substitute, on whom lay only an obligation to possess in terms of the investiture.

Their Lordships held it, therefore, unnecessary to deal with the question of prescription as affecting the obligation, had it existed; and it remained only to apply principles already settled in the law of entail to the other points in the case.

INTERLOCUTORS affirmed.

W. KELSO MARTIN AND OTHERS, Appellants.—*Lord Adv. Moncreiff—Rolt, Q. C.* No. 12.

ELEONORA KELSO AND OTHERS, Respondents.—*Att.-Gen. Sir R. Bethell—Anderson, Q. C.*

Entail—Constitution—Fetters—Altering succession—Construction.—An entail gave powers to heirs in possession, "so often as their presumptive heirs were females," so to alter the succession as "to settle the estate upon a younger daughter in preference to an elder daughter;"—Held (*affirming the judgment of the Court of Session*), *that an heir in possession was entitled to exercise this power by calling to the succession a younger in preference to an elder sister, though not his daughter, and that a deed of alteration was effectual in favour of the lady preferred and her heirs, though she only should survive the granter, and at the date of his death the next heir under the entail, but for the deed of alteration, would have been the son of the elder sister who had predeceased.*

(IN the Court of Session, 19th July 1853. See ante, vol. xv. p. 950.) Mar. 20, 1857.

The entail of the estate of Dankeith contained a clause empowering the institute and the other heirs of entail, "so often as their apparent or presumptive heirs are females, so far to alter the destination of succession" specified in the deed, "as to settle the estate upon a younger daughter in preference to an elder daughter, or to pass by such daughters altogether, and settle the estate upon the presumptive heir-male;" and, "for these ends, to grant such deed or deeds as shall be competent of the law," &c. The late Colonel Kelso being heir in possession, whose heirs presumptive were his four sisters, executed a deed calling the youngest, Miss Eleonora Kelso, to the succession. While in possession under this deed she executed another, calling to the succession after her Mrs Utterson, the youngest of her two then surviving sisters. She thereafter presented a petition for authority to disentail under the Entail Amendment Act, which was served upon Mrs Utterson and her two sons as the next heirs of entail, and the disentail was carried through. A reduction was brought at the instance of Mr Martin, the son of her eldest sister, who had died before

Lord Cranworth, C. Lord Wensleydale.

No. 12.

Mar. 20, 1857.

Martin v. Kelso.

the disentail was completed. It was held in the Court of Session, that the deed of alteration executed by Colonel Kelso was good, though the heirs-female were not his daughters. That the deed of alteration executed was effectual, in favour not only of the heir-female preferred, Miss Eleonora Kelso, but also of her heirs; and that a similar deed executed by Miss Kelso, as at the time of its execution there were two or more heirs-female in life, was effectual in favour of the party preferred, though she alone should survive the granter, and an older heir-female who was excluded was survived by a son, who at Miss Kelso's death was, but for the deed of alteration, the heir under the entail.

The pursuer appealed.

The Lord Chancellor moved that the judgment of the Court of Session should be affirmed. Lord Wensleydale concurred. In delivering his opinion, he remarked on the only part on which their Lordships felt any difficulty;—when a deed of alteration was executed, it was necessary that there should be two or more presumptive heirs-female, in order to the due execution of the power; and it was contended that there ought equally to be two or more when the succession opened, in order to give it effect. Only one of the sisters of Miss Eleonora Kelso survived her. Her eldest sister was dead, leaving a son, and he was heir of entail, and would have been entitled to succeed at that time as an heir-male. After his mother's death, the power to alter could not have been exercised by Miss Kelso. But he held that a condition which is not clearly expressed ought not to be implied—viz. the condition that more than one heir-female should exist not only at the time of the execution of the deed of alteration, but also at the time of the death of the person executing that deed. The clause in the original deed of entail was perfectly reasonable without such a condition. It gives a present right to make a change which shall regulate future succession; and in the language of the Lord Justice-Clerk, was in itself a present act final, and not dependant on the state of things at the time of the death of the grantee.

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[For facility of reference, points decided in the House of Lords are printed in *Italics*.]

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